Docket: 2014-887(IT)G

BETWEEN:

GLENCORE CANADA CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 23, 24, 25, 26, 27, November 26 of 2019, at Toronto, Ontario, and continued by a case management conference held on September 9, 2020 with final submissions received on September 18, 2020.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Guy Du Pont Nathalie Goyette Matthias Heilke James Trougakos
Counsel for the Respondent:	Elizabeth Chasson Darren Prevost Peter Swanstrom

---

AMENDED JUDGMENT

The appeal from the reassessment dated December 16, 2013 made under the *Income Tax Act* by the Minister of National Revenue in respect of the Appellant's 1996 taxation year is dismissed with costs in accordance with the attached Amended Reasons for Judgment.

The parties shall have until December 13, 2021 to reach an agreement on costs, failing which the parties shall have until January 21, 2022 to serve and file

written submissions on costs and the parties shall have until February 4, 2022 to serve and file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, the parties shall bear their own costs.

This Amended Judgment is issued in substitution of the Judgment dated on October 12th, 2021.

Signed at Montreal, Quebec, this 8th day of December 2021.

"Réal Favreau"

Favreau J.

Citation: 2021TCC63
Date: 20211208
Docket: 2014-887(IT)G

BETWEEN:

GLENCORE CANADA CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a reassessment dated December 16, 2013 made under the *Income Tax Act*, R.S.C. 1985, C. 1 (5th Supp.), as amended (the "*Act*") by the Minister of National Revenue (the "Minister") by virtue of which the Minister assessed as income a commitment fee of $28,206,106 (the "Commitment Fee") and a non-completion fee of $73,335,881 (the "Non-Completion Fee") received by the Appellant's predecessor, Falconbridge Limited, (hereinafter referred to as "Falconbridge") in its 1996 taxation year in the context of a failed merger with Diamond Fields Resources Inc. ("DFR").

[2] For income tax purposes, Falconbridge included both the Commitment Fee and the Non-Completion Fee in computing its income with the intention of challenging any assessment thereof. This was believed by Falconbridge to be the best course of action to preserve its right to make an election under subsection 12(2.2) of the *Act*.

[3] Glencore Canada Corporation was formerly known as Xstrata Canada Corporation, the successor corporation by amalgamation to Falconbridge Limited and Falconbridge Nickel Mines Limited.

[4] At all material times, Falconbridge was an integrated nickel mining company generating revenues by exploring, developing, mining, processing, marketing and selling metals and minerals.

[5] At all material times, DFR was a Canadian public mining company that owned mineral claims in a major nickel-copper-cobalt deposit at Voisey's Bay Labrador ("Voisey's Bay") which had been discovered by Archean Resources Limited in September 1993 and acquired by DFR in February 1995. The ore deposit was thought to be the largest and most concentrated sources of nickel in the world. According to DFR, Voisey's Bay could be the highest grade and lowest cost nickel producer in the world.

[6] DFR first announced the discovery of a "potentially occurrence of base metal mineralization" on November 14, 1994. From that time onward, DFR issued a continuous series of positive announcements regarding its drilling program at Voisey's Bay. DFR was investigating nickel, copper and cobalt mineralization in three areas: the Ovoid Zone, the Eastern Deeps and the Western Extension.

[7] The essential facts of this case are not contested by the parties and an Agreed Statement of Facts (Partial) has been filed as Exhibit R-6 by consent. The Agreed Statement of Facts (Partial) is reproduced at the end of this judgment.

Background information

[8] Falconbridge was formerly known as Falconbridge Nickel Mines Limited, a corporation formed in 1928 to develop the Falconbridge nickel-copper ore deposit near Sudbury, Ontario. The following year, Falconbridge acquired a nickel refinery in Kristiansand, Norway to process the output from the Falconbridge mine.

[9] Falconbridge did carry on its operations directly on its own account and through subsidiaries. Falconbridge compensated for the depletion of its ore and grew essentially by relying on traditional exploration and by carrying on business development activities, such as acquisition of proven assets, joint ventures, partnerships and corporate acquisitions.

[10] In its 1996 taxation year alone, Falconbridge spent $465.7 million in exploration and development expenditures for its Raglan (Quebec) and Collahuasi (Chili) projects, which were described in its Annual Report 1995 dated February 1, 1996 as the "cornerstones of [its] growth strategy".

[11] In early 1995, Falconbridge held discussions with DFR to acquire an interest in Voisey's Bay but these discussions failed.

[12] On June 8, 1995, DFR and Inco Limited ("Inco"), a competitor of Falconbridge in the nickel industry, entered into an acquisition agreement in respect of the Voisey's Bay project (the "Inco Agreement"). Under the terms of that agreement:

(a) Inco acquired from DFR 25% of the outstanding shares of its subsidiary, Voisey's Bay Nickel Company ("VBNC"), which held the mineral claims in Voisey's Bay in exchange for Inco preferred shares with a value of $525 million.

(b) Inco agreed to market all nickel and cobalt production from the Voisey's Bay project from the first 5 years of production and agreed to market a minimum amount of nickel production for the following 15 years.

(c) In the event that DFR received a takeover offer from a third party, it would notify Inco of this offer and provide a reasonable opportunity to discuss the offer.

[13] The same day, Inco announced that it had acquired 2 million of DFR's outstanding common shares.

[14] In April 1995, Teck Corporation ("Teck"), a major mining company, subscribed for 3 million common shares of DFR at a price of $108 million. Teck also agreed to make its engineering staff available, at no cost, to DFR to assist in the pre-feasibility phase of Voisey's Bay.

[15] In August 1995, Teck was engaged as the primary contractor to conduct the mine feasibility study at Voisey's Bay.

The Contemplated Transactions

A. The Peace Project

[16] In early 1996, DFR contacted Falconbridge about a possible sale of its 75% interest in Voisey's Bay.

[17] On 9 February 1996, Falconbridge made its offer to merge with DFR pursuant to the terms of the two following documents:

a) the "Merger Offer Delivery Agreement"; and

b) the "Arrangement Agreement";(collectively referred to as the "Merger Offer").

[18] Under the terms of the Merger Offer, the outstanding common shares of DFR would be exchanged for a combination of Falconbridge shares, cash and exchangeable notes with a total value of approximately $4.1 billion.

[19] Pursuant to the terms of the Merger Offer, DFR agreed to pay a Commitment Fee to Falconbridge upon execution of the Merger Offer Delivery Agreement (cumulatively with the Non-Completion Fee, the "Fees" or the "Break-Fees"). The amount of the Commitment Fee was equal to $0.25 per outstanding DFR common share.

[20] DFR paid to Falconbridge the Commitment Fee: $28,000,000 on 9 February 1996 and the balance of $206,106 at a later time, for a total of $28,206,106.

B. The "Mini-Peace Project"

[21] Following the acceptance of the Merger Offer, Inco declined to deliver an alternative offer by February 14, 1996.

[22] After the Arrangement Agreement became binding, Falconbridge and Inco opened negotiations over a "Mini-Peace" project. This project would avert a bidding war between Falconbridge and Inco by finding an acceptable means to share Voisey's Bay between the two companies. Falconbridge would not receive the Non-Completion Fee if the Mini-Peace project succeeded.

[23] After intense negotiations, the "Mini-Peace" project failed because DFR rejected the idea.

C. Inco's offer and Falconbridge's Amended Offer

[24] On 26 March 1996, Inco offered to purchase DFR's outstanding common shares. This offer would have Inco acquire the outstanding common shares of DFR that it did not already own. Consideration would consist of Inco shares, cash and exchangeable notes, with a total value of approximately $4.3 billion.

[25] On 2 April 1996, Falconbridge submitted an amended bid to acquire DFR's common shares. This offer was conditional upon DFR and Inco approving the restructuring of the ownership of Voisey's Bay. Specifically, Inco would acquire an

additional 25% of the shares of VBNC so that Falconbridge and Inco would each own (directly or indirectly) 50% of VBNC's shares.

[26] Falconbridge's offer stipulated that Inco and Falconbridge would each market 50% of the metals production from the Voisey's Bay project.

[27] On 3 April 1996, the DFR board of directors recommended that the shareholders of DFR reject Falconbridge's counter-bid and accept Inco's offer. The DFR shareholders voted to follow their board's recommendation. Inco formally acquired DFR in August 1996.

[28] Pursuant to the terms of the Merger Offer, DFR paid the Non-Completion Fee (which totalled $73,335,881) to Falconbridge.

Tax Reporting

[29] As mentioned above, Falconbridge included, in computing its income tax for the 1996 taxation year, the total amount of the Commitment Fee and the Non-Completion Fee.

[30] The Minister initially assessed Falconbridge's income tax return and accepted its reporting treatment of the fees by notice dated August 29, 1997 (the "Assessment").

[31] Falconbridge objected to the Assessment by notice dated November 14, 1997, requesting that the Assessment be referred back to the Minister, *inter alia*, so that the amounts of the Commitment Fee and the Non-Completion Fee be removed from its income as assessed for the 1996 taxation year ending on December 31, 1996 on the grounds that the Fees were non-taxable capital receipts.

[32] On June 22, 2001 and August 28, 2001, the Minister reassessed Falconbridge without removing the Commitment Fee and the Non-Completion Fee from income. Falconbridge objected to these reassessments by way of notices dated September 19, 2001 and November 15, 2001.

[33] The Minister again reassessed Falconbridge on December 16, 2013 without removing the Commitment Fee and the Non-Completion Fee from income (the "Reassessment").

The Issues

[34] This appeal raises two issues:

(a) whether the Minister properly included the Fees in the Appellant's income for the 1996 taxation year and there are two sub-issues before this Court:

i. whether the Fees constituted income from a source pursuant to section 3 of the *Act*; and

ii. whether the Fees were taxable under paragraph 12(1)(x) of the *Act*; and

(b) in the alternative, whether the Fees gave rise to a capital gain includible in the Appellant's income pursuant to sections 38 and 39 of the *Act*.

Evidence of the witnesses

A. Witnesses for the Appellant

[35] The Appellant called Jack Cockwell, Paul Severin, Steven Young, Robert McDermott and Don Lindsay as witnesses.

I. Mr. Jack Cockwell

[36] Mr. Cockwell is the current chairman of the Brookfield Management Partnership and is also its Partners Foundation chair. Brookfield (formerly known as "Brascan") acquired Noranda in 1981, a large natural resource company which controlled a number of Canadian mining companies, including Falconbridge. In 1996, Brascan had a 50% controlling interest in Noranda, which in turn had a 46% stake in Falconbridge. Mr. Cockwell was a director of Falconbridge from early 1996 up to 2006, at the relevant time of the attempted transaction between DFR and Falconbridge. As an attendee in person and by phone of the board meetings held, Mr. Cockwell rehashed the discussions of the board as he remembered them and by reference to the board minutes as they were presented to him. He explained Falconbridge's corporate strategy in acquiring resources; through either exploration or by investing in junior mining companies. Mr. Cockwell also discussed the "road show" organized by Falconbridge, where individuals from Falconbridge travelled to various cities to give presentations to shareholders of Falconbridge and DFR on the benefits of the proposed merger. With regards to the negotiation of the Fees, Mr. Cockwell testified that this was not something that the board of directors was involved with directly, and that the Fees were negotiated on Falconbridge's behalf by its investment bankers. Further, Mr. Cockwell said it was a disappointment from

the board's point of view when the deal fell through, as Falconbridge had missed out on a major opportunity to gain a competitive advantage in the mining industry.

II. Mr. Paul Severin

[37] Mr. Severin served as the Vice-President of Exploration of Falconbridge from 1995 until his retirement in 2006. In this role, Mr. Severin travelled to Voisey's Bay to evaluate the deposit's potential and perform the due diligence required for the merger agreements, and was also one of the participants on Falconbridge's "road show" team. Mr. Severin explained Falconbridge's business activities of traditional exploration; which for Falconbridge consisted of staking property and developing a mine of its own, or alternatively Falconbridge would enter into joint venture option agreements to work with junior mining companies. Mr. Severin testified about the differences between Falconbridge's other mining operations, such as the Collahuasi copper mine in Chile and the Raglan project in Québec, from that of Voisey's Bay and discussed the unique features of the Voisey's Bay deposit from a geological perspective.

III. Mr. Steven Young

[38] Mr. Young is a retired lawyer who acted as the Vice-President Legal of Noranda and Falconbridge commencing in 2003. As part of his duties, Mr. Young also acted as the corporate secretary and was responsible for maintaining the entire legacy of the corporation's records, including annual reports. Mr. Young discussed his understanding of Falconbridge's general practice of keeping copies of documents prepared for meetings of the Board of Directors, but stated that he was unaware of any formal retention policy in place with respect to these kinds of documents. Further, Mr. Young testified that he did not know of any formal policies Falconbridge or its successors had for archiving emails.

IV. Mr. Robert McDermott

[39] Mr. Robert McDermott is a retired lawyer who worked previously for McMillan Binch LLP and was retained by Falconbridge starting mid-1980s to act as assistant internal counsel from time to time. Mr. McDermott testified that his role was to implement the transaction between Falconbridge and DFR and that his mandate was to draft the documentation in a manner that allowed Falconbridge to acquire DFR and more specifically, its 75% interest in the Voisey's Bay deposit. Mr. McDermott travelled with the Falconbridge team on the "road show" to address any legal concerns shareholders of Falconbridge and DFR may have raised.

[40] In his testimony, Mr. McDermott went through the agreements at issue and revealed how the deal was structured. He elaborated that the agreements at issue included a plan of arrangement, as often seen in complex transactions involving corporate laws of multiple jurisdictions, where the plan of arrangement comes before a court to determine its "fairness" to shareholders. Mr. McDermott described the three-part consideration Falconbridge would pay to DFR: the equity shares, the subordinate voting shares and the diamond notes. Mr. McDermott acknowledged that in order to create the new shares contemplated in the agreements at issue, amendments had to be made to Falconbridge's articles of incorporation.

[41] In addition to the attempted transaction with DFR, Mr. McDermott was also involved on the side "mini-peace" negotiations with Inco. Mr. McDermott testified that as break fees were a relatively new concept around this time, the legal team at McMillan Binch LLP investigated the matter and came to the conclusion that the Fees, as laid out in the agreements at issue, were enforceable. While Mr. McDermott drafted the agreements at issue, his testimony was that he did not negotiate the amount of the Break Fees.

V. Mr. Don Lindsay

[42] Mr. Don Lindsay is the current President and CEO of Teck Resources; and is a former investment banker for CIBC Wood Gundy who acted as an advisor and lead negotiator on the transaction between Falconbridge and DFR. Mr. Lindsay met with the Falconbridge board of directors on several occasions to explain the economics of the deal and what form the newly merged company would take. Mr. Lindsay was one of Falconbridge's participants in the "road show" to sell the deal to the shareholders.

[43] Per Mr. Lindsay's recollection, a standard merger and acquisition checklist would have been used by the investment bankers in negotiations and break fees were an item on this list. According to Mr. Lindsay, approximately 30-50% of deals included break fees in 1995-1996. He stated that common levels of break fee amounts in early 1996 were between 3-4%, and that these figures would have been provided by the bank's checklist.

[44] Mr. Lindsay testified that Falconbridge's lowest acceptable amount for Break Fees was $100 million, due to the psychological effect $100 million would draw by making industry headlines. Further, Mr. Lindsay stated that the purpose of the Break Fees would have negatively impacted Inco's balance sheet. Mr. Lindsay also stated that the amount of the Break Fees did not change in Falconbridge's amended bid, in response to Inco's offer. Falconbridge did not match the price Inco proposed to acquire DFR but restructured the forms of consideration offered. Other forms of consideration included a security designed to compensate DFR shareholders based on the future total of tonnes flowing from Voisey's Bay.

[45] Mr. Lindsay also discussed the magnitude of the Voisey's Bay discovery in the mining market, describing it as a "game changer in the industry". Mr. Lindsay explained that this was because the nickel and copper found at the initial Ovoid Zone was high grade, easily mineable and would be quick to get into production. According to him, the subsequent finding of Eastern Deeps deposit was transformational because it meant that the Voisey's Bay had the potential to become a "camp", a region with several mines in the same area. Mr. Lindsay described the dynamics between the mining companies in Canada; in 1996 Inco was considered number one and Falconbridge number two. For Falconbridge, Mr. Lindsay stated that acquiring Voisey's Bay was an extremely exciting prospect as it could have positioned them to surpass Inco as number one in the market.

B. Witnesses for the Respondent

[46] The witnesses for the Respondent were Mr. Louis Martin, Mr. Michael Doggett and Mr. Guhan Subramanian.

I. Mr. Louis Martin

[47] The former Vice President of Taxation at Falconbridge, Mr. Louis Martin, was not a compellable witness to the proceedings, as he had moved out of the country. As such, Mr. Martin was not present at the hearing. Excerpts of Mr. Martin's discovery were read into evidence to address the searches conducted

by Falconbridge for documents relevant to the appeal and the efforts taken personally by Mr. Martin to ascertain the existence and/or availability of these documents.

II. Mr. Michael Doggett

[48] Mr. Michael Doggett, B. Sc., M. Sc. and PhD, an adjunct professor from Queen's University, was qualified as an expert witness for the Respondent specializing in mineral economics. Mr. Doggett's testimony discussed the factors affecting the nickel market in 1995 and 1996 and the makeup of the market. Mr. Doggett stated that the nickel industry consisted of four to five major players fighting for market share, as there were significant barriers to entry for smaller companies.

[49] Mr. Doggett spoke to the competitive atmosphere in the industry due to the depletion of resources (e.g. nickel mines) forcing the companies to look elsewhere for new supplies. Further, Mr. Doggett testified that adding Voisey's Bay to Falconbridge's assets would significantly impact the company's metal production and revenues and favorable change their position in the market. Mr. Doggett elaborated that the potential finding of a camp in the Eastern Deeps meant that several deposits could feed into a central processing plant. However, Mr. Doggett also stated that there was no direct economic impact of the Voisey's Bay discovery on the market, because there would be a large time lapse between the discovery and actual production of the nickel. In Mr. Doggett's opinion, the bids being tendered to acquire Voisey's Bay were higher than value of the tested samples from the discovered Ovoid Zone. Mr. Doggett asserted that the bids made by Inco and Falconbridge were truly premised upon further discoveries and development of the area around Voisey's Bay.

III. Mr. Guhan Subramanian

[50] Mr. Guhan Subramanian, A.B., M.B.A., J.D., is a professor in both the business and law faculties at Harvard University. He was qualified as an expert witness for the Respondent in "deal protection devices", having written several publications focusing on negotiations of corporate deals, specifically mergers and acquisitions. Mr. Subramanian's testimony provided background information on the underlying principles of break fees.

[51] Mr. Subramanian explained there is a two-fold purpose of break fees: to deter third parties from bidding and to compensate the first bidder. His testimony

discussed the difficulty of quantifying costs associated with larger merger deals, such as opportunity costs, reputational costs, switching and searching costs and time spent by management. Mr. Subramanian's opinion was that any deterrence effect, a break fee might have, would be reduced when the underlying assets of the target company are speculative.

[52] Mr. Subramanian further elaborated how a "toehold" works within the context of a merger; such as why an individual already owning shares in a corporation that is be taken over would benefit from a bidding war. He explained how "match rights" are generally meant to deter a bidding war, as the party without a match right will be uncertain of how high the party with a match right is willing to bid. Another concept addressed was a "no shop clause", which Mr. Subramanian said is when a target company is contractually prevented from soliciting other offers, subject to a fiduciary out if they are approached independently by a third party with a better deal.

[53] During the voir dire of Mr. Subramanian, the ruling was given that Mr. Subramanian was qualified as an expert on deal protection devices in the merger and acquisition context. The Appellant later brought a motion to strike out parts of Mr. Subramanian's expert report, "Deal Protection Device in the Falconbridge Diamond Fields Transaction". The motion was granted in part. Paragraphs 71-87 of the expert report were deleted for failing to meet the relevance criteria, which is a threshold requirement for the admission of expert evidence. The expert report was largely based on US data which did not account for the particularities of the Canadian market in 1995 and 1996 which is a much smaller market in terms of size, depth and number of companies operating in different sectors of the economy.

The Law

[54] The relevant provisions of the *Act* in their version applicable to the 1996 taxation year, are the following:

> **DIVISION B**
>
> **Computation of Income**
>
> **Basic Rules**
>
> Income for taxation year
>
> **3** The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:
>
> > (a) determine the total of all the amounts of each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition

of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

(b) determine the amount, if any, by which

(i) the total of

(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and

(B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,

exceeds

(ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,

(c) determine the amount, if any, by which the total determined under paragraph (a) plus the amount determined under paragraph (b) exceeds the total of the deductions permitted by Subdivisions E in computing the taxpayer's income for the year (except to the extent that those deductions, if any, have been taken into account in determining the total referred to in paragraph (a), and

(d) determine the amount, if any, by which the amount determined under paragraph (c) exceeds the total of all amounts each of which is the taxpayer's loss for the year from an office, employment, business or property or the taxpayer's allowable business investment loss for the year,

and for the purposes of this Part,

(e) where an amount is determined under paragraph (d) for the year in respect of the taxpayer, the taxpayer's income for the year is the amount so determined, and

(f) in any other case, the taxpayer shall be deemed to have income for the year in an amount equal to zero.

Income or loss from a source or from sources in a place

4(1) For the purpose of this Act,

> (a) a taxpayer's income or loss for a taxation year from an office, employment, business, property or other source, or from sources in a particular place, is the taxpayer's income or loss, as the case may be, computed in accordance with this Act on the assumption that the taxpayer had during the taxation year no income or loss except from that source or no income or loss except from those sources, as the case may be, and was allowed no deductions in computing the taxpayer's income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that source or to those sources, as the case may be, and except such part of any other deductions as may reasonably be regarded as applicable thereto; and
>
> […]

SUBDIVISION B

Income or Loss from a Business or Property

Basic Rules

Income

9(1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

Loss

(2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

Gain and losses not included

(3) In this Act, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.

Inclusions

Income inclusions

12(1) There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable

[…]

Inducement, reimbursement, etc.

(x) any particular amount (other than a prescribed amount) received by the taxpayer in the year, in the course of earning income from a business or property, from

> (i) a person or partnership (in this paragraph referred to as the "payer") who pays the particular amount
>
> > (A) in the course of earning income from a business or property,
> >
> > (B) in order to achieve a benefit or advantage for the payer or for persons with whom the payer does not deal at arm's length, or
> >
> > (C) in circumstances where it is reasonable to conclude that the payer would not have paid the amount but for the receipt by the payer of amounts from a payer, government, municipality or public authority described in this subparagraph or in subparagraph (ii), or
>
> (ii) a government, municipality or other public authority,

where the particular amount can reasonably be considered to have been received

> (iii) as an inducement, whether as a grant, subsidy, forgivable loan, deduction from tax, allowance or any other form of inducement, or
>
> (iv) as a refund, reimbursement, contribution or allowance or as assistance, whether as a grant, subsidy, forgivable loan, deduction from tax, allowance or any other form of assistance, in respect of
>
> > (A) an amount included in, or deducted as, the cost of property, or
> >
> > (B) an outlay or expense,

to the extent that the particular amount

> (v) was not otherwise included in computing the taxpayer's income, or deducted in computing, for the purposes of this Act, any balance of undeducted outlays, expenses or other amounts, for the year or a preceding taxation year,
>
> (v.1) is not an amount received by the taxpayer in respect of a restrictive covenant, as defined by subsection 56.4(1), that was included, under subsection 56.4(2), in computing the income of a person related to the taxpayer,
>
> (vi) except as provided by subsection 127(11.1), 127(11.5) or 127(11.6), does not reduce, for the purpose of an assessment made or that may be made

> under this Act, the cost or capital cost of the property or the amount of the outlay or expense, as the case may be,
>
> (vii) does not reduce, under subsection 12(2.2) or 13(7.4) or paragraph 53(2)(s), the cost or capital cost of the property or the amount of the outlay or expense, as the case may be, and
>
> (viii) may not reasonably be considered to be a payment made in respect of the acquisition by the payer or the public authority of an interest in the taxpayer or the taxpayer's business or property;

Positions of the Parties

A. The Appellant's Position

[55] The Appellant has made three arguments: 1) that the Fees were extraordinary receipt not from a source, 2) that paragraph 12(1)(x) of the *Act* does not apply and 3) that in the alternative, the Fees should be categorized as capital gains.

[56] The Appellant submits that the Fees do not fall under an enumerated source of income per section 3 of the *Act* and therefore are not taxable. Falconbridge's business consisted of exploring, developing, mining, processing and marketing minerals; as such, Falconbridge's business was not the source of the Fees. Falconbridge's sole purpose for the Merger Offer was to acquire an interest in Voisey's Bay and was capital in nature. The Fees were at most a *de minimis* consideration and originated from the itemized list of negotiable points of investment banking team at CIBC Wood Gundy.

[57] The Appellant distinguished the case at bar from *Morguard* and *Ikea* because the Fees were not inextricably linked to Falconbridge's daily activity or incident of those activities; the purpose of the Merger Offer was not to receive the Fees; and lastly because the Fees did not compensate Falconbridge for any costs or expenses.

[58] The Fees were designed to act as a deterrent, and Falconbridge's actual expenses incurred in respect of the attempted merger totalled $15.3 million. The Appellant submits the actual expenses have no correlation with the quantum of the Fees, as they barely exceeded half the size of the Commitment Fee.

[59] The Appellant argues that the Fees have no source and submits it is unreasonable without evidence of the alleged expenses to conclude a payment was made in relation to those expenses. The Appellant also asserts that even though the

sources of income enumerated in section 3 are not exhaustive, courts have generally given a narrow interpretation to the concept of income.

[60] The second argument is that paragraph 12(1)(x) is not applicable, because there must be a clear link between the amount received and either an amount included in the cost of property (or deducted as the cost of property) or an outlay or expense in order for subparagraph 12(1)(x)(iv) to apply. According to the Appellant, the Respondent failed to identify which expenses are being reimbursed.

[61] The third argument is that the Fees should be characterized as a capital gain because Falconbridge's rights prior to and pursuant to the Merger Offer qualify as capital property. The contractual rights secured by Falconbridge under the Merger Offer include several promises by DFR, such as to carry on business as usual, to complete the transaction within the negotiated conditions and not solicit competing offers.

B. The Respondent's Position

[62] The Respondent argues that the Fees are properly characterized as income receipts because the purpose of the Fees were compensatory and not deterrent. The Fees constituted 2.5% of the bid amount, which, according to the Respondent, are too small to have a deterrent effect to keep third parties from bidding. Further, the Respondent asserts that the Fees were actively negotiated and that Falconbridge was aware that Inco would likely bid on DFR.

[63] The Respondent relies on the test in *Ikea* and argues that the Fees are receipts on income account. The main consideration in *Ikea* is that commercial purpose of the payment and its relationship to the business operations of the recipient. The Respondent alleges that the potential acquisition of the Voisey's Bay deposit was part of Falconbridge's strategy for earning income from its business, and that the purpose of bidding on DFR was for Falconbridge to obtain the nickel deposit.

[64] The Respondent relies on *Cranswick* as the authority on characterization of non-taxable windfalls because Falconbridge had an enforceable claim to the payments, the Fees were extensively negotiated between two sophisticated parties, the Fees were solicited by Falconbridge and that Falconbridge was interested in acquiring Voisey's Bay but wanted the deal protection devices in place when bidding on DFR. The Respondent argues that the negotiation of the Fees is incompatible with the concept of a windfall.

[65] The Respondent submits that paragraph 12(1)(x) of the *Act* applies because the Fees were inducements for Falconbridge to bid on DFR and that the Non-Completion Fee was intended to reimburse Falconbridge for the expenses incurred to bid. The Respondent argues that the Fees were received in the course of earning income because the motive to acquire DFR and Voisey's Bay was to maximize shareholder value. The Respondent alleges that Falconbridge would not have bid on DFR until the Commitment Fee was paid, and that the Commitment Fee was actively negotiated between DFR and Falconbridge.

[66] The Respondent disagrees that the Fees were proceeds of disposition, as there was no transfer of property between Falconbridge and DFR. The Respondent relies on *Morguard*, in which counsel for the taxpayer conceded that the break fee in that case was not received as proceeds of disposition of a capital property. This was the correct position according to Justice Sharlow, writing for FCA.

[67] Lastly, the Respondent made submissions on evidentiary matters, particularly that the admission of authenticity of a document is not an admission of the truth of its contents. The Respondent argues that where the author of the document is not present in court, its contents are hearsay and therefore admissibility of the document must be established. The Respondent also asked the Court not to infer that the missing documentation from the absent Agenda Binder (provided to the Board of Directors at one of their meetings) supports the Appellant's position in any way.

Analysis

[68] On February 9, 1996, when Falconbridge and DFR each announced that Falconbridge had agreed to acquire DFR, another Canadian public company, the situation was as follows:

a) Inco Limited ("Inco") had acquired from DFR 25% of the outstanding shares of its subsidiary, Voisey's Bay Nickel Company Limited ("VBNC") which held the mineral claim in Voisey's Bay in exchange for Inco preferred shares having a value of approximately $525 million;

b) Inco had agreed to market all nickel and cobalt production from the Voisey's Bay project for the first 5 years of production and had agreed to market a minimum amount of nickel production for the following 15 years;

c) DFR had undertaken to notify Inco in the event it received a takeover offer from a third party and to provide a reasonable opportunity to Inco to discuss the offer;

d) Inco had acquired 2 million of DFR's outstanding common shares representing approximately a 8 percent interest in DFR;

e) Teck, a major Canadian public mining company, had subscribed for 3 million common shares of DFR at a price of $108 million.

f) Teck had agreed to make its engineering staff available, at no cost, to DFR, to assist in the pre-feasibility phase of Voisey's Bay;

g) Teck was engaged as the primary contractor to conduct the mine feasibility study at Voisey's Bay;

h) Falconbridge was aware of Inco's and Teck's various interests in the Voisey's Bay deposit and in DFR.

[69] Falconbridge came in late in the game and realized that the only way it could acquire an interest in Voisey's Bay deposit was by making a bid for all outstanding common shares of DFR.

[70] On February 9, 1996, Falconbridge made its offer to merge with DFR. Under the terms of the Merger Offer, the outstanding common shares of DFR would be exchanged for a combination of Falconbridge shares, cash and exchangeable notes with a value of $4.1 billion.

[71] The Merger Offer included the payment of a Commitment Fee equal to $0, 25 per outstanding DFR common shares for a total of $28,206,106 and of a Non-Completion Fee equal to $0, 65 per outstanding DFR common shares for a total of $73,335,881. The quantum of the Break Fees was determined by negotiation and represented 2, 5 percent of the bid. This was thought to be a deterrent for other bids.

[72] Falconbridge primary objective was clearly to acquire a 75% interest in the Voisey's Bay deposit but, in doing so, it made sure that all its takeover bid expenses would be covered by the Commitment Fee and that a substantial profit would be realized if the bid failed. In fact, Falconbridge did not take any financial risk by entering into the Merger Offer Delivery Agreement with DFR and had as a secondary objective to make a substantial profit within a very short period of time in the event that the bid failed.

[73] It is clear from the evidence that Falconbridge was not in the business of acquiring or selling companies. The business of Falconbridge consisted of exploring, developing, mining, processing and marketing minerals. The activities undertaken

by Falconbridge to grow its nickel business necessarily included the replacement of depleting ore reserves through various means such as exploration with its own staff but also through acquisitions of claims or interests in ore deposits by entering into joint ventures or partnership agreements with junior mining companies or prospectors. The attempted acquisition of DFR was structured differently than Falconbridge's other acquisitions simply because DFR was a public company. The fact that Falconbridge's attempt to acquire the Voisey's Bay deposit took the form of a bid for the common shares of DFR is of no significance.

[74] The potential acquisition of DFR was a means to acquiring the Voisey's Bay deposit and the evidence clearly establishes that the Falconbridge's business included the acquisition of mineral deposits.

[75] The Break Fees received by Falconbridge were inextricably linked to Falconbridge's ordinary business operations as a nickel mining company. Falconbridge pursued the Voisey's Bay deposit for the purpose of making a profit. As a public company, all of Falconbridge's activities were directed to that end i e. to increase shareholder value. The potential acquisition of the Voisey's Bay deposit was part of Falconbridge's strategy for earning income from its business.

[76] Falconbridge was carrying on its business when it negotiated the Merger Offer Delivery Agreement and the Arrangement Agreement, both of which provided for the fees in dispute. Falconbridge's strategy in attempting to acquire the Voisey's Bay deposit was to maximize shareholder value by maintaining and bolstering its ore reserves and by containing its production costs. These goals were inextricable interwoven with Falconbridge's business. The Break Fees were ancillary business income received by Falconbridge in the course of earning income from business.

[77] This conclusion is supported by the decision of the Supreme Court of Canada in *Ikea Limited v. R. [1998] 1 S.C.R 196* ("SCC") ("*IKEA*", which is the leading case on the characterization of extraordinary or unusual receipts in the business context. *IKEA* did not include a tenant inducement payment in its computation of income for tax purposes on the basis that it was a "tax-free capital receipt"). The SCC held that the determination of the characterization of an extraordinary or unusual receipt involves the consideration of a number of factors including the commercial purpose of the payment and its relationship to the business operations of the recipient. The SCC considered that the tenant inducement payment was ordinary revenue from *IKEA*'s business operations. The tenant inducement payment arose out of obligations, i.e. the payment of rent and the operation of *IKEA'*s business in the leased premises, that were necessary incidents of the conduct of *IKEA'*s business.

As such, the tenant inducement payment was "clearly received as part of [IKEA's] ordinary business operations and was, in fact, inextricably linked to such operations" (para. 33).

[78] In this instance, the Break Fees were the subject of negotiations between two public companies, were paid pursuant to the terms of two agreements, and were necessary and integral parts of Falconbridge's bid for DFR, the main purpose of which was the acquisition of the Voisey's Bay nickel deposits.

[79] In light of the foregoing, it is not necessary to consider the other arguments invoked by the parties.

[80] For the above reasons, the appeal is dismissed with costs.

[81] The parties shall have until December 13, 2021 to reach an agreement on costs, failing which the parties shall have until January 21, 2022 to serve and file written submissions on costs and the parties shall have until February 4, 2022 to serve and file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, the parties shall bear their own costs.

This Amended Reasons for Judgment is issued in substitution of the Reasons for Judgment dated on October 12th, 2021.

Signed at Montreal, Quebec, this 8th day of December 2021.

"Réal Favreau"

Favreau J.

CITATION:	2021 TCC 63
COURT FILE NO.:	2014-887(IT)G
STYLE OF CAUSE:	GLENCORE CANADA CORPORATION AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 23, 24, 25, 26, 27, November 26 of 2019 and continued by a case management conference held on September 9, 2020 with final submissions received on September 18, 2020.
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	October 12, 2021
DATE OF AMENDED JUDGMENT:	December 8th, 2021
DATE OF AMENDED REASONS FOR JUDGMENT:	December 8th, 2021

APPEARANCES:

Counsel for the Appellant:	Guy Du Pont Nathalie Goyette Matthias Heilke James Trougakos
Counsel for the Respondent:	Elizabeth Chasson Darren Prevost Peter Swanstrom

COUNSEL OF RECORD:

For the Appellant:	
Name:	Guy Du Pont Nathalie Goyette Matthias Heilke James Trougakos
Firm:	Davies Ward Phillips & Vineberg LLP
For the Respondent:	Francois Daigle Deputy Attorney General of Canada Ottawa, Canada

ANNEXE

R-6

2014-887(IT)G

TAX COURT OF CANADA

IN RE: The *Income Tax Act*

BETWEEN:

GLENCORE CANADA CORPORATION

(FORMERLY XSTRATA CANADA CORPORATION, SUCCESSOR BY AMALGAMATION TO FALCONBRIDGE LIMITED AND FALCONBRIDGE NICKEL MINES LIMITED)

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

AGREED STATEMENT OF FACTS (PARTIAL)

Guy Du Pont, Ad.E.
Nathalie Goyette
Matthias L. E. Heilke
James D. Trougakos
DAVIES WARD PHILLIPS & VINEBERG LLP
1501 McGill College Avenue, 26th Floor
Montréal, Québec H3A 3N9

Tel: 514.841.6406 (G. Du Pont)
Tel: 514.841.6530 (N. Goyette)
Tel: 514.841.6416 (M. Heilke)
Tel: 514.841.6400 (J. Trougakos)
Fax: 514.841.6499
Email: gdupont@dwpv.com
ngoyette@dwpv.com
mheilke@dwpv.com
jtrougakos@dwpv.com

Counsel for Falconbridge

Darren Prévost
Elizabeth Chasson
Peter Swanstrom
DEPARTMENT OF JUSTICE CANADA
Ontario Regional Office
120 Adelaide Street West
Suite 400
Toronto, ON M5H 1T1

Tel: 647.256.7435 (D. Prevost)
Tel: 647.256.7346 (E. Chasson)
Tel: 647.256.7448 (P. Swanstrom)
Fax 416.973.0810
Email: darren.prevost@justice.gc.ca
elizabeth.chasson@justice.gc.ca
peter.swanstrom@justice.gc.ca

Counsel for the Respondent

2014-887(IT)G

TAX COURT OF CANADA

IN RE: The *Income Tax Act*

BETWEEN:

GLENCORE CANADA CORPORATION

(FORMERLY XSTRATA CANADA CORPORATION, SUCCESSOR BY AMALGAMATION TO FALCONBRIDGE LIMITED AND FALCONBRIDGE NICKEL MINES LIMITED)

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

AGREED STATEMENT OF FACTS (PARTIAL)

The parties agree, through their undersigned counsel, for the purposes of this appeal only, to admit the truth of the following facts. The parties may tender additional evidence provided it is not contradictory to the facts as agreed.

1. The original Falconbridge Nickel Mines Limited was formed in 1928 to develop the Falconbridge nickel-copper ore deposit near Sudbury, Ontario. The following year, Falconbridge acquired a nickel refinery in Kristiansand, Norway to process the output from the Falconbridge mine.

2. In its "Strategy Overview 1995-2010", Falconbridge stated:

> Ore acquisition encompasses a blend of traditional exploration and business development activity:

> acquisition of proven assets, joint ventures and corporate acquisitions. Over its history, Falconbridge has used both approaches although over the past decade the focus has largely been on exploration.
>
> Competition in this area is driven by the producer's investment time horizon, their need for ore and their tolerance of risk. Competitive advantage is provided by their business development focus, their capabilities in and application of exploration technology, and the consistency of their efforts. [...]

3. Diamond Fields Resources Inc. ("**DFR**") was a mining company that owned mineral claims in a major nickel-copper-cobalt deposit at Voisey's Bay, Labrador ("**Voisey's Bay**"). The nickel-copper-cobalt deposit at Voisey's Bay was discovered by Archean Resources Limited in September 1993 and acquired by DFR in February 1995. This mineral deposit was thought to be among the largest and most concentrated sources of nickel in the world. Three of the minerals that formed Falconbridge's main mineral products as a percentage of revenue were present in significant quantities at Voisey's Bay.

4. DFR stated publicly that once commercial production commenced, a mine at Voisey's Bay could be the highest grade, lowest cost nickel producer in the world.

5. On 8 June 1995, DFR and Inco Ltd. ("**Inco**") entered into an acquisition agreement in respect of the Voisey's Bay project (the "**Inco Agreement**"). Under the terms of that agreement:

   (a) Inco acquired from DFR 25% of the outstanding shares of its subsidiary Voisey's Bay Nickel Company ("**VBNC**"), which held the mineral claims in Voisey's Bay, in exchange for Inco preferred shares with a value of approximately $525 million.

   (b) Inco agreed to market all nickel and cobalt production from the Voisey's Bay project for the first 5 years of production and

agreed to market a minimum amount of nickel production for the following 15 years.

(c) In the event that DFR received a takeover offer from a third party, it would notify Inco of this offer and provide a reasonable opportunity to discuss the offer.

6. The same day, Inco announced that it had acquired 2 million of DFR's outstanding common shares.

7. In early 1995, Falconbridge held discussions with DFR to acquire an interest in Voisey's Bay. These efforts, entitled Project "Friday" by Falconbridge, failed.

8. In early 1996, DFR contacted Falconbridge about a possible sale of its 75% interest in Voisey's Bay.

9. On 9 February 1996, Falconbridge made its offer to merge with DFR pursuant to the terms of the two following documents:

(a) the "Merger Offer Delivery Agreement"; and

(b) the "Arrangement Agreement (collectively referred to as the "**Merger Offer**").

10. Under the terms of the Merger Offer, the outstanding common shares of DFR would be exchanged for a combination of Falconbridge shares, cash and exchangeable notes with a total value of approximately $4.1 billion.

11. Pursuant to the terms of the Merger Offer, DFR agreed to pay a Commitment Fee to Falconbridge upon execution of the Merger Offer Delivery Agreement (cumulatively with the Non-Completion Fee, the "**Fees**"). The amount of the Commitment Fee was equal to $0.25 per outstanding DFR common share.

12. DFR paid to Falconbridge the Commitment Fee: $28,000,000 on 9 February 1996 and the balance of $206,106 at a later time, for a total of $28,206,106.

13. On 26 March 1996, Inco offered to purchase DFR's outstanding common shares. This offer would have Inco acquire the outstanding common shares of DFR that it did not already own. Consideration would consist of Inco shares, cash and exchangeable notes, with a total value of approximately $4.3 billion.

14. On 2 April 1996, Falconbridge submitted an amended bid to acquire DFR's common shares. This offer was conditional upon DFR and Inco approving the restructuring of the ownership of Voisey's Bay. Specifically, Inco would acquire an additional 25% of the shares of VBNC so that Falconbridge and Inco would each own (directly or indirectly) 50% of VBNC's shares.

15. Falconbridge's offer stipulated that Inco and Falconbridge would each market 50% of the metals production from the Voisey's Bay project.

16. On 3 April 1996, the DFR board of directors recommended that the shareholders of DFR reject Falconbridge's counter-bid and accept Inco's offer. The DFR shareholders voted to follow their board's recommendation. Inco formally acquired DFR in August 1996.

17. Pursuant to the terms of the Merger Offer, DFR paid the Non-Completion Fee (which totalled $73,335,881) to Falconbridge.

18. In computing its income for tax purposes for the Relevant Taxation Year, Falconbridge included the total amount of the Commitment Fee and the Non-Completion Fee. Falconbridge did so with the intention of objecting to the resulting assessment and to:

(a) preserve its ability to challenge the inclusion of those Fees; and

(b) preserve its right to make an election under subsection 12(2.2) of the *Income Tax Act*.[1]

19. The Minister of National Revenue (the "**MNR**") initially assessed Falconbrige's income tax return and accepted its reporting treatment of the Fees by Notice dated 29 August 1997 (the "**Assessment**").

20. Falconbridge objected to the Assessment by Notice dated 14 November 1997, requesting that the Assessment be referred back to the MNR *inter alia* so that the amounts of the Commitment Fee and the Non-Completion Fee be removed from its income as assessed for the Relevant Taxation Year on the grounds that the Fees were non-taxable capital receipts.

---

[1] R.S.C. 1985, c. 1 (5th Supp), as amended. Unless otherwise indicated, all references to specific legislative provisions are to the *Income Tax Act*.

DATED AT MONTRÉAL, this 25th day of September 2019.

DAVIES WARD PHILLIPS & VINEBERG, LLP

Guy Du Pont, Ad.E.
Nathalie Goyette
Matthias L. E. Heilke
James D. Trougakos
Davies Ward Phillips & Vineberg, LLP
1501 McGill College Avenue, 26th Floor
Montréal, Québec H3A 3N9
Tel: 514.841.6406 (G. Du Pont)
514.841.6530 (N. Goyette)
514.841.6416 (M. Heilke)
514.841.6400 ext. 3344 (J. Trougakos)
Fax: 514.841.6499
Counsel for Falconbridge

DATED AT TORONTO, this 25th day of September 2019.

~~**David Lametti**~~

Attorney General of Canada
Solicitor for the Respondent

Darren Prévost
Elizabeth Chasson
Peter Swanstrom
DEPARTMENT OF JUSTICE CANADA
Ontario Regional Office
120 Adelaide Street West
Suite 400
Tel: 647.256.7435 (D. Prevost)
Tel: 647.256.7346 (E. Chasson)
Tel: 647.256.7448 (P. Swanstrom)
Fax 416.973.0810
Email: darren.prevost@justice.gc.ca
elizabeth.chasson@justice.gc.ca
peter.swanstrom@justice.gc.ca

Counsel for the Respondent