Docket: 2005-1448(IT)G

BETWEEN:

CGU HOLDINGS CANADA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 10, 2007, at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant:	David C. Muha Margaret Nixon
Counsel for the Respondent:	Ernest Wheeler

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2000 taxation year is dismissed with costs to the Respondent in accordance with and for the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of March, 2008.

"J.E. Hershfield"

Hershfield J.

Citation: 2008TCC167
Date: 20080325
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BETWEEN:

CGU HOLDINGS CANADA LTD.,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Hershfield J.

Background and Issues

[1] The Appellant appeals the Minister of National Revenue's (the "Minister") assessment of its 2000 taxation year which denied a refund claimed in respect of a taxable dividend paid by it in the year. The refund claimed pertains to an "allowable refundable tax on hand" account[1] (the "refundable tax account" or "allowable refundable tax"). The Appellant's entitlement to the refund depends on the correctness of its calculation of the refundable tax account and its standing as a "non-resident-owned investment corporation" (an "NRO") at the requisite time.

[2] An NRO is a corporation all of the shareholders of which are non-residents or one or more other NROs.[2] An NRO is allowed a refund from its refundable tax account when it pays a dividend. The Appellant claimed such a refund in respect of a dividend paid by it in its 2000 taxation year. The refund was denied on the basis that the Appellant was not an NRO and on the basis that, in any event, the amount of its

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[1] As defined in subsection 133(9) of the *Income Tax Act* (the "*Act*").

[2] As defined in subsection 133(8) of the *Act*, having non-resident or NRO shareholders is only one requirement to being an NRO. Other requirements place restrictions on the types of assets owned by, and activities carried on by, the corporation.

refundable tax account was nil. The Appellant relies on its determination of its allowable refundable tax and on an election it made, pursuant to section 134.1 of the *Act*, to be deemed to be an NRO at the relevant time. The Respondent asserts that the Appellant is not eligible to make such an election.

[3] The Appellant was formed on the amalgamation of three corporations in March 1999. Its first taxation year ended on the last day of February 2000. One of the three predecessor corporations was an NRO. However, since two of the predecessors were not NROs, the Appellant did not qualify as an NRO unless section 134.1 applies.[3]

[4] The predecessor that was an NRO, namely, GA Scottish Corporation (Canada) Ltd. ("GA Scottish"), had a refundable tax account and at least one of the shareholders of one of the predecessor corporations was an unidentified NRO.[4] The dividend that the Appellant asserts triggers the refund in issue was received entirely by that unidentified NRO. The suggestion during the hearing was that but for the amalgamation, a dividend by the NRO predecessor corporation, GA Scottish, would have triggered a refund of its allowable refundable tax if it had been paid before the amalgamation. In this context one might say that the issue in this appeal is whether the amalgamation has deprived the Appellant of a refund of refundable tax.

[5] The background facts that I have been apprised of are not in dispute. A Statement of Agreed Facts was submitted at the hearing. That statement is appended to these Reasons.

[6] The agreed facts can be summarized quite simply as follows:

i) On March 2, 1999 the Appellant was formed on the amalgamation of three companies only one of which (GA Scottish) was an NRO immediately before the amalgamation;

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[3] The definition of NRO in subsection 133(8) precludes an amalgamated corporation from being an NRO unless all of the predecessor corporations were NROs immediately before the amalgamation.

[4] The agreed facts do not state that the NRO recipient of the dividend was a shareholder of GA Scottish. As well, there was nothing said during the course of the hearing to indicate whether that was the case or not.

ii) The Appellant's first taxation year following the amalgamation commenced at the time of the amalgamation[5] and ended on February 29, 2000;

iii) Immediately before the amalgamation GA Scottish had an unrefunded balance in its refundable tax account of $1,265,348.00; cumulative taxable income of $1,917,233.00; and retained earnings of $1,641,791.00;

iv) During its first taxation year, the Appellant paid a taxable dividend (within the meaning of subsection 133(8)) in the amount of $7,706,000.00 to a shareholder that was an NRO;

v) The Appellant made a timely election pursuant to paragraph 134.1(1)(*c*) of the *Act* to be deemed to be an NRO for the 2000 taxation year and applied to the Minister pursuant to subsection 133(6) for an allowable refund from the refundable tax account; and

vi) The Minister denied the refund on the basis that the Appellant did not satisfy the criteria set out in paragraph 134.1(1)(*a*) for making the election and on the basis that the refundable tax account of the amalgamated corporation (i.e. the Appellant) was nil.

The Taxation of NROs

[7] A brief summary of how NROs are treated under the *Act* will be helpful in order to put the issues in this appeal in context. In very general terms an NRO is a Canadian corporation engaged only in certain types of activities and all of the shares of which are beneficially owned by non-resident persons or by other NROs. The definition of an NRO is set out in subsection 133(8) of the *Act*. It is not in dispute that GA Scottish qualified as an NRO.

[8] The tax regime prescribed in section 133 is that an NRO is taxed at the rate of 25% pursuant to subsection 133(3). This tax is refunded when the NRO pays dividends to its shareholders. Since the shareholders of an NRO must be either non-residents or other NROs, the shareholders will be either subject to a 25% refundable NRO tax (in the case of a dividend recipient that is an NRO) or a 25%

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[5] Paragraph 87(2)(*a*) of the *Act*.

withholding tax (subject to applicable tax treaty limitations) under Part XIII of the *Act* (in the case of dividends paid to other non-resident shareholders). In either case the payment of a dividend by an NRO gives rise to a refund of the initial 25% tax paid by it.

[9] The NRO rules are designed to permit the ultimate non-resident shareholder of an NRO to be taxed in Canada without an extra level of tax being imposed on the intermediary NRO. Generally speaking, the ultimate non-resident shareholders of an NRO will then receive the same tax treatment they would have received had they held the NRO's property directly. The refundable tax regime ensures this result without allowing a deferral of that tax. This integration scheme will not be achieved if refundable tax accounts are locked-in as they would be in the case at bar if the Respondent's position prevails.

[10] That is, if a refund was not permitted where an NRO has paid the 25% tax on its taxable income, a dividend would be subject to a degree of double tax: two taxpayer tiers, each subject to tax on the same original source of income. Whether such double tax is acceptable is a matter of tax policy. Generally speaking, the scheme of the NRO provisions is to avoid any double tax. This might be seen as favourable treatment or a benefit given to NROs since this type of integration between companies and their shareholders is by no means universally reflected by the provisions of the *Act* dealing with other types of corporations.[6] On the other hand, inter-corporate dividends are generally received tax free pursuant to a deduction permitted under section 112. This prevents further levels of taxation being imposed on corporate tiers. The recipient NRO in the case at bar however would be expressly excluded from this regime by virtue of subsection 112(1) which expressly denies the deduction to NROs.[7]

<u>The Legislation and the Position of the Parties</u>

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[6] Refundable dividend tax on hand as defined in section 129 and the small business deduction together with the dividend tax credit are other examples of integration schemes found in the *Act* but they might readily be said to be exceptions or partial concessions to a scheme that seeks to impose a regime that is intended to impose a double tax on corporations and their shareholders.

[7] A deduction of the dividend received by an NRO would not address the issue raised by the Appellant in this case. Section 112 operates in a wholly different regime than that applicable to NROs. Only the subsistence of the refund regime will relieve the Appellant of the burden imposed in this case.

[11] The relevant sections to consider are paragraph 87(2)(*a*) and section 134.1 which read as follows:

> **87(2) Rules applicable** -- Where there has been an amalgamation of two or more corporations after 1971 the following rules apply:
>
> (a) **[deemed new corporation --] taxation year** -- for the purposes of this Act, the corporate entity formed as a result of the amalgamation shall be deemed to be a new corporation the first taxation year of which shall be deemed to have commenced at the time of the amalgamation, and a taxation year of a predecessor corporation that would otherwise have ended after the amalgamation shall be deemed to have ended immediately before the amalgamation;
>
> **134.1**
>
> **(1) NRO -- transition** -- This section applies to a corporation that
>
> (a) was a non-resident-owned investment corporation in a taxation year;
>
> (b) is not a non-resident-owned investment corporation in the following taxation year (in this section referred to as the corporation's "first non-NRO year"); and
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> (c) elects in writing filed with the Minister on or before the corporation's filing-due date for its first non-NRO year to have this section apply.
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> **(2) Application** -- A corporation to which this section applies is deemed to be a non-resident-owned investment corporation in its first non-NRO year for the purposes of applying, in respect of dividends paid on shares of its capital stock in its first non-NRO year to a non-resident person or a non-resident-owned investment corporation, subsections 133(6) to (9) (other than the definition "non-resident-owned investment corporation" in subsection 133(8)) and section 212 and any tax treaty.

[12] The Department of Finance Technical Notes explain the introduction of section 134.1 as follows:

> **March 2001 TN**: New section 134.1 provides special transitional rules to accommodate the phase out of non-resident-owned investment corporations (NROs). The present NRO rules allow an NRO to claim a refund of its 25% refundable tax when it pays dividends to its non-resident shareholders (at which time the dividend withholding tax in Part XIII of the Act applies). However, to access the pool of refundable tax for a given taxation year, the refund mechanism requires dividends to be paid in a subsequent taxation year. Since the amended definition “non-resident-owned investment corporation” in subsection 133(8)

> calls for the phase-out of NROs over a three-year period, a corporation that ceases to be an NRO would not be able to claim a refund of the 25% refundable tax that it would pay in respect of its last taxation year as an NRO. To accommodate the refund of this tax, new paragraph 134.1(1)(c) provides an election through which a corporation that ceases to be an NRO can elect to have its status as an NRO extended for this specific purpose for its first non-NRO year. In order to access the refund, the dividends paid in the first non-NRO year must be paid to a non-resident person or another NRO.
>
> New section 134.1 applies to corporations that cease to be NROs because of a transaction, event or circumstance that arises in a taxation year of the corporation that ends after February 27, 2000. An election under the section is treated as having been made in a timely manner if it is made on or before the electing corporation's filing-due date for its taxation year that ends after this amendment receives Royal Assent.[8]

[13] Paragraph 87(2)(*a*) provides that the Appellant is a new corporation formed as a result of the amalgamation. It does not qualify as an NRO since immediately before the amalgamation not all of the predecessor corporations were NROs. Subsection 133(8) of the *Act* provides as a post-amble following paragraph (*f*) of the definition of NRO the following:

> Except that no case shall a new corporation (within the meaning assigned by section 87) formed as a result of an amalgamation after June 18, 1971 of two or more predecessor corporations be regarded as a non-resident-owned investment corporation unless each of the predecessor corporations was, immediately before the amalgamation, a non-resident-owned investment corporation;[9]
>
> …

[14] Accordingly, as a result of the amalgamation, the Appellant, not being an NRO, would not be eligible for the refund but for the application of subsection 134.1(1). The dividend paid would accordingly be subject to the double tax complained of by the Appellant.

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[8] *Explanatory Notes Relating to Income Tax - March 2001* - Department of Finance – The Honourable Paul Martin, P.C., M.P. Minister of Finance. The above cited text taken from the *Department of Finance Technical Notes, Income Tax*, 15th Edition, 2003 (Consolidated to October 17, 2003) – Thompson Carswell – includes text missing from the Explanatory Notes.

[9] A 2001 amendment to the NRO definition set this limitation out in a new paragraph (*g*) of the definition applicable for amalgamations after February 27, 2000. The Appellant was amalgamated in 1999 so the new paragraphing of this limitation is not applicable.

[15] The Appellant asserts that section 134.1 should be applied in a manner that will prevent that result. To allow the refundable tax account of an NRO to be trapped and then subject the dividend recipient NRO to an additional 25% tax is a result not consistent with the underlying policy of the NRO regime.

[16] The Appellant's argument is based on the principle first applied in *R. v. Black and Decker Manufacturing Co.*[10] that predecessor corporations continue to exist in the amalgamated corporation. The argument is that the Appellant, as the corporation continuing from the amalgamation, was an NRO before the amalgamation because GA Scottish, a predecessor, was an NRO before the amalgamation. It was not an NRO after the amalgamation. Hence, it meets the requirements of section 134.1 which provides that in those circumstances a corporation can elect to be deemed to be an NRO in the first year it ceased to be an NRO – namely in the 2000 year, in the case at bar, it being the first year the Appellant is not an NRO.

[17] As well, the Appellant notes that if the dividend paid by the Appellant to the NRO shareholder ($7,706,000.00) was eligible to trigger the refund there would be no slippage of tax since the NRO recipient is subject to a 25% tax. There would simply be no two tier tax which was not intended for NROs in the first place.

[18] On the other hand, there seemed to be the suggestion in this case, in highlighting the retained earnings of GA Scottish, that a full refund may not have been possible on a dividend paid prior to the amalgamation. However, there is, in fact, no evidence that the full dividend paid by the Appellant could not have been paid by GA Scottish. Dividends are not limited to retained earnings.[11] Further, it does not appear to me that the intention of Parliament was to deny an NRO the opportunity to more fully access a refundable tax account by using an amalgamation, at least where all the predecessors of the amalgamated corporation were NROs. In that case the refund would apply regardless of the financial status of a particular predecessor and regardless of which shareholder of which

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[10] [1975] 1 S.C.R. 411 (S.C.C.). The Supreme Court in *Black and Decker* came to conclusions based on the language of the *Canada Corporations Act* which was the statute governing the amalgamation it was considering. The amalgamation in the present case is governed by the *Canada Business Corporations Act*. It is not in dispute that the provisions of such enactments are substantially the same so no distinctions have been argued on that basis.

[11] Section 42 of the *Canadian Business Corporations Act*, R.S.C. 1985,c. C-44; and section 38 of the *Business Corporations Act*, R.S.O. 1990, c. B. 16.

predecessor corporation received the dividend that triggered the refund. That this may be what the Appellant sought to achieve by electing under section 134.1 in the case at bar, even though not all its predecessors were NROs, does not strike me as troublesome or relevant.

[19] Of relevance is the Respondent's concern that section 134.1, which permits a non-NRO to elect to be an NRO, was added as part of the phasing out of the special tax regime available for NROs. The Respondent suggests that it would be a misuse of the election to construe it in such a way as would open the door for amalgamated corporations to have a more favourable tax result arising from a phase out provision than would have been available but for the phase out. Absent the phase out provision, the refundable tax account would be effectively wiped out on an amalgamation, such as this one, where the predecessor corporations are not all NROs. The language of that transitional provision should be strictly applied to ensure that result is not lost. That is, the language of that provision should not be afforded a liberal construction on some theory of parliamentary intent to avoid double taxation. The provision of the *Act* relied on by the Appellant serves a different purpose altogether than to allow the Appellant access to a refundable tax account that it otherwise could not have access to.

Analysis

[20] The parties' arguments are based on the intention of Parliament and tax policy concerns. Each has an arguable position that could attract favour. What is required however is a close scrutiny of the express language of the subject provisions in order to determine the need to rely on such arguments and to provide a better context in which to weigh those arguments should it be necessary to do so. Not surprisingly, there are several issues that need to be resolved in coming to a determination as to what the subject provisions say in relation to the facts of this appeal.

I. *Who Can Elect?*

[21] The first issue is whether the Appellant is a person that qualifies to make the election to be deemed to be an NRO in its first non-NRO year. The Respondent says it is not.

[22] Subsection 134.1(1) provides that the election required to deem a non-NRO to be an NRO must be made by "a corporation that (a) was a non-resident-owned investment corporation in a taxation year; (b) is not a non-resident-owned

investment corporation in the following taxation year … ; and (c) elects … to have this section apply". It is clear from this language that the corporation that can make the election is *the* corporation that lost its status from one year to the next. While the Appellant seeks to apply the continuity theory to the effect that GA Scottish, as a continuing entity, is *that* corporation, the Respondent argues the Appellant is still not *the* corporation that was GA Scottish. The corporation that had NRO status no longer exits as the *same* entity and cannot be said to be *the* corporation that was the NRO before the amalgamation.

[23] The Respondent's view is that applying the continuity theory of a predecessor continuing to exist within the amalgamated company, in the context of the express language of subsection 134.1(1), is trying to fit a square peg in a round hole. An amalgamated corporation comprised of a composite of continuing corporate personas is not the same corporation as any one of the predecessor corporations. There is good authority for this position in *Pan Ocean Oil Ltd. v. R.* and *Dow Chemical Canada Inc. v. R.*[12]

[24] Indeed, the statutory scheme of the *Act* does seem to adopt this premise. Paragraph 87(2)(*a*) provides that for the purposes of the *Act*, the corporation formed on an amalgamation shall be deemed to be a new corporation. This is incongruous with the notion that the amalgamated corporation is the same corporation as any of its predecessors. If it were the same corporation as a predecessor, many of the amalgamation rules would be redundant.[13] Of even more importance perhaps in illustrating that the *Act* intends a difference between deeming an amalgamated corporation to be a "new corporation" (as opposed to deeming it to be the "same" corporation as a predecessor corporation) is found in subsection 87(1.2) where the merged corporation on an amalgamation of parent and wholly owned subsidiary corporations is deemed to be the "same" corporation as, and a continuation of, each predecessor corporation for the purposes of certain provisions of the *Act* and the *Income Tax Application Rules*. That provision arguably evidences Parliament's intention that a predecessor and an amalgamated corporation are distinct, different corporations except for enumerated purposes, which do not include elections under section 134.1.

[25] Regardless, the Appellant's argument gives no relevance to "sameness". The Appellant's argument relates to the continued existence of the predecessor GA

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[12] This was the finding of Hugessen J.A. in *Pan Ocean,* 94 D.T.C. 6412 (F.C.A.) at paragraph 15 and cited with approval by Mogan J. in *Dow Chemical,* 2007 TCC 668 at paragraph 36.

[13] For example – paragraph 87(1)(*a*) which provides for the transfer of the predecessors' property to the new corporation.

Scottish in accordance with the principles laid down in *Black and Decker*. Here the Appellant argues that paragraph 87(2)(*a*) does not say that predecessor corporations cease to exit for the purposes of the *Act*. It says they have a year-end immediately before the amalgamation. That the amalgamated corporation is a new corporation does nothing to impact corporate law as set out in *Black and Decker* which treats predecessor corporations as continuing. As such, the creation of a "new" corporation on amalgamation as provided for in paragraph 87(2)(*a*) has limitations in respect of the consequences that flow from that creation. Such limitations have been the subject of many cases.

[26] The first limitation recognized by the Courts was that paragraph 87(2)(*a*) is simply the mechanical approach employed to consolidate multiple year ends. It is intended as a means of starting a new single year for the new consolidated entity and terminating the current year of each of the predecessor corporations. For the purposes of the *Act* it is necessary to determine the commencement of the taxation year of the corporation formed on the amalgamation and the ending of taxation years of the predecessor corporations and the deeming of a "new" corporation *for that purpose* should not be taken as barring a finding that the law dealing with the continued existence of predecessor corporations must prevail. The Appellant cites *R. v. Guaranty Properties Ltd.*[14] in support of this approach. The Federal Court of Appeal in that case found that the *Act* did not negate the general corporate law principle which recognized the continued existence of predecessor corporations. The *Act* only provided for ending the taxation years of predecessor corporations.

[27] The Appellant went on to recognize that the subsequent decision of the Federal Court of Appeal in *Pan Ocean* qualified that limitation of paragraph 87(2)(*a*) by finding that it applied for purposes beyond establishing year ends but was nonetheless limited in its application to computations of the amalgamated corporation's income and where necessary, as a consequence thereof, to its computation of taxable income.[15]

[14] [1990] 2 C.T.C. 94 (F.C.A.) Leave to appeal refused.

[15] See paragraph 13. The Appellant also relied on *Dow Chemical* which applied *Pan Ocean.* However, it appears to me that such reliance is misguided. As discussed later in these Reasons, Justice Mogan in *Dow Chemical* at paragraph 36 applied that part of *Pan Ocean* that said at paragraph 15 that the new corporation was manifestly not any of its predecessors.

[28] As well the Appellant cites *Canadian Roxy Petroleum Ltd. v. Alberta*[16]. In that case the Court applied the continuing entity principle to find that an amalgamated corporation was grandfathered from the application of a new provision even though it was formed after the grandfathering deadline. Since a predecessor was grandfathered or would have been but for the amalgamation and since it continued in the form of the amalgamated corporation, the amalgamated corporation was thereby grandfathered. The limitation in paragraph 87(2)(*a*) did not apply as it did not concern the computation of income or taxable income of the amalgamated corporation. The amalgamated corporation was treated as though it existed before the amalgamation which is exactly what the Appellant seeks to have recognized in the present appeal.

[29] Accepting this limitation on the notion that the Appellant is a new corporation, deflates the relevance of the Respondent's position that the Appellant as a new corporation cannot be the same corporation that had previously been an NRO. That is, the fact that GA Scottish and the Appellant are not the same corporation does not impact the analysis. Clearly there is no authority to suggest that an amalgamated corporation is the same corporation as any one or more of its predecessors. The principle applied in *Black and Decker,* does not suggest that. At page 417 of that case the Supreme Court of Canada confirms, as a matter of corporate law, that an amalgamation does not extinguish the existence of a predecessor. Rather, a predecessor remains in existence. The Court likened an amalgamation to a river formed by the confluence of two streams or a single rope made up of intertwining rope with all the strengths and weaknesses of each component. However, such analogy does not mean it is the same corporation. It cannot be.

[30] Still, the Respondent argues that where there are no identifiable intertwining ropes but rather only an indistinguishable blending of two streams, the finding should be that the predecessor attributes cannot be attributed to the amalgamated corporation under the continued existence theory.

[31] It is true that in some cases it is easy to identify characteristics of a predecessor that are inheritable or continue to exist without distortion. A liability, as considered in *Black and Decker* is the best example. However, where the amalgamation changes the very character or persona of a predecessor and that essence or persona is the critical thing that must survive the amalgamation to meet

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[16] 98 D.T.C. 6313 (Alta. Q.B.).

a particular statutory test it seems to me the Respondent has a good argument. However, as attractive as that argument may be, it is neither the direction that corporate law, nor tax law, has taken.

[32] The cases relied on by the Appellant are reflective of the state of the law. Parliament has watched how the Courts have limited the application of paragraph 87(2)(*a*) and done nothing to give it a fuller life. To say now that reading the *Act* as a whole should support the Respondent's argument that this Court on its own initiative breathe fresh life into that section is not something I am prepared to do even though I am of the view that the law as it has evolved has put limitations on its application that I likely would not have imposed. I say this as it seems to me, looking at the *Act* and *Regulations* as a whole, that the drafters of the amalgamation provisions of the *Act* have assumed that an amalgamation gives rise to a new corporation that has none of the tax impacting attributes of a predecessor unless they are continued by an express provision of the *Act*. This gives Parliament control over the circumstances that afford an amalgamated corporation the tax treatment afforded a predecessor. Parliament, or so it seems, wanted to have that control in order to say "no" to the very situation before me unless it chose to expressly provide otherwise. However, even though Parliament saw such control slipping away, it did nothing to restore it. Perhaps that casts doubt on that theory in the first place.

[33] In any event, Parliament must be presumed to know the law and when it drafts legislation, its impact under the law must be presumed to be intended. On this basis it is hard to accept the Respondent's argument that subsection 134.1(1), which sets out who can make the subject election, must be given a narrow scope to reflect a narrow transitional purpose. The section on its face does not preclude the application of the legal principles established by the cases relied on by the Appellant. Since the election provided for in section 134.1 does not deal with the calculation of income or taxable income, the case law is clear. GA Scottish has not ceased to exist by virtue of the amalgamation. It can make the election in subsection 134.1(1) as the corporation that was an NRO in 1999 and not an NRO in the following year. It did make the election and is thereby deemed to be an NRO in the 2000 year. If that opens the door to an unintended tax benefit, Parliament needed to narrow the application of the rule. It is not for me to correct. I am bound by the decisions of the higher Courts. I leave it to the Court of Appeal to recast the limitations currently set out in *Pan Ocean* should it see the room and need to do so. I see no ready way to distinguish that case from the case at bar and I am bound by that authority.

[34] Being satisfied that the requirements of section 134.1 have been met, a further question has been suggested; namely, in whose name does the election have to be filed. The Appellant filed the election in its name. In *Witco Chemical Co., Canada v. Oakville (Town)*[17] the Supreme Court of Canada clearly found that a predecessor corporation's continuance included continuance of its identity as a juristic person with status to commence an action. That does not mean that the election had to be filed by GA Scottish in this case. It means that if it had been filed in that name it would not have invalidated the election. I do not see the Respondent as having taken serious issue with this.[18] In any event, I find that the election was properly filed.

II. *Is the Refundable Tax Account Nil?*

[35] This takes me to consider the second issue; namely whether the refundable tax account of the amalgamated corporation, the Appellant, is nil as asserted by the Respondent.

[36] The transfer of the allowable refundable tax account of a predecessor corporation to an amalgamated corporation occurs pursuant to subparagraph 87(2)(cc)(*i*). That subparagraph simply adds the predecessor's account immediately before the amalgamation to the account of the new corporation if the new corporation is an NRO. If the Appellant is an NRO, it will have what it asserts it has, namely, the full amount of GA Scottish's refundable tax account. The problem here for the Appellant is that subsection 134.1(2) sets out that the corporation that lost its NRO status, by virtue of the election is deemed to be an NRO for the purposes of section 212 and subsections 133(6) to (9) excluding the definition of NRO in subsection 133(8). No mention is made of subparagraph 87(2)(cc)(*i*).

[37] The Appellant argues that the deeming provision in subsection 134.1(2) is sufficient to allow the transfer of the refundable tax account on an amalgamation. The deeming provision is expressly said to apply for the purposes of subsections 133(6) to (9) in respect of dividends paid. Subsection 133(9) defines the refundable tax account. If the Appellant is deemed to be an NRO for the purpose of applying the definition of the subject account, then that must include acknowledging that

[17] [1975] 1 S.C.R. 273.

[18] The Canada Revenue Agency as a matter of practice accepts elections made in the name of the amalgamated entity on behalf of a predecessor where there is no dispute to the right to make the election. See Technical Interpretation 2003-0046015.

status in respect of related provisions that prescribe how that account is calculated. In this sense the Appellant's counsel refers to paragraph 87(2)(*cc*) as a supporting rule. Further, by invoking the general rules relating to allowable refunds in subsections 133(6) to (9), subsection 134.1(2) must be taken as invoking a supporting rule that, in the case of amalgamations, itself refers to subsection 133(9). Its supporting role in the case of amalgamation is expressly stated in subparagraph 87(2)(cc)(*i*) which reads as follows:

> 87(2) Where there has been an amalgamation of two or more corporations after 1971 the following rules apply:
>
> (cc) in the case of a new corporation that is a non-resident-owned investment corporation,
>
> (i) <u>for the purpose of computing its allowable refundable tax on hand (within the meaning assigned by subsection 133(9)) at any time</u>, where a predecessor corporation had allowable refundable tax on hand immediately before the amalgamation, the amount thereof shall be added to the total determined for A in the definition "allowable refundable tax on hand" in subsection 133(9),
>
> …
>
> [Emphasis added.]

[38] The Appellant argues that deeming the amalgamated corporation to be an NRO for the purposes of paragraph 87(2)(*cc*) is a logical and necessary extension of deeming the amalgamated corporation to be an NRO for the purpose of paragraph 133(9). Such extension is not expressly precluded by section 134.1 or by section 87. To take these provisions as expressly precluding such a finding would be to read words into the *Act* that are not there. I am cautioned not to read in words to subparagraph 87(2)(cc)(*i*) or subsection 134.1(2) that would exclude their interdependency. Section 134.1 operates in respect of dividends paid to shareholders that are NROs for the purpose of allowing refunds to avoid double tax and it must be allowed to operate to give effect to that purpose in the case at bar.

[39] The Appellant's arguments all hinge on this last premise: section 134.1 is intended to, or should be construed so as to, relieve double tax in all cases where it can achieve that result without tax slippage or offence to the overall tax regime governing NROs. Section 134.1 opens the door to an equitable resolution of an inequitable double tax problem. I am put upon to construct the subject provisions to ensure that opening. With a certain ironic twist, the Appellant even asks: What is the point of allowing the deeming provision to apply (by allowing the election)

and then give no benefit to that allowance? Considering that I have concluded that it is unlikely that Parliament intended that amalgamated corporations would be eligible to make that election as a result of the amalgamation, it is no surprise to me that there is no allowance in section 134.1 for the flow-through of a predecessor's allowable refundable tax account.

[40] Indeed, it is on this basis that the Respondent takes the position that the Appellant's allowable refundable tax account is nil. The Respondent's position is that subsection 134.1(2) sets out that the corporation that lost its NRO status is deemed to be an NRO *only* for the purposes of section 212 and subsections 133(6) to (9) excluding the definition of NRO in subsection 133(8). No mention is made of subparagraph 87(2)(cc)(*i*) because Parliament did not envision or intend that section 134.1 would deem a non-NRO to be an NRO for the purpose of allowing a flow-through of a predecessor's allowable refundable tax account where the normal requirements for that to occur have not been met. Accordingly, an amalgamated corporation that has lost its NRO status as a result of the amalgamation is simply not deemed by section 134.1 to be an NRO for the purposes of section 87. This is entirely consistent with the tax treatment of NROs where there has been an amalgamation. As noted above, the post-amble to the definition of NRO in subsection 133(8) provides that "in no case shall a new corporation (within the meaning assigned by section 87) formed as a result of an amalgamation after June 18, 1971 of two or more predecessor corporations be regarded as a non-resident-owned investment corporation unless each of the predecessor corporations was, immediately before the amalgamation, a non-resident-owned investment corporation".[19] There is no basis to expand the scope of the deeming provision, where to do so goes well beyond its phasing out purpose and opens a door that Parliament clearly had intentionally shut.

[41] I agree with the Respondent's position on this issue. I cannot see how the deeming provision in subsection 134.1(2) can possibly result in GA Scottish's

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[19] The Respondent also argued that the express exclusion or carve-out in subsection 134.1(2) of the application of the deeming provision to the definition of NRO in subsection 133(8) supports its position. In my view the purpose of this carve-out can be nothing other than to prevent the deeming rule from frustrating the phase-out provision set out as part of that definition in paragraph (*i*) in the post February 2000 version of the definition. That paragraph renders an NRO to be a non-NRO. A deemed NRO cannot be subject to this rendering – hence the need for the carve-out. Embracing such limited purpose to this carve-out, renders other constructions of it (whether of assistance to the Respondent or the Appellant) unconvincing. That is, none of arguments raised by counsel in respect of this carve-out, distract me from the conclusions reached without consideration of that carve-out language.

allowable refundable tax being added to the Appellant's account on the basis that it is a supporting rule.

[42] Turning back to the continuance theory should assist keeping matters in perspective. The Appellant cannot say that the continuance of GA Scottish means it survives within the Appellant so as to make the Appellant an NRO. It is admitted that the Appellant is not an NRO. Further, none of the continuance cases support the view that the amalgamated company is the predecessor. The new corporation formed on the amalgamation is manifestly not the predecessor regardless of corporate law principles. The Appellant is not GA Scottish. It does not have that which the *Act* notionally created for GA Scottish. The refundable tax account is not like land, inventory, contractual rights or goodwill that are property transferred under corporate law and by the *Act* under paragraph 87(1)(*a*) from a predecessor to the amalgamated corporation. That transfer must be provided for expressly by the legislation that notionally brought it into being. That has not been done. The legislative scheme here is clearly not to permit such transfer. Indeed, to the contrary, the transfer is expressly prohibited in the circumstances of the case at bar.

[43] The trapping of refundable tax after amalgamations, equitable or not, is quite intentional where the predecessor corporations were not all NROs. In these circumstances the notional account created in subsection 133(9) ceases to exist on an amalgamation. There must, in my view, be an express provision to bring that account back to life. Silence as to its resurrection (i.e. the absence of an express provision in section 134.1 to preclude such resurrection) is not sufficient. The reference in subsection 134.1(2) to particular subsections of section 133 is not sufficient to bring life to this expired account. An express provision would refer to the so called supporting rule directly.

[44] That the Appellant is deemed to be an NRO without a benefit only underlines that it was not contemplated by the subject provision to afford a benefit in these circumstances. As reflected in the Technical Notes, section 134.1 was enacted as part of the phase-out of the NRO regime in the *Act*. That phase out is built into the definition of "NRO" in subsection 133(8) at paragraph (*i*)[20] which provides as follows":

> (*i*) subject to section 134.1, a corporation is not a non-resident-owned investment corporation in any taxation year that ends after the earlier of,

[20] This version of the definition is applicable after February 27, 2000.

(i) the first time, if any, after February 27, 2000 at which the corporation effects an increase in capital, and

(ii) the corporation's last taxation year that begins before 2003;

[45] The election in section 134.1 allows for an NRO, that lost its status due to this provision, to keep its status for the first year following that loss so that *its'* allowable refundable tax account, calculated without a supporting rule, can be cleared. There is nothing in the subject provision that suggests that *its'* account must be calculated as if the deeming rule in section 134.1 required the invocation of a supporting rule.

[46] Accordingly, for these reasons, the appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 25th day of March, 2008.

"J.E. Hershfield"

Hershfield J.

APPENDIX A

Court File No.: 2005-1448(IT)G

TAX COURT OF CANADA

BETWEEN:

CGU HOLDINGS CANADA LTD.,

Appellant,

-and-

HER MAJESTY THE QUEEN,

Respondent.

STATEMENT OF AGREED FACTS

The parties to this proceeding admit the authenticity of the documents referred to herein, true copies of which are contained in the attached "Joint Book of Documents".

The parties to this proceeding admit, for the purposes of this proceeding only, the truth of the following facts:

A. Background

1. On March 2, 1999, the Appellant corporation was formed on the amalgamation of the following predecessor corporations (the "Amalgamation")[1] under section 185 of the *Canada Business Corporations Act* (the "CBCA"):

   (i) GA Scottish Corporation (Canada) Ltd. ("GA Scottish");

   (ii) Commercial Union of Canada Holdings Ltd; and

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[1] At the time of Amalgamation, the Appellant's legal name was General Accident Holdings (Canada) Limited. The Appellant changed its name to CGU Holdings Canada Ltd. on March 31, 1999.

(iii) General Accident Holdings (Canada) Limited.

A copy of the Amalgamation Agreement and the Certificate of Amalgamation are contained in the Joint Book of Documents at Tabs 1 and 2.

2. The taxation years of the Appellant's predecessor corporations were deemed to have ended immediately before the Amalgamation.

3. The Appellant's first taxation year following the Amalgamation was deemed to have commenced at the time of the Amalgamation and ended on February 29, 2000 (the "2000 taxation year").

A copy of the Appellant's income tax return for the 2000 taxation year is contained in the Joint Book of Documents at Tab 3.

B. GA Scottish's "Allowable Refundable Tax on Hand"

4. Immediately before the Amalgamation:

(i) GA Scottish was a "non-resident-owned investment corporation" (an "NRO") within the meaning of subsection 133(8) of the *Income Tax Act* (Canada) (the "Act"); and

(ii) Commercial Union of Canada Holdings Ltd. and General Accident Holdings (Canada) Limited were not NROs within the meaning of subsection 133(8) of the Act.

5. The Appellant did not qualify as an NRO under subsection 133(8) of the Act following the Amalgamation because not all of its predecessor corporations were NROs immediately before the Amalgamation, as required by the postamble to the definition "non-resident-owned investment corporation" in subsection 133(8) of the Act, as it read on March 2, 1999 (now paragraph (g) of the definition "non-resident-owned investment corporation" in subsection 133(8) of the Act.)

6. Immediately before the Amalgamation, GA Scottish had (i) an unrefunded balance of $1,265,348 of "allowable refundable tax on hand" (within the meaning of subsection 133(9) of the Act) (the "Refundable Tax"), (ii) "cumulative taxable income" (within the meaning of subsection 133(9) of the Act) of $1,917,233, and (iii) retained earnings of $1,641,791. The Refundable Tax represents the 25% NRO tax that GA Scottish had paid in respect of income earned prior to the Amalgamation.

C. The Section 134.1 Election and Application for an "Allowable Refund"

7. During its first taxation year following the Amalgamation, the Appellant paid a "taxable dividend" (within the meaning of subsection 133(8) of the Act) in the amount of $7,706,000 to a shareholder that was an NRO. The amount of the dividend was sufficient to generate a complete refund of the Refundable Tax, provided the Appellant was otherwise eligible under the Act to recover the Refundable Tax. The shareholder of the Appellant was required by the Act to pay a 25% refundable tax in respect of its receipt of the dividend.

   See Schedule 26 to the Appellant's income tax return for its 2000 Taxation year at Tab 3 of the Joint Book of Documents.

8. The Appellant made a timely election pursuant to paragraph 134.1(1)(c) of the Act to be deemed to be an NRO for the 2000 taxation year and applied to the Minister of National Revenue (the "Minister) pursuant to subsection 133(6) of the Act for an "allowable refund" of the Refundable Tax.

D. The Minister's Assessment

9. The Minister assessed the Appellant in respect of the 2000 taxation year to deny a refund of the Refundable Tax on the basis that the Appellant did not satisfy the criteria in paragraph 134.1(1)(a) for making the election. In addition, the Minister has taken the position that even if the Appellant was entitled to make the election, the "allowable refund" resulting from the dividend paid by the Appellant in the 2000 taxation year could not exceed nil.

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