Docket: 2004-3026(IT)G

BETWEEN:

GARY LANDRUS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 15, 2007, at Toronto, Ontario.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Louise R. Summerhill
Counsel for the Respondent:	Franco Calabrese

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1994 taxation year is allowed with costs and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to deduct a terminal loss of $29,130.

Signed at Ottawa, Canada, this 2nd day of May 2008.

"B.Paris"

Paris J.

Citation: 2008TCC274
Date: 20080502
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BETWEEN:

GARY LANDRUS,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Paris, J.

[1] The Appellant was a limited partner in the Roseland Park II Limited Partnership ("Roseland II"), which was formed in 1989 to acquire a newly built condominium building in London, Ontario. Another newly built condominium building, adjacent to the Roseland II property, was acquired by the Roseland Park I Limited Partnership ("Roseland I"). Due to a general downturn in the real estate market in Southern Ontario, the value of the Roseland I and II properties dropped substantially in the years following their acquisition.

[2] In a series of transactions undertaken in December 1994, Roseland I and Roseland II sold all of their assets to a new limited partnership, Roseland Park Master Limited Partnership ("RPM") and the limited partners of Roseland I and II received partnership interests in RPM.

[3] The dispositions triggered terminal losses to Roseland I and II under subsection 20(16) of the *Income Tax Act* [1] (the "*Act*"), since there was still a positive Undepreciated Capital Cost ("UCC") balance after the disposition. These losses were allocated to the limited partners. The Appellant deducted $29,130 as his share

[1] R.S.C. 1985, c. 1 (5th Supp.).

of the terminal loss of Roseland II in computing his income for the 1994 taxation year.

[4] The Minister of National Revenue ("Minister") used the general anti-avoidance rule ("GAAR") in section 245 of the *Act* to deny the deduction of the terminal loss.

[5] In general terms, the GAAR applies in circumstances where a taxpayer obtains a tax benefit as a result of a transaction which is not arranged primarily for *bona fide* purposes other than to obtain the tax benefit and the transaction amounts to abusive tax avoidance.

[6] Since the Appellant has conceded that there was a tax benefit, the issues in this appeal are whether the assets of Roseland II were transferred to RPM primarily to obtain the tax benefit, and if so, whether this constituted abusive tax avoidance. If both conditions are met, the GAAR would apply, and the Appellant concedes that the Minister would be entitled to deny the terminal loss deduction pursuant to subsection 245(5) of the *Act*.

Facts

[7] A partial agreed statement of facts and joint book of documents were filed by the parties at the hearing. The Appellant also called four witnesses: Mr. Gary Landrus, the Appellant, Mr. Joseph Froio, a limited partner in Roseland I, Mr. Wayne Jacobs, an executive of Allied Canadian Corporation, the corporation ("Allied") that became the general partner of Roseland II in 1993 and who devised the restructuring proposal, and Mr. Ralph Neville, a partner at BDO Dunwoody, who provided accounting advice on the transaction.

Background

[8] Roseland I was formed in 1988 to acquire and operate a 94 unit residential condominium building located at 858 Commissioners Road East, London, Ontario. A total of 94 partnership interests in the limited partnership were sold to the public. The general partner was Roseland Park (I) General Partner Limited.

[9] Roseland II was formed in 1989 to acquire and operate a 110 unit residential condominium building located at 860 Commissioners Road East, London, Ontario. A

total of 110 partnership interests in Roseland II were sold to the public. The general partner was Roseland Park (II) General Partner Limited.

[10] Roseland I acquired the property at 858 Commissioners Road East on December 30, 1988 at the following cost:

(a) Land $476,000
(b) Building $5,495,845
(c) Furniture and Equipment $515,100
(d) Landscaping $27,137
(e) Paving $78,614

[11] Roseland II acquired the property at 860 Commissioners Road East on January 31, 1990 for the following cost:

(a) Land $555,200
(b) Building $6,632,492
(c) Furniture and Equipment $653,400
(d) Paving $102,995

[12] The buildings at 858 and 860 Commissioners Road East were part of a development that was to consist of four residential condominium towers and an amenities centre with two levels of parking, a swimming pool, clubhouse, community centre and tennis court. Due to the slowdown in the real estate market, only three towers (including the Roseland I and II properties) and the amenities centre were built. The development was located next to a hospital in what was said to be a good area of the city, and had views over the Grand River.

[13] Each partnership interest in Roseland I and II had referenced to it a particular condominium unit in the respective buildings. Upon withdrawal from the partnerships, each partner became entitled to receive the referenced unit. The size of the unit and its location in the building determined the cost of the partnership interest and the partner's percentage interest in the partnership. The limited partner selected the referenced unit at the time of acquiring his or her interest in the limited partnership.

[14] The rental income from all of the units was pooled for each building, respectively, and net profit was allocated to each limited partner based on his or her percentage interest in the partnership.

[15] Financing for the partnership units had been arranged by the promoter and was available in part by means of a mortgage from the Royal Bank registered against the referenced unit selected by the purchaser of the partnership interest.

[16] On May 10, 1989, the Appellant purchased his interest in Roseland II for $107,650 which he financed as follows:

(a) Cash: $6,630
(b) Royal Bank mortgage: $70,725
(c) Second mortgage: $30,295

[17] The Appellant chose Unit 1005A as the condominium unit available to him upon withdrawal from the partnership.

[18] Roseland I began rental operations in February 1989 and Roseland II in February, 1990. They faced a difficult rental market almost from the outset. According to a note sent to the investors in Roseland II by the General Partner in May 1991[2], London had the highest vacancy rate in Ontario due to the completion of almost 4,500 new rental apartments in the area between 1988 and 1990. The vacancy rate for apartment buildings in London, completed after 1985, was said to be 10.4% in October 1990. Also, unemployment in the region was increasing.

[19] It is clear from the evidence that the financial performance of Roseland I and II in the initial years was disappointing to the investors. Cash flow was less than anticipated and resale prices for condominium units in both buildings were well below the prices paid originally for the partnership interests to which the units were referenced.

[20] According to Mr. Froio, the value of the condominium units had "plummeted like a rock." He also said that a number of units in Roseland I had been foreclosed by the Royal Bank in the first few years of operation and that the units had been resold for as little as half their original price.

[21] The Appellant said that he had the impression from one visit to the property in 1990 or 1991 that Roseland I and II were in competition with each other for rentals and resales, although he had thought that the two buildings were supposed to be part of a common enterprise. He also saw a "downward spiral" in the resale prices of units in the building.

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[2] Joint Book of Documents, Volume III, Tab 50.

[22] The Appellant felt that the management of Roseland II was inadequate. At first he talked a couple of times a year with a representative of the general partner and received regular mail outs about Roseland II, but he said that after 1991, mail outs were irregular and that he had difficulty keeping up with what was going on with the property. He also thought the general partner or property manager could be doing more to coordinate resales of the units.

[23] In early 1993, against this backdrop of investor dissatisfaction, Allied was approached about taking over as the general partner of Roseland II.

[24] Mr. Wayne Jacobs, an executive with Allied, testified that, during that period, the company was developing a niche in the property management market in Southern Ontario dealing with real estate owned by limited partnerships. He said:

> The niche was the tumbling real estate market of the early '90s and there were a lot of limited partnerships in the marketplace where the general partner or property manager hadn't performed to the expectation of these investors and so these investors felt that that there was a need to try and do something about the value of their property and the asset that they owned.[3]

[25] Mr. Jacobs testified that Allied was first approached by certain limited partners in Roseland II, whereas the first reporting letter sent out to the limited partners in Roseland II by Allied in 1993 said that Mr. Tom Borromeo, who was the director and an officer of the general partner of Roseland II at the time, approached Allied. The report stated:

> . . . Mr. Borromeo recently came to the conclusion that the Limited Partnership would be better served by an organization with comprehensive syndicate management and property management expertise. As a result, he approached Allied Canadian Corporation. . .[4]

[26] In June 1993, Allied acquired the one outstanding share of Roseland Park (II) General Partner Limited, and Allied personnel were elected as directors and appointed as officers of the general partner. In September 1993, Allied Canadian Management Corporation (a company related to Allied) took over as property manager of Roseland II.

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[3] Transcript of Proceedings, Volume 1, p. 134.
[4] Joint Book of Documents, Volume III, Tab 29.

[27] Once Allied took over, Mr. Jacobs said that he felt the financial results could be improved by combining the operations of Roseland I and II in order to achieve "economies of scale". He said the restructuring was necessary "in order to really make a difference" and "to bring everything under one management group so there would be no duplication of efforts by anyone." He said that there would be a "tremendous savings of costs plus there wouldn't be the same fight for the rental revenue."[5]

[28] Mr. Jacobs said that Allied made the recommendation to bring the two partnerships together after Allied was approached by investors from Roseland I who were aware that Allied had taken over the management of Roseland II, although he did not give any specific date when this happened.

[29] Mr. Froio said that rumours began circulating among the partners of Roseland I in late 1993 or early 1994 that Allied had some idea of putting the partnerships together to save some costs, and the topic was discussed at a meeting of the Roseland I partners in April 1994. The Appellant said that he first became aware of the restructuring proposal after reading the quarterly reporting letter sent out by Allied to the limited partners in June 1994.

[30] The documents in evidence show that the matter of the restructuring was discussed at the annual meetings of both limited partnerships in the spring of 1994.[6] Also, according to a report to Roseland II partners dated June 1, 1994[7] the restructuring proposal had the support of both limited partnerships at that time.

[31] Mr. Jacobs said that after obtaining the support of the limited partners for the proposal, Allied retained the services of Ralph Neville, senior tax partner at BDO Dunwoody Ward Malette, as well as the law firm Aird & Berlis, in order to confirm the viability of the transaction. He said that Allied wanted to try and understand if the restructuring was possible and what the implications of it would be. He said that Allied did not want the restructuring to have a negative impact on the partners so it "approached BDO to try and understand what were the implications of bringing two different partnerships together as a single partnership."

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5 Transcript of Proceedings, Volume I, p. 143.

6 Joint Book of Documents, Volume III, Tab 45 p. 8 and Volume IV, Tab 72.

7 Joint Book of Documents, Volume III, Tab 30.

[32] Allied also obtained an appraisal of the assets of Roseland I and Roseland II. The appraisal report was dated August 31, 1994. On the basis of these appraisal values, an estimate of each partner's terminal loss was calculated.

[33] Allied set up two meetings for September 8, 1994, one for the partners of Roseland I and the other for the partners of Roseland II, to discuss and vote on the proposal. The partners were provided in advance of the meetings with an information circular including the estimate of the potential terminal loss for each partner and a copy of an opinion letter from Mr. Neville. The proposal was described in the following terms in the information circular:

> The proposed restructuring involves the sale of each Limited Partnership's property in its entirety to a new limited partnership, which will be owned directly or indirectly by the current limited partners of the Limited Partnerships. Each limited partnership interest will continue to be referenced to its current individual condominium unit and each limited partner of the new limited partnership will have the same rights and obligations as in their respective previous limited partnership.[8]

[34] Allied also sent a letter dated August 26, 1994 to the Roseland I partners setting out the following advantages of its proposal:

> Short-Term Benefit: Average terminal loss per limited partnership interest of approximately $19,000, permitting reduction in income taxes payable in 1994 by approximately $10,106 (assuming top marginal rates of income tax).
>
> Long-Term Benefit: Potential to benefit from evident recovery in real estate market by selling at a future date into an improved market.
>
> Flexibility: Highly flexible, in that it does not preclude any course of action in the future, including outright liquidation.
>
> Tax Effectiveness: Highly effective, in that it liberates a loss for income tax purposes in 1994 without crystallizing an economic loss.
>
> Comprehensive Management: Allied Canadian has comprehensive asset management capability that can be brought to bear on the combined properties of both limited partnerships, resulting in diversification of risk and the achievement of economies of scale.

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8 Joint Book of Documents, Volume IV, Tab 72.

> Overall Cost of Holding: The after-tax cost to limited partners of holding the investment throughout 1995 and 1996, taking account of the terminal loss, will be negligible.[9]

[35] The Appellant attended the special meeting of the partners of Roseland II on September 8, 1994 where presentations were made by representatives of Allied, BDO and Aird & Berlis. The Appellant said that the limited partners were told that the restructuring would create a larger rental pool and create efficiencies in operations such as common management, and only one management residence on site rather than two. The tax consequences of the proposal were also discussed, and were estimated to have taken up about half the time of the meetings. At his examination for discovery, the Appellant had said that the bulk of the discussion at the meeting was related to the tax aspect of the transaction.

[36] The limited partners of Roseland II then approved the proposal and the necessary special resolution was passed on or about September 8, 1994.

[37] The Appellant stated that he voted for the proposal because he felt that a larger unit with more effective rental policies would stop or decrease the "rush to the door selling" and that there would be "a larger pool on which to develop the investment." He also thought that the restructuring would eliminate competition between the two buildings. He said that he was skeptical about the tax benefit because in other limited partnerships in which he had been involved, cash flow and tax projections had not always proved reliable.

[38] In cross-examination he agreed that at the time he was desperate to get something out of his investment, although he still wanted to continue with it.

[39] The Appellant said that from his point of view the primary purpose of the reorganization was "to salvage our investments, to have a larger rental pool with proper management to be a more effective sufficient rental organization."

[40] A special meeting of the partners Roseland I was also held on September 8, 1994 to vote on the proposal. Mr. Froio said that he understood before the meeting that "there was going to be a good cost potential savings to put it together" and a better payout to the partners. He voted in favour of the restructuring "mainly for the business purposes and a possibility of the tax thing", although he thought the tax benefit was too good to be true. He also added that, from his perspective, the

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[9] Joint Book of Documents, Volume III, Tab 56.

transaction was undertaken for cost savings and to create synergies with regard to getting the tenants that both buildings were competing for.

[41] The special resolution approving the sale of the assets of the partnership to a new limited partnership was subsequently passed by the Roseland I limited partners on September 22, 1994.

[42] The sale of the assets of Roseland II to RPM took place as follows:

- RPM was formed and registered on December 21, 1994.

- on December 23, 1994, Roseland II subscribed for 4,448 interests in RPM. The subscription price of $4,448,000, being equal to the fair market value of the net assets of Roseland II net assets (as determined by the appraisal referred to above), was paid by promissory note.

- on December 23, 1994, Roseland II directed RPM to issue the limited partnership interests subscribed for in RPM, to the limited partners of Roseland II in proportion to their existing interests in Roseland II. The Appellant received a 1.002% interest in RPM.

- on December 28, 1994, Roseland II sold all of its assets to RPM for fair market value consideration paid by cancellation of the promissory note given by Roseland II for the subscription price of the partnership interests in RPM.

[43] The sale of the assets of Roseland I to RPM was done in a similar manner, except that an additional step was added to ensure that Ontario land transfer tax would not have to be paid.

[44] The sale of the assets by Roseland I and Roseland II resulted in terminal losses of $1,709,454 and $2,916,612 respectively, which were allocated to the limited partners.

[45] Roseland I and Roseland II were dissolved on June 3, 1998.

[46] The Appellant said that after the reorganization of the partnerships, he recalled that there was some increase in cash flow. Wayne Jacobs said that the two properties had better operating results but gave no details in this regard.

[47] No reference was made by any of the witnesses to a document[10] included in the joint book of documents which set out the income and expenses for Roseland I and II for 1993 and 1994, and for RPM for 1995, which on its face does not appear to show any significant change in income or expenses after 1994 when the partnerships were combined.

[48] The Appellant withdrew from RPM in 2000, and exercised his option to take title to Unit 1005A. He then sold that unit to an unrelated party for $63,500. He reported the difference between the sale price and his share of the cost at which RPM purchased the Roseland II assets in 1994 on income account. At the time of the hearing, Mr. Froio was still a member of RPM.

[49] Mr. Ralph Neville gave evidence concerning the accounting advice he provided on Allied's proposal to combine the two limited partnerships. He stated that the "traditional" way of effecting a merger of two partnerships was to dissolve the existing partnerships and distribute the assets of the partnerships into the hands of the existing partners, and then have the existing partners contribute those assets into a new partnership in return for a partnership interest.

[50] In this case, he felt that there were certain business reasons for not using this method to merge the partnerships. The first related to the fact that, upon distribution of partnership property to the limited partners, each limited partner would hold an undivided interest in the entire property. In order to transfer that property into the new limited partnership, it would be necessary for all of them to agree to the transfer. Without the unanimous agreement of the limited partners, the transfer could not proceed, thus giving each limited partner the power to block the transfer of the property to the new limited partnership by withholding his or her agreement. Mr. Neville said that it was not certain in this case whether all of the limited partners in Roseland I and II would have consented to such a transfer. The second reason for not using the traditional method was that the transfer of the partnership property would have attracted Ontario land transfer tax.

[51] He therefore recommended the method that was used here, which involved the sale of the partnership property to RPM, and the issuance of partnership interests in RPM that were subsequently distributed to the limited partners of Roseland I and II.

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[10] Joint Book of Documents, Volume IV, Tab 60.

[52] Mr. Neville also gave evidence that he understood that using the traditional method would have enabled the limited partners in Roseland I and II to claim terminal losses to the same extent as using the method he recommended. He explained that upon dissolution of a partnership the distribution of the partnership assets to the partners is done at the fair market value of the assets (in the absence of any election by the partners under subsection 98(3)). This would have triggered a terminal loss in the same way that the disposition of the assets at fair market value to RPM did.

Reassessments

[53] The Minister assessed the limited partners of Roseland I and II and denied the deduction of the terminal losses. The Minister initially took the position that there was no change in beneficial ownership of the Roseland I and II assets upon the sale to RPM, that the “stop-loss” provisions of section 85(5.1) of the *Act* applied to deny to the terminal losses resulting from the transfer of the property, and, finally, in the alternative, that the GAAR applied to deny the terminal losses.

[54] Subsequent to the Appellant’s notice of objection, the Minister confirmed the reassessment, relying only on the GAAR.

Relevant legislation

[55] Section 245 reads as follows for the year in issue:

> **245. (1)** In this section,
>
> **"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 but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty;
>
> **"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;
>
> **"transaction"** includes an arrangement or event.
>
> **(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.

(3) An avoidance transaction means any transaction

> (*a*) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or
>
> (*b*) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

(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.

(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.

[56] The terminal loss provision, subsection 20(16) read as follows for the year in issue:

Notwithstanding paragraphs 18(1)(*a*), 18(1)(*b*) and 18(1)(*h*), where at the end of a taxation year,

> (*a*) the total of all amounts used to determine A to D in the definition "undepreciated capital cost" in subsection 13(21) in respect of a taxpayer's depreciable property of a particular class exceeds the total of all amounts used to determine E to J in that definition in respect of that property, and
>
> (*b*) the taxpayer no longer owns any property of that class,

in computing the taxpayer's income for the year

> (*c*) there shall be deducted the amount of the excess determined under paragraph 20(16)(*a*), and
>
> (*d*) no amount shall be deducted for the year under paragraph 20(1)(*a*) in respect of property of that class.

<u>Appellant's position</u>

[57] The Appellant concedes that the terminal loss allocated to him by Roseland II is a tax benefit within the meaning of subsection 245(1). However, he takes issue with the Minister's conclusions that the transaction giving rise to the terminal losses, i.e. the disposition of the property by Roseland II to RPM, was not done for *bona fide* purposes other than to obtain the tax benefit, and that the transactions result in a misuse of the provisions of the *Act* or an abuse of the *Act* read as a whole.

[58] The Appellant argued that there was no avoidance transaction in this case because the primary purpose of the transactions was to bring two competing buildings into a common pool, streamlining costs and management.

[59] The Appellant submitted that the fact that information was received on the tax savings resulting from the reorganization must be considered in the context of all the evidence and does not prove the sale was tax motivated. Mr. Jacobs indicated that the business purpose was identified before tax advice was sought and that lawyers and accountants were only contacted in order to determine the best way to effect the sale and ensure that there were no adverse consequences to the partners.

[60] The Appellant also referred to his testimony that his decision to vote for the reorganization had nothing to do with the proposed tax benefits.

[61] Based on the foregoing the Appellant concluded that the sale of the building was done primarily for business reasons other than to obtain the terminal losses.

[62] The Appellant further submitted that the disposition of the partnership assets to RPM did not involve any misuse of the terminal loss provision, subsection 20(16), or any abuse of the *Act* as a whole.

[63] The Appellant submits that there is nothing in the object, spirit or purpose of subsection 20(16) that would prevent partners from claiming a terminal loss on the disposition of depreciable property by the partnership such as was done in this case.

[64] The Appellant referred to the understanding expressed by Mr. Neville that terminal losses are generally available in a traditional merger of partnerships where the conditions of subsection 20(16) are otherwise met: see Interpretation Bulletin IT-471R dealing with the merger of partnership.

[65] The Appellant also referred to an opinion letter written by the Rulings Directorate of Revenue Canada in 1994 that states that if there is a dissolution of a limited partnership and a distribution of the partnership assets to the partners, the partnership will be deemed to have disposed of the assets and any terminal loss arising from that disposition can be allocated to the partners and claimed by them.[11]

[66] In the Appellant's view, this shows that the Canada Revenue Agency ("CRA") accepts that the object, spirit and purpose of subsection 20(16) is not offended by these transactions.

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[11] "Winding Up – Partnership", April 20, 1994, doc. #9335385, Tax Windows File.

[67] The Appellant underlined the fact that this case does not involve a scheme whereby the Appellant is trying to claim a loss incurred by some other taxpayer. The Appellant in this case suffered a real economic loss on his investment in Roseland II when the property was sold for fair market value in 1994 because the property was worth less than when it was purchased in 1989. The fair market value of the property was therefore substantially less than its undepreciated capital cost and this resulted in a terminal loss under subsection 20(16) of the *Act*.

[68] The Appellant said that none of the stop-loss rules to which the Respondent referred in argument were applicable in this case and that the object spirit and purpose of the stop-loss rules is therefore irrelevant to the issue to be decided. The only issue is the object, spirit and purpose of subsection 20(16).

[69] The Appellant also contended that the Respondent is attempting to characterize the transaction in suggesting that there was no disposition of an economic interest. There was a real change of ownership of the assets from Roseland Park II to RPM which resulted in the receipt of proceeds of disposition.

[70] In the event that the GAAR is found to apply, the Appellant does not challenge the Minister’s determination of the appropriate tax consequences pursuant to subsection 245(5) of the *Act*.

Respondent’s position

[71] The Respondent takes the position that the primary purpose of the dispositions of the assets by Roseland I and II was to obtain a tax benefit for the limited partners by crystallizing the terminal losses on the properties, without disposing of their investment in the underlying assets, and that the dispositions would result in a misuse of the provisions of the *Act* or an abuse having regard to the provisions of the *Act* as a whole.

[72] The Respondent acknowledged that, once it has been established that an avoidance transaction occurred, GAAR will apply only if the Respondent is able to show that the transaction was abusive within the meaning of subsection 245(4) of the *Act*. This involves a two step process. The provision that gave rise to the tax benefit must be interpreted to ascertain its object, spirit or purpose and then the Respondent must demonstrate that the avoidance transaction frustrates the object spirit or purpose of that provision.[12]

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[12] *Canada Trustco Mortgage Co. v. The Queen*, 2005 DTC 5523 at paragraph 49.

[73] The Respondent identified the provisions which gave rise to the tax benefit to the Appellant in this case, as subsection 20(16) and section 96 of the *Act*. He said that "the scheme of the *Act* within which these provisions operate seeks to prevent deductions in respect of the disposition of capital property in circumstances in which there is not a true economic disposition of the property between parties within the same economic unit such that the taxpayer either directly or indirectly continues to participate with the same or an identical property even after the disposition."[13]

[74] The Respondent explained that subsection 20(16) is part of the Capital Cost Allowance ("CCA") system in the *Act* which allows the taxpayer to deduct the actual cost of depreciable assets over a period of time at a rate prescribed by the *Act*. Citing the Federal Court of Appeal decision in *Water's Edge Village Estates (Phase II) v. Canada*,[14] he stated that the object and spirit of the CCA provisions in the *Act* was to provide for the recognition of money spent to acquire qualifying assets to the extent that they are consumed in income earning processes under the *Act.*

[75] The Respondent said that the terminal loss under subsection 20(16) is premised on the taxpayer no longer owning any property of a prescribed class at the end of a taxation year, and there being "unused" UCC in respect of that prescribed class. Therefore, the terminal loss provision acts as a final adjustment to CCA "when an arm's length sale demonstrates the property has been under-depreciated" under the CCA system.

[76] According to the Respondent, the policy of the *Act* is to recognize a disposition only in situations in which there has been a "real economic disposition" of a taxpayer's interest in property.

[77] The Respondent argued that further evidence of this policy is found in the following provisions in the *Act* (as it read for the year in issue), commonly referred to as "stop-loss" provisions:

> Subparagraph 40(2)(*g*)(i), which provided that a superficial loss from the disposition of a capital property is nil. "Superficial loss" is defined in subsection 54(1) as the loss arising from a disposition of property by a taxpayer where the same or identical property was acquired by the taxpayer, the taxpayer's spouse or a corporation controlled by the taxpayer directly or indirectly in any manner whatever

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[13] Respondent's Written Argument, paragraph 53.

[14] 2002 FCA 291.

within a period beginning 30 days before the disposition and ending 30 days after the disposition.

Paragraph 40(2)(*e*), which denied a corporation's loss from the disposition of any capital property by it to a person by whom it was controlled or to a corporation that was controlled by a person who controlled the corporation;

Subsection 85(4), which denied a loss that would otherwise arise on the disposition of capital property (except depreciable capital property) or eligible capital property by a taxpayer to a corporation controlled, directly or indirectly in any matter what ever, by the taxpayer, by the spouse of the taxpayer or by a person or group of persons by whom the taxpayer is controlled, directly or indirectly in any matter what ever; *or where an amount would otherwise be deductible under paragraph 24*(1)*(a),*

Subsection 85(5.1) which denied or reduced a terminal loss which would otherwise have resulted from the disposition of depreciable property by a person or partnership to:

- a corporation that was controlled, directly or indirectly in any manner whatever immediately after the disposition by the transferor, the transferor's spouse, or a person, group of persons or partnership by whom the transferor was so controlled; or

- a person, spouse of a person, member of a group of persons or partnership who controlled the transferor; or

- a partnership in which the transferor's interest, as a member, was as a majority interest partner as described in paragraphs 97(3.1)(a) or (b) of the Act.

[78] The stop-loss rule in subsection 85(5.1) was repealed and replaced in 1998 by subsection 13(21.2) which was made applicable to transactions occurring after April 26, 1995. One of the changes brought about by the enactment of subsection 13(21.2) was to expand the scope of former subsection 85(5.1) to include a broader range of transferees, and to cover transfers made indirectly to those transferees.

[79] The definition of superficial loss was also amended at the same time to apply to a reacquisition of the subject property (or acquisitions of identical property) by a wider group of persons related to the taxpayer.

[80] The Respondent submitted that the Court could look to the policy behind subsection 13(21.2) and the amendments to the superficial loss definition even though those provisions were not yet in effect in the year in issue in this appeal. He said that in *Water's Edge Village Estates (Phase II) v. Canada,* the Federal Court of

Appeal accepted that subsequent amendments to the *Act* could be taken as demonstrating a desire by Parliament to close loopholes that previously existed in the *Act* in which permitted an anomalous result having regard to the object and spirit of the relevant provisions of the *Act*.

[81] The Respondent argued that in each of these stop-loss provisions, the *Act* specifically provides that a legal disposition in and of itself is not sufficient to permit a deduction of a loss where the taxpayer has simply transferred the interest to either a related party or a member of an "economic unit" of which the taxpayer is a part. Any recognition of the losses for tax purposes would be premature, since the taxpayer has not truly disposed of his or her economic interest in the property. In the Respondent's words, there was no "disposition of economic substance."

[82] According to counsel this is indicative of a policy under the A*ct* to prevent recognition of losses where no disposition of the taxpayer's economic interest in the property has occurred, or where the taxpayer continues to have a direct or indirect interest in the property after the disposition.

[83] The Respondent submitted, therefore, that the transaction carried out by Roseland II in this case frustrated the object, spirit or purpose of subsection 20(16) because it was simply a transfer of property by a group of partners from one partnership to another, and was not a true disposition of property as intended by Parliament. He said that, in the end, the Appellant and the other investors were able to access the terminal losses while at the same time continuing their investment in the same property or a similar property through different partnerships. There was no change to their investment after the transfer since they continued to have the right to acquire the same referenced condominium units after the restructuring as they did before. The realization of terminal loss was premature because the investors had not stopped using the partnership assets in the income earning process. It was therefore only a paper loss occasioned by the decrease in the value of the partnerships' assets by 1994. In the Respondent's view, accessing the terminal losses before the sale of the partnership assets to third parties constituted abusive tax avoidance.

Analysis

Purpose of the transaction

[84] Subsection 245(3) provides that the GAAR will not apply to a transaction that "may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit." In determining purpose,

regard must be had to all of the circumstances surrounding the transaction. In *OSFC Holdings Ltd. v. R.*,[15] Rothstein J. said:

> The words "may reasonably be considered to have been undertaken or arranged" in subsection 245(3) indicate that the primary purpose test is an objective one. Therefore the focus will be on the relevant facts and circumstances and not on statements of intention. It is also apparent that the primary purpose is to be determined at the time the transactions in question were undertaken. It is not a hindsight assessment, taking into account facts and circumstances that took place after the transactions were undertaken

[85] Firstly, I am unable to accept that the proposal to merge the partnerships was initially developed and promoted by Allied as a means of saving operating costs and eliminating competition between the buildings for rentals. The first documented reference to the restructuring proposal, found in the reporting letter sent out by Allied to the Roseland II limited partners in the fourth quarter of 1993, refers only to the potential “significant” income tax benefits of the restructuring:

> Management is formulating a restructuring proposal for the Limited Partnership. If implemented, this restructuring could have significant income tax benefits for limited partners in the 1994 taxation year. Management intends to call a meeting within the next couple of months to introduce the proposed restructuring to limited partners in a comprehensive way.[16]

[86] This is inconsistent with Mr. Jacobs’ evidence that Allied was not in a position to discuss the tax ramifications of the restructuring prior to obtaining legal and accounting advice in the summer of 1994. Mr. Jacobs said that initially Allied did not discuss any tax issues with the partners of Roseland II because it was a real estate company and was not in a position to discuss tax strategies. However, I infer that the reference in the reporting letter was to the restructuring proposal that was ultimately carried out since Mr. Jacobs was not aware of any other proposal ever being developed by Allied for Roseland I and II.

[87] This first reference to the restructuring makes no mention of any benefit to the limited partners other than the tax benefit.

[88] There is also evidence that leads me to believe that Allied had previous experience with restructuring limited partnerships that resulted in tax advantages to the limited partners. The minutes of the special meeting of the partners of Roseland I,

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[15] 2001 FCA 260 at para. 46.

[16] Joint Book of Documents, Volume IV, Tab 66.

held on September 8, 1994, show that Mr. Mike Emory, the president of Allied, addressed the meeting and referred to Allied's previous experience with "these types of transactions".

> Michael Emory, the President of Allied Canadian Equities Corporation, presented his view that there were significant benefits to the partners to be gained from the transaction. Mr. Emory stated that the transaction would have a business purpose which would comply with income tax laws and that the immediate income tax deductions to partners would be approximately $19,000 per unit. Mr. Emory also advised that Allied Canadian had not obtained an advance tax ruling from Revenue Canada with respect to the transaction. In addition, Mr. Emory reviewed his firm's experience with these types of transactions and their performance to date.[17]
>
> (Emphasis added.)

[89] Given the apparent focus of Mr. Emory's comments at the meeting on the tax aspects of the restructuring, I infer that the reference to "these types of transactions" was a reference to restructuring limited partnerships, and that Allied was aware from the outset of the potential tax benefits from these arrangements. Mr. Jacobs' evidence that Allied developed a niche in the market in the early 1990's working with limited partnerships whose property had fallen in value is consistent with this conclusion.

[90] I am also not satisfied that the Appellant has proven that the primary goal of the restructuring was to save costs and eliminate competition between the buildings. Although the Appellant, Mr. Froio and Mr. Jacobs all stressed that they believed the restructuring would result in such savings, it does not appear that any analysis was done by any of the parties to determine what those savings would likely be. The Appellant was unaware of any work done to determine whether the anticipated savings in operating expenses would outweigh the costs of the restructuring, and there is no evidence that any cost/benefit analysis or financial projections relating to the restructuring were ever prepared for the partners of Roseland I or II.

[91] This contrasts with the effort put into obtaining legal and accounting advice on the restructuring and the estimation of the terminal loss for each partner prior to the special meetings of the partners.

[92] Furthermore, no evidence was led to show that cost savings were in fact achieved as a result of the restructuring or to show that any attempt was ever made to

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[17] Joint Book of Documents, Tab 73.

monitor the performance of the properties after the restructuring to determine whether the anticipated benefits had been realized.

[93] It does not appear that any less costly alternative to restructuring was considered in order to achieve the stated purposes, either. The Respondent queried Mr. Jacobs about the possibility of combining the rental operations of Roseland I and II by having a common general partner and sharing a property manager. This would have allowed the two buildings to share services and achieve any economies of scale that were made possible by the restructuring of the partnerships, but would have avoided the costs of the restructuring itself. Mr. Jacobs said that he did not consider this to be a feasible option because of the difficulties the general partner and property manager would face in having to "serve two masters." However, the two buildings had been under common management up to 1991 and there was no evidence to show that there was any conflict between the two groups of limited partners that affected the management of the rental operations during that time.

[94] Another stated purpose of the restructuring was to eliminate competition for tenants between the Roseland I and II buildings. However, the Appellant admitted in cross-examination that the competition faced by Roseland II for tenants came from other rental properties in the area and not from Roseland I and it was not shown that rents for units in Roseland I or II were ever set to undercut each other. According to the appraisal report prepared in August 1994, both Roseland I and II benefited from high rents and low vacancy rates prior to the transfer. It cannot be said, therefore, that competition between the buildings was affecting operating results or that by combining the two operations there would have likely been any meaningful increase to revenue. The Appellant himself admitted that he did not anticipate any increase in rents as a result of the restructuring.

[95] Finally, the magnitude of the anticipated tax benefit dwarfed any costs to be saved from the rental operations. The terminal loss for Roseland II was $2,916,612 million whereas the total of *all* expenses of Roseland II exclusive of property taxes was approximately $320,000 in 1994.

[96] After considering all of the circumstances surrounding the transaction, I conclude that the disposition of the assets of Roseland II to RPM cannot reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit, and was therefore an avoidance transaction.

Second issue: Misuse or abuse

[97] Having found that the disposition of the partnership property by Roseland II to RPM was an avoidance transaction, it is necessary to determine whether that transaction amounts to abusive tax avoidance according to subsection 245(4) of the *Act*.

[98] In *Canada Trustco,* the Supreme Court of Canada set out the approach to be followed in making this determination. At paragraphs 44 and 45 of that decision, the Court said that:

> The heart of the analysis under s. 245(4) lies in a contextual and purposive interpretation of the provisions of the Act that are relied on by the taxpayer, and the application of the properly interpreted provisions to the facts of a given case. The first task is to interpret the provisions giving rise to the tax benefit to determine their object, spirit and purpose. The next task is to determine whether the transaction falls within or frustrates that purpose. The overall inquiry thus involves a mixed question of fact and law. The textual, contextual and purposive interpretation of specific provisions of the *Income Tax Act* is essentially a question of law but the application of these provisions to the facts of a case is necessarily fact-intensive.
>
> This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions. By contrast, abuse is not established where it is reasonable to conclude that an avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit.

[99] The Appellant contends that subsection 20(16) is the provision giving rise to the tax benefit in this case, and is therefore the focus of the textual, contextual and purposive interpretation mandated by the Supreme Court of Canada.

[100] The Respondent referred the Court to section 96 as well as subsection 20(16).

[101] While section 96 is relevant to the Appellant’s claim in the sense that the terminal loss was calculated at the partnership level because the transaction involved the disposition of the partnership assets, that section, in and of itself, gives rise to no benefit. In this case its effect is limited to the flow through of the losses on the

disposition of the partnership property to the partners of the limited partnership. In *Mathew v. Canada,*[18] the Supreme Court said at paragraph 51 that:

> The partnership rules under s. 96 are predicated on the requirement that partners in a partnership pursue a common interest in the business activities of the partnership, in a non-arm's length relationship. …

[102] It is not disputed that, at the time of the transfer of the partnership property by Roseland II to RPM, the partners of Roseland II were carrying on business in common in a non-arm's length relationship. The flowing of the terminal loss to the limited partners accords with the underlying purpose of the partnership rules. It is not necessary therefore to consider the context and purpose of the partnership rules beyond this point.

[103] The specific conditions to be met in order to claim a terminal loss are found in subsection 20(16). The issue before this Court is therefore whether allowing the Appellant to claim a terminal loss would frustrate or defeat the object purpose or spirit of this section.

Text

[104] For ease of reference subsection 20(16) is reproduced, for the year in issue:

> Notwithstanding paragraphs 18(1)(*a*), 18(1)(*b*) and 18(1)(*h*), where at the end of a taxation year,
>
> (*a*) the total of all amounts used to determine A to D in the definition "undepreciated capital cost" in subsection 13(21) in respect of a taxpayer's depreciable property of a particular class exceeds the total of all amounts used to determine E to J in that definition in respect of that property, and
>
> (*b*) the taxpayer no longer owns any property of that class,
>
> in computing the taxpayer's income for the year
>
> (*c*) there shall be deducted the amount of the excess determined under paragraph 20(16)(*a*), and
>
> (*d*) no amount shall be deducted for the year under paragraph 20(1)(*a*) in respect of property of that class.

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[18] 2005 DTC 5538.

[105] The opening words simply indicate that the deduction of the terminal loss is permitted notwithstanding paragraphs 18(1)(*a*), (*b*) and (*h*). Paragraphs 20(16)(*a*) and (*b*) then set out two conditions that must be met at the end of the taxation year in order to obtain the terminal loss. The first, in paragraph (*a*), is that the undepreciated capital cost of the class of property be a positive amount. The calculation in paragraph (*a*) mirrors the calculation of the undepreciated capital cost of a class of property that is set out in the definition of "undepreciated capital cost" in subsection 13(21). The second condition, according to paragraph (*b*), is that the taxpayer no longer owns any property of the particular class.

[106] Where those two conditions are met, the amount determined under paragraph (*a*) may be deducted under paragraph (*c*). The deduction is known as a "terminal loss."

[107] It is conceded by the Respondent that there is no ambiguity in the wording of subsection 20(16) and that on a literal reading of paragraphs (*a*) and (*b*), the conditions set out therein were met. In particular, Roseland II disposed of its legal and beneficial interest in the condominium building to RPM on December 28, 1994 and therefore did not own any property in that class at the end of the 1994 taxation year.

[108] It is also conceded by the Respondent that there is no express restriction in subsection 20(16) on claiming a terminal loss where both the transferor and the transferee of the depreciable capital property are partnerships and all of the members of the transferor partnership are members of the transferee partnership after the transfer. Also, there is nothing in subsection 20(16) itself from which to infer any limitation on claiming a terminal loss where depreciable capital property is disposed of to a related party.

<u>Context and purpose</u>

[109] As set out by the parties, subsection 20(16) is a part of the CCA system under the *Act*. This system permits the deduction of an annual allowance in respect of assets that are used to produce income from business or property. CCA takes the place of any deduction for depreciation, which is prohibited by paragraph 18(1)(*b*) of the *Act*.

[110] The amount of the allowance is based on the cost of the assets to the taxpayer and is intended to allocate the cost of the assets over its economic life. In the words

of Noël, J.A. in *Duncan v. R.*,[19] "the clear and obvious purpose of the provisions is to provide for the recognition of money spent to acquire qualifying assets to the extent that they are consumed in the income-earning process."

[111] The general scheme of the CCA system can be described as follows:

> CCA is allowed as deduction under 20(1)(*a*) to the extent provided by the *Income Tax Regulations*.
>
> Eligible assets, referred to as "depreciable property", are grouped into prescribed classes in accordance with Schedule II of the *Regulations*.
>
> Regulation 1100 prescribes the rates of CCA that can be deducted each year for each class of depreciable property. This rate is a percentage of the "undepreciated capital cost" of the property in the class.
>
> "Undepreciated capital cost" is defined in subsection 13(21) and, roughly speaking, is the cost to the taxpayer of all of the property in that class minus the amount of any CCA taken on the property in that class in previous years and minus the proceeds from the disposition of any assets in the class before that time (up to the cost of the assets).
>
> On disposal of assets, to the extent that the proceeds of disposition exceed the "undepreciated capital cost" of the class, capital cost allowance previously taken is "recaptured" (i.e. added back into income) pursuant to subsection 13(1) of the *Act*.
>
> Upon disposal of all the assets in a particular class any remaining balance of "undepreciated capital cost" for the class is deductible in the year as a terminal loss under subsection 20(16).

[112] The purpose of the terminal loss provision is to adjust the aggregate of the annual deductions of CCA taken by a taxpayer on a class of depreciable property when subsequent events demonstrate that the property in that class have been under-depreciated. The adjustment occurs when a taxpayer no longer owns any property of that class at the end of a given taxation year and is predicated on the fact that the taxpayer is no longer able to use the property to earn income because that property is no longer available to him or her. It is intended to match the total CCA deduction under the *Act* in respect of property used to earn income by a taxpayer to the actual cost of that property to the taxpayer.

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[19] 2002 FCA 291 at paragraph 44.

[113] The Respondent argues that despite the disposition of the partnership assets to RPM the property was still available to the Appellant to earn income, albeit through another partnership, and that the transfer was done to precipitate the terminal loss before a disposal of the Appellant's economic interest in the property.

[114] The Respondent stated that the stop-loss provisions in paragraphs 40(2)(*g*)(i), subsection 85(4), paragraph 40(2)(*e*) and subsection 85(5.1) of the *Act,* and certain amendments to those provisions, are also part of the legislative context of subsection 20(16) that is relevant for the purpose of the GAAR analysis, and that they are evidence of a general policy in the *Act* to disregard dispositions of property to persons within what he described as "the same economic unit" as the taxpayer.

[115] In my view, the stop-loss provisions cited by the Respondent do not show a clear and unambiguous policy in the *Act* to disregard dispositions and deny any loss where the disposition giving rise to the loss was from the taxpayer to any related party. I think that the Respondent overstates the extent and comprehensiveness of the policy underlying these provisions.

[116] In a paper presented at the 1995 Canadian Tax Foundation Conference entitled "*New Rules, Old Chestnuts, and Emerging Jurisprudence: The Stop-Loss Rules*", at p. 34:1, Edward Heakes described the policy underlying those rules in the *Act* as follows:

> Tax legislators have long recognized that, in order to prevent undue erosion of the tax base, special rules are needed to deal with the recognition, denial, or deferral of losses for tax purposes that might otherwise be recognized on transfers of property between persons having a degree of connection or relationship with each other. The Income Tax Act is no exception and contains numerous provisions, commonly referred to as "stop-loss rules", that are intended to deal with this concern. . .

[117] Parliament has addressed the problem by creating a series of provisions that deny losses that would otherwise be allowed under the *Act*, in specific situations. These rules are precisely drafted and set out detailed conditions for the denial of a loss that would otherwise arise on the disposition of a particular type of property. Those conditions vary from one stop-loss rule to the other. An important variation, for the purposes of this case is in the degree of connection or relationship required between the transferor and transferee.

[118] This can be seen from the following comparison of these sections. Paragraph 40(2)(*e*) applies to dispositions by a corporation to a person by whom the corporation is controlled or to a corporation that was controlled by such a person.

Subsection 85(4) applies to dispositions by all taxpayers, including partnerships, to corporations controlled by the transferor, the spouse of the transferor or by a person or group of persons who controlled the transferor. Subsection 85(5.1) also applies to dispositions by all taxpayers, but is limited to the disposition of depreciable capital property. The range of transferees targeted in subsection 85(5.1) is broader than in either paragraph 40(2)(*e*) or subsection 85(4). It covers dispositions to:

-a corporation that immediately after the disposition was controlled by the transferor, by his spouse, or by a person, group of persons, or partnership under the control the transferor;

-a person, the spouse of that person, a member of a group of persons, or partnership immediately after the disposition controlled the transferor; or

-a partnership in which the transferor is a majority interest partner.

[119] In each case, it is reasonable to infer that Parliament intended to promote a particular purpose concerning the distinct relationship or relationships described in those provisions between the transferor and the transferee.

[120] In my view, the particularity with which Parliament has specified the relationship that must exist between the transferor and transferee for the purpose of each stop-loss rule referred to by the Respondent is more indicative that these rules are exceptions to a general policy of allowing losses on all dispositions. In other words, where there is a general provision in the *Act* allowing for the deduction of a loss, subject to a restriction or exception in certain circumstances, the limited nature of the exception can be seen as underscoring the general policy of the *Act* to allow the loss. Furthermore, it is not accurate to say that these rules deny losses on transfers between all related parties. As seen above, the distinct relationship that Parliament sought to target in each case is clear.

[121] The large-scale revision of the stop-loss rules in 1998, effective with respect to transactions entered into after April 26, 1995, is not material to the determination of the policy underlying the stop-loss rules cited by the Respondent that were in effect for the year under appeal. The changes that were made do not alter the fact that the stop-loss rules are exceptions that operate in well-defined circumstances.

[122] The Respondent has therefore not satisfied me that there is a general or overall policy in the *Act* prohibiting losses on any transfer between related parties, or parties described by counsel as forming an economic unit.

[123] I would also point out that Parliament has chosen to define the circumstances in which the terminal loss will be denied on transfers of depreciable property *between partnerships* in subsection 85(5.1) (now subsection 13(21.2)) and in doing so would appear to have chosen to allow taxpayers who are not within the circumstances set out in that provision to claim their terminal losses. The Minister admits in this case that Roseland II did not fall within subsection 85(5.1) because it was not a majority interest partner in RPM.

[124] The Minister is therefore using the GAAR in this case to fill in the gaps left by Parliament in subsection 85(5.1). This is an inappropriate use of the GAAR, as noted by Bowman A.C.J. in *Geransky v. The Queen:* [20]

> . . .The *Income Tax Act* is a statute that is remarkable for its specificity and replete with anti-avoidance provisions designed to counteract specific perceived abuses. Where a taxpayer applies those provisions and manages to avoid the pitfalls the Minister cannot say "Because you have avoided the shoals and traps of the *Act* and have not carried out your commercial transaction in a manner that maximizes your tax, I will use GAAR to fill in any gaps not covered by the multitude of specific anti-avoidance provisions".

[125] In light of my findings above, I conclude that the transaction in issue did not result in a misuse of any provision of the *Act*, or an abuse having regard to the provisions of the *Act* read as a whole. Therefore, the GAAR is not applicable and the appeal is allowed, with costs.

Signed at Ottawa, Canada, this 2nd day of May 2008.

"B.Paris"

Paris J.

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[20] [2001] 2 CTC 2147 at paragraph 42

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