Docket: 2018-2771(IT)G

BETWEEN:

POLARSAT INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion for an order granting leave of the Court for the Respondent to file an Amended Reply to the Notice of Appeal heard on November 21, 2022 at Montréal, Québec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Jonathan Lafrance
Counsel for the Respondent:	Nathalie Labbé

ORDER

The Motion for an order granting leave of the Court for the Respondent to file an Amended Reply to the Notice of Appeal pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)* is allowed without costs, in accordance with the attached reasons for order, and the Court grants leave for the Respondent to file the Amended Reply to the Notice of Appeal.

Signed at Montréal, Québec, this 25th day of January 2023.

"Réal Favreau"

Favreau J.

Citation: 2023 TCC 10
Date: 20230125
Docket: 2018-2771(IT)G

BETWEEN:

POLARSAT INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Favreau J.

[1] This motion is for an order granting leave of the Court for the Respondent to file an amended Reply to the Notice of Appeal (the "Amended Reply"), pursuant to section 54 of the *Tax Court of Canada Rules* (*General Procedure*) (the "Rules").

Part 1- The Amendments

[2] The proposed amendments to the Reply filed on September 27, 2018 are the following:

a) at paragraph 8.1 of the Amended Reply, the Respondent adds an alternative argument, based on the General Anti-Avoidance Rule (the "GAAR"), to submit that the Appellant is not entitled to claim the enhanced investment tax credit pursuant to subsection 127(10.1) of the *Income Tax Act*.

Paragraphs 8.1 in the section "Issues to be decided" reads as follows:

> **8.1** In the alternative, whether the GAAR applies to deny the tax benefit noted above?

b) as to the additional facts alleged at paragraphs 7.1 (a) to (d) of the Amended Reply, the Respondent explains the tax benefit consisting of the reduction of tax resulting from claiming of the additional ITC and the series of transactions undertaken by the Appellant.

Paragraphs 7.1 (a) to (d) read as follows:

7.1 At this stage, the AGC relies on the General Anti-Avoidance Rule (the GAAR), as an alternative position, to the support the appellant's tax liability for the 2011, 2012, 2013, 2014 and 2015 taxation years.

I. Tax Benefit

(a) A series of transactions was undertaken to circumvent the application of paragraph (b) of the definition of CCPC in subsection 125(7) of the *Income Tax Act* (the Act) in order for the appellant to qualify as a CCPC

(b) As a result, the appellant was able to access the enhanced investment tax credit (ITC) rate in subsection 127(10.1) of the Act and to benefit from the application of subsection 127.1(1) of the Act.

(c) Consequently, in computing its ITC for the taxation years under appeal, the appellant was to claim an additional amount equal to 15% or 20% of its "SR&ED qualified expenditure pool" as defined in subsection 127(9) of the Act.

(d) The tax benefit consists of the reduction of tax resulting from the additional refundable ITC claimed by the appellant in each taxation year under appeal as detailed below:

	Additional refundable ITC claimed
2011	$292,331
2012	$293,339
2013	$293,775
2014	$249,749
2015	$202,418

The rate was 15% for taxation years ending before 2014.

c) the Respondent underlines that the transactions described in subparagraphs 7.1(e) i. to viii. of the Amended Reply are identical to the assumptions of facts mentioned in paragraph 7 of the original Reply to the Notice of Appeal. Therefore, the Appellant is aware of the relevant evidence the Respondent relies on to support the application of the GAAR.

Subparagraphs 7.1(e) i to viii, read as follows:

II. Avoidance Transactions

(e) The following transactions constitute a series of transactions (**Series of Transactions**) that resulted in the tax benefit identified above:

> i. The incorporation of 0698817 B.C. Ltd on June 30, 2004 and the appointment of Mr. Cos Modafferi as President and Chief Executive Officer.
>
> ii. The incorporation of 0698824 B.C. Ltd. on June 30, 2004 and the appointment of Mr. Cos Modafferi as President and Chief Executive Officer.
>
> iii. The incorporation of 0698829 B.C. Ltd on June 30, 2004 and the appointment of Mr. Cos Modafferi as President and Chief Executive Officer.
>
> iv. The incorporation of the appellant, PolarSat Technology Inc., on July 2, 2004.
>
> v. The settlement of the Trust by 0698817 B.C. Ltd on January 1st, 2005.
>
> vi. The transfer of PSat1's assets to the appellant on January 1st, 2005.
>
> vii. The transfer by PSat1 of 100 common shares it held in the appellant to 0698817 B.C. Ltd on January 1st, 2005.
>
> viii. The donation by 0698817 B.C. Ltd of 100 common shares it held in the appellant to the Trust on January 1st, 2005.

d) the Respondent further adds, in paragraph 7.1(f), that none of the transactions may reasonably be considered to have been undertaken primarily for *bona fide* purposes other than to obtain the tax benefit.

Paragraph 7.1(f) reads as follows:

> (f) None of the transactions in the Series of Transactions may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.

e) the Respondent adds at paragraph 9, the references to subsection 152(9), section 245 and subsection 248(10) of the *Income Tax Act* to the list of

provisions on which the AGC relies on. The amended paragraph 9 reads as follows:

> 9. The AGC relies on section 127.1, 245 and subsections 125(7), 127(5), 127(9), 127(10.1), 152(9), 248(1), 248(10), 256(5.1), 256(6.1) and 256(6.2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), as amended. The AGC also relies on article 321 of the *Quebec Civil Code*, SQ, 1991, c 64.

f) finally, relying on the well-established framework to apply the GAAR, the Respondent explains her alternative argument in paragraphs 14 to 25 of the Amended Reply.

Paragraphs 14 to 25 read as follows:

> The GAAR
>
> 14. At this stage, in the alternative, the AGC respectfully submits that the GAAR applies to deny the tax benefit noted above.
>
> 15. The framework to apply the GAAR is well established. Three conditions must be met for its application:
>
> > (a) There must be a tax benefit resulting from a transaction or a series of transactions;
> >
> > (b) The transactions or, in the case of a series of transactions, at least one of the transactions in the series, must be an avoidance transaction (not undertaken primarily for bona fide non-tax purposes);
> >
> > (c) The avoidance transactions must be abusive, meaning that they circumvent, frustrate or defeat the object, spirit and purpose of the relevant provisions giving rise to the tax benefit.
>
> I. Tax benefit
>
> 16. The AGC submits that the transactions described in subparagraphs 7.1(d)i to viii, constitute a series of transactions, within the common law meaning of that term and its extended meaning in subsection 248(10) of the Act.
>
> 17. The AGC submits that the Series of Transactions resulted in a tax benefit for the appellant within the meaning found at subsections 245(1) and 245(2) of the Act, namely to access the enhanced ITC rate in subsection 127(10.1)

of the Act and to benefit from the reduction of tax resulting from the additional ITC claimed under subsection 127.1(1) of the Act.

II. Avoidance Transactions

18. The AGC submits that none of the following avoidance transactions may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit, and are consequently avoidance transactions within the meaning of subsections 245(2) and 245(3) of the Act.

(a) The incorporation of 0698817 B.C. Ltd on June 30, 2004 and the appointment of Mr. Cos Modafferi as President and Chief Executive Officer.

(b) The incorporation of 0698824 B.C. ltd on June 30, 2004 and the appointment of Mr. Cos Modafferi as President and Chief Executive Officer.

(c) The incorporation of 0698829 B.C. Ltd on June 30, 2004 and the appointment of Mr. Cos Modafferi as President and Chief Executive Officer.

(d) The incorporation of the appellant, PolarSat Technology Inc., on July 2, 2004.

(e) The settlement of the Trust by 0698817 B.C. Ltd on January 1st, 2005.

(f) The transfer of PSat1's assets to the appellant on January 1st, 2005.

(g) The transfer by PSat1 of 100 common shares it held in the appellant to 0698817 B.C. Ltd. on January 1st, 2005.

(h) The donation by 0698817 B.C. of 100 common shares it held in the appellant to the Trust on January 1st, 2005.

III. The Series of Transactions resulted in an abuse of paragraph (b) of the definition of CCPC in subsection 125(7) as well as subsections 127(10.1) and 127.1(1) of the Act

19. The ACG submits that the avoidance transactions are abusive within the meaning of subsection 245(4) of the Act since:

> (a) they circumvented the application of paragraph (b) of the definition of CCPC in subsection 125(7) of the Act in order to unduly benefit from the enhanced ITC regime in subsections 127(10.1) and 127.1(1) of the Act, and
>
> (b) the result frustrates the underlying rationale of these provisions.

20. Prior to entering into a Series of Transactions, 99.9% of PSat1's were owned by non-resident corporations. As a result, PSat1 did not qualify as a CCPC by virtue of paragraph (b) of the definition of the term in subsection 125(7) of the Act, and consequently was not entitled to the enhanced ITC regime.

21. By implementing its reorganization, and in particular by transferring PSat1's assets to the appellant and by interposing a trust between the appellant and the non-resident shareholders, the appellant was able to circumvent the application of paragraph (b) of the definition of CCPC in subsection 125(7) of the Act and qualify as a CCPC. It was therefore eligible to claim the fully refundable ITCs at the enhanced rate.

22. The enhanced ITC regime was introduced to benefit Canadian small business owners. It was therefore limited to CCPC's, which the Act treats as a proxy for its ultimate shareholders. In other words, where a corporation does not qualify as a CCPC, it is because its shareholders are not intended to benefit from certain incentives reserved for resident individuals, including the enhanced ITC regime.

23. In this case, the Trust was inserted to break the legal ownership link between the appellant and its ultimate non-resident owners. However, the Trust is merely a conduit. In effect, through a series of wholly-owned holding corporations, the non-residents are the capital and income beneficiaries of the Trust. There was therefore no change in effective ownership of the appellant. Moreover, the non-residents are indirectly entitled to any income distributed by the appellant to the Trust, which, according to the trust deed, must be paid out within the year. Accordingly, all of the benefits of the enhanced ITC continue to accrue to them, albeit indirectly. The result clearly frustrates the rational of the enhanced ITC regime.

> 24. Moreover, the AGC submits that the result also frustrates the underlying rationale of paragraph (b) of the definition of CCPC. This provision attributes all shares owned by non-residents to a hypothetical person. In enacting paragraph (b), Parliament made it clear that control by non-residents is not the only determining factor in establishing CCPC status. Simple ownership, direct or indirect, of a majority of shares by non-qualifying persons is sufficient to disqualify a corporation from being a CCPC. The AGC adds that the reason why paragraph (b) is inoperative in this case is because the ownership link between the operating corporation and its non-resident shareholders was broken as a result of the insertion of a Trust. However, the non-resident shareholders remain the effective owners of those shares.
>
> IV. Reasonable Tax Consequences
>
> 25. The tax benefit noted above should be denied pursuant to subsection 245(2) of the Act. The reasonable tax consequences would be to disallow the additional refundable ITC's claimed under subsections 127(10.1) and 127.1(1) of the Act for the taxation years at issue.

Part II- Facts

A. Question at issue in this appeal

[3] On April 25 and July 15, 2016, the Minister of National Revenue (the "Minister") issued reassessments to the Appellant for its 2011, 2012, 2013, 2014 and 2015 taxation years, to deny the enhanced investment tax credit it had claimed for those years pursuant to subsection 127(10.1) of the *Income Tax Act* R.S.C 1985, C.1 (5th Supp.), as amended (the "Act") on the basis that the Appellant did not qualify as a "Canadian Controlled Private Corporation ("CCPC").

[4] In the paragraph 7 of the Reply, the Respondent has stated the facts relied upon by the Minister in concluding that the Appellant was controlled *de facto* by Polarsat Holdings Inc. ("PSat1") which, in turn, was held by many non-resident corporations.

[5] In paragraphs 10 to 13 of the Reply, the Respondent has stated the grounds relied upon in determining that the Appellant did not qualify as a CCPC as defined in subsection 125(7) of the Act. The grounds can be summarized as follows:

a) All the shares of PSat1 owned by the non-residents would be notionally attributed to a hypothetical shareholder, which would *control de jure* PSat1 by virtue of paragraph b) of the definition of CCPC found in subsection 125(7) of the Act.

b) The non-resident hypothetical shareholder who controls PSat1, and PSat1 itself, control simultaneously, directly or indirectly in any manner, the Appellant pursuant to subsection 256(5.1) of the Act. In effect, PSat1 is in a position to have significant influence over the Appellant, both from an economic and operational perspectives.

c) Subsection 256(6.1) of the Act specifies, for greater certainty, that a corporation may be controlled simultaneously by persons or groups at more than one level above it in a corporate chain. Moreover, subsection 256(6.2) of the Act states that the rule regarding simultaneous control in subsection 256(6.1) of the Act also applies to the concept of *de facto* control set out in subsection 256(5.1) of the Act. Their primary effect is to cause each corporation in a chain of controlled corporations to control each corporation below it simultaneously.

d) As a result, when applying paragraphs (a) and (b) of the definition of CCPC found in subsection 125(7) of the Act together with subsections 256(5.1), 256(6.1) and 256(6.2) of the Act, the Appellant is controlled directly or indirectly in any manner simultaneously by PSat1 and the notional non-resident shareholder and consequently cannot be a CCPC and thus is not eligible to receive the 35% refundable investment tax credit under subsection 127(10.1) of the Act.

B. Procedural Context

[6] On February 12, 2019, the parties filed a timetable for the completion of the preliminary steps prior to hearing.

[7] On March 14, 2019, the Honourable Justice K. Lyons issued an Order from the Court confirming the deadlines established in the timetable filed by the parties.

[8] On September 12, 2019, by letter filed to the Court, the parties requested to suspend the timetable until a decision was rendered in the appeal of *CO2 Solution*

Technologies Inc. (“CO2”), file number 2015-5635(IT)G, which was heard on November 20, 2018, before the Honourable Justice Smith.

[9] The parties commonly agreed that the decision in CO2 would provide helpful guidance in the conduct of the examinations for discovery in the present file because of the similarities in the issues with CO2.

[10] By letter dated September 24, 2019, the Court allowed the matter to be held in abeyance until a decision in CO2 had been rendered and ordered the parties to report, within 60 days following the decision to be rendered in CO2, on the status of the appeal in the present case.

[11] On December 20, 2019, the Honourable Justice Guy R. Smith rendered a judgment in the CO2 file.

[12] However, on January 20, 2020, CO2 appealed Justice Smith’s judgment to the Federal Court of Appeal (“FCA”).

[13] Consequently, on January 27, 2020, the parties mutually decided to submit to the Court a request to maintain the suspension of the matter until a final decision would be rendered in the CO2 appeal.

[14] The parties proposed to undertake to communicate with the Court within 70 days of the FCA’s decision to be rendered.

[15] By letter dated March 4, 2020, the Court allowed the matter to continue to be held in abeyance pending the resolution at the FCA of the CO2 file.

[16] The letter by the Court ordered the parties to report, within 70 days following the decision to be rendered in the CO2 appeal, on the status of the appeal of the present file.

[17] On April 27, 2020, Bresse Syndics Inc (“Bresse Syndics”) filed a Notice of Continuance of Suit in the CO2 file, as they were appointed at act as Trustee of CO2’s assets and were authorized by the FCA to act as the appellant in the continuance of suit on their behalf.

[18] The CO2 file was then cited as *Bresse Syndics Inc v. Canada*, 2021 FCA 115 and the Honourable Chief Justice Noël, concurred by Justices Nadon and Rivoalen, rendered a judgment on June 10, 2021.

[19] By letter signed by the parties and filed to the Court on August 17, 2021 and pursuant to the letter dated March 4, 2020, the parties reported to the Court on the status of the file and established a new timetable.

[20] November 8, 2021, the Honourable Justice Bocock issued an Order confirming the deadlines established by the new timetable filed by the parties on August 17, 2021.

[21] The examination for discovery of the Respondent's nominee, Ms. Patrizia Molino, and the Appellant's nominee, Mr. Cosimo Modafferi, were held prior to the deadline established by the new timeline, on January 21, 2022.

[22] Ms. Molino had undertaken to answer four questions during the course of her examination for discovery. By April 30, 2022, three major undertakings were completed and sent to the Appellant. As for the fourth undertaking, after a reminder received from Appellant's counsel, the Respondent's counsel provided answers on May 20, 2022.

[23] On May 6, 2022, Respondent's counsel wrote a letter to the Appellant's counsel to advise him that the Respondent would raise an alternative argument based on the general anti-avoidance rule to support the Reassessments issued to Polarsat Inc. In this letter, Respondent's counsel added that draft Amended Reply to the Notice of Appeal will be sent by the end of June.

[24] On May 30, 2022, Respondent's counsel sent an email to Appellant's counsel for their consent to file an Amended Reply to the Notice of Appeal ("Amended Reply"), pursuant to section 54 of the Rules.

Part III- Submissions of the Parties

A. Respondent

[25] Section 54 of the Rules provides that a party may amend its pleadings under certain conditions:

> **54.** A pleading may be amended by the party filing it, at any time before the close of pleadings, and thereafter either on filing the consent of all other parties, or with leave of the Court, and the Court in granting leave may impose such terms as are just.

[26] Under section 54 of the Rules, the Court has a broad discretion to allow an amendment, but must interpret the Rules liberally, "to secure the just, most expeditious and least expensive determination of every proceeding on its merits". (*Continental Bank Leasing v R.*, 93 D.T.C. 298, paras 18 and 19). In *R.v. Canderel Ltd.* [1993] 2 C.T.C. 213, para 10 ("Canderel"), a unanimous decision of the FCA, Justice Décary wrote that the "general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real question in controversy between the parties. Provided, notably, that the allowance would not result in an injustice to the party not capable of being compensated by an award of costs and that it would serve the interests of justice."

[27] More recently, the FCA clarified the guiding principles for amendments in *Canada v. Pomeroy Acquireco Ltd*. 2021 FCA 187 ("Pomeroy"). It stated that Courts should allow amendments at any stage if they assist in "determining the real questions in controversy between the parties". This is subject to the condition that the amendments do not result in an injustice not compensable by costs and that it serves the interests of justice to allow them (at para. 4).

[28] Subsection 152(9) of the Act allows the Minister to advance an alternative basis or argument in support of an assessment at any time after the normal reassessment period subject to certain limitations, such as situations where the taxpayer may no longer have access to relevant evidence.

[29] In this instance, the amendments proposed by the Respondent are meant to enable the Crown to raise an additional argument in support of its position and are based on the existing facts found in the Reply. Therefore, the facts at the heart of

this litigation remain the same, whether it is for the primary position of the Respondent or the proposed alternative argument.

[30] The Respondent alleges that the amendments will not cause an injustice to the Appellant that cannot be compensated by an award of costs and states that the Appellant will not be prejudiced by not having access to relevant evidence.

[31] The proposed amendments are based on the same facts as the ones found in the Reply. Therefore, the Appellant is not taken by surprise nor is it in a situation where it is obligated to present evidence with respect to facts or transactions that were not known until now.

[32] In the Reply at subparagraph 7(k), the Respondent has already put at issue the purpose of the reorganization of 2005. Therefore, the Appellant was already aware that the objectives sought by the reorganization were relevant considerations for the purpose of this appeal.

[33] For the GAAR analysis, the question of whether the transactions forming part of the series of transactions constitute avoidance transactions requires an objective assessment of the driving forces of the transactions (whether it is tax-driven or whether it has a bona fide non-tax purpose). The inquiry will focus on an objective test to determine the primary purpose of the transactions in light of the relevant facts and circumstances and not on statements of intention.

[34] The appellant's nominee, Mr. Cosimo Modafferi, has been examined by the Respondent and has been able to provide context to the transactions forming part of the reorganization of 2005 as well as the objectives sought.

[35] Mr. Cosimo Modafferi has been involved with the Polarsat Group since at least 2003. He has been a director and officer of various corporate entities within the group that were instrumental to the reorganization that took place as of 2004 and continued in 2005. Furthermore, Mr. Cosimo Modafferi held the position of Trustee of Polarsat Financial Trust and director of PSat1. During his examination for discovery, Mr. Modafferi provide context regarding planning documents and other relevant corporate documents.

[36] In any event, the Respondent will bear the burden of convincing the Court that the transactions of the series are avoidance transactions and that the series of transactions resulted in a tax benefit.

[37] The Respondent also alleges that the timing of the amendments does not create an injustice for the Appellant as the Respondent proposed to amend its pleading after the completion of the examinations for discovery after a re-evaluation of its position. The Respondent acknowledges that the potential application of the GAAR had been considered by various officers of the CRA during the audit of the Appellant but that it was ultimately not a basis on which the reassessments had been issued.

[38] The fact that the Respondent has chosen to add now the proposed amendments to its pleading does not constitute a prejudice to the Appellant. If the Appellant wishes to conduct further discovery on the amendments, the Respondent will support the costs of it. As the matter has not been set down for hearing yet, it cannot be said that the instruction of this matter would be substantially delayed because of the amendments.

[39] The Respondent considers that it is in the interest of justice to grant leave to amend. Considering the absence of procedural unfairness or abuse of process, it would be in the interests of justice to allow the amendments required by the Respondent.

[40] The reliance on the GAAR in this case is particularly relevant because the Appellant argues, as an alternative position that even if the Appellant was controlled de facto by PSat1 (or PSat Holdings), the Appellant would still qualify as a CPCC since PSat1 (or PSat Holdings) would not be a non resident corporation or a public corporation.

B. Appellant

[41] The Respondent alleges that the Respondent did not establish the reassessments under appeal relying on GAAR, as a primary or alternative basis. The reassessments were solely and exclusively established based on a technical position combining specific deeming provisions and de facto control provisions in the Act.

[42] In the course of the audit, which lasted two and a half years, CRA employees, including the auditor and two tax avoidance specialists from the CRA Headquarters, concluded that GARR was not a suitable basis for reassessment in this case.

[43] In June 2022, when all the pre-trial stages had been conducted by the parties and a few days prior to the Parties delay to communicate with the Court to set a time and place for hearing, the Respondent filed and served a motion for leave to amend its Reply to include GAAR as an alternative basis for reassessment. According to the Appellant, this Court has never allowed the Respondent to invoke GAAR as an alternative argument so late in the pre-trial process.

[44] The Respondent alleges that the Respondent's motion must be quashed for the following four (4) reasons:

a) GAAR has never been the real issue at question between the parties (in fact, its application was ruled out be the Respondent more than six (6) years ago);

b) The unchallenged and uncontradicted evidence presented by the Appellant demonstrates that it will suffer an important prejudice that cannot be compensated with costs, namely, the inability to provide evidence at trial if the amendment is allowed;

c) The Respondent's motion and the supporting affidavit are deficient, and fall short of the burden of proof necessary for the Respondent to obtain leave to amend; and

d) It is contrary to the interest of justice to allow the amendment.

[45] The real question at issue in this appeal is whether the Appellant is a CCPC within the meaning of subsection 125(7) of the Act, and is thus entitled to the 35% refundable investment tax credit pursuant to subsection 127(10.1) of the Act? The CCPC status is a technical concept precisely defined in the Act. A corporation qualifying as a CCPC has access to a member of tax benefits and tax disadvantages. Over the last nine (9) years, the Parties always conducted this dispute on the mutual understanding that the sole issue was whether the Appellant qualified as a CCPC under subsection 125(7) of the Act.

[46] The Respondent had numerous opportunities to introduce on alternative basis of the reassessments but failed to do so.

[47] The appellant alleges that the burden of proving the facts justifying the amendment falls on the Respondent (*Merck & Co. Inc. v Apotex Inc*., 2003 FCA 488, para. 32). The Respondent's application record fails to meet the burden for the following reasons:

a) the affidavit in support of the Respondent's motion does not state any facts justifying:

   - how the amendment allegedly helps determine the real question(s) in controversy;
   - how it does not result in an injustice to the Appellant that is not capable of being compensated by any award of costs, and
   - how it serves the interest of justice;

b) the affidavit in support of the Respondent's motion was filed by a paralegal in the Tax Law Services of the Department of Justice who has no personal knowledge of the facts that would potentially be relevant to justify the leave to amend. The Respondent's affidavit is, on its face, useless to support the motion brought by the Respondent;

c) the Appellant filed an affidavit of its Chief Executive Officer, Mr. Cosimo Modafferi, in support of its opposition to the motion. The affidavit explains in detail why the Appellant would suffer a prejudice that is not capable of being compensated by an award of cost, and why it is against the interest of justice to allow the amendment. As the Respondent choose not to cross-examine Mr. Modafferi on its affidavit, it follows that the evidence adduced by the Appellant against the motion is unchallenged and uncontradicted, and must be taken as is.

[48] The Appellant considers that invoking GAAR this late in the process, once all the pre-trial steps have been duly completed, represents a radical change in the nature of the question of controversy which has significant consequences:

a) the Appellant will inevitably suffer an irreparable prejudice that cannot be compensated by an award of costs, because the Appellant will be significantly

limited in its ability to adduce evidence on the existence of *bona fide* transactions, since most of the evidence that relate to these events does not exist anymore; and

b) the interest of justice will not be served, since allowing the amendment here would defeat the purpose of pleadings, because the Respondent provided no explanation for why the amendment is necessary and why it happened just before fixing the date for the trial.

[49] If the Respondent is allowed to amend its Reply to include GAAR, the Appellant will have to adduce evidence about the purpose and context of the transactions that occurred in between 2003 and 2005, when the alleged series of transactions took place, to establish that the transactions had bona fide purposes. The affidavit of Mr. Modafferi is clear to the effect that:

a) the three (3) individuals and majority shareholders whom authorized the corporate reorganization that occurred between 2003 to 2005 (which the Respondent claims is a series of avoidance transactions for the purpose of GAAR) were not shareholders of the Appellant during the taxation years at issue, and are not shareholders of the Appellant anymore;

b) Mr. Modafferi hasn't had any exchanges with these three (3) individuals for many years, and has no way of contacting them;

c) the three shareholders were at all time non-residents of Canada;

d) it is those three shareholders that decided the structure of the Appellant to which the Respondent seeks to apply GAAR to.

[50] Because the alleged series of transactions occurred 20 years ago and that the shareholders who took the decisions at that time and who could shed light on the purpose of the transactions are long gone, the ability of the Appellant to adduce evidence on the purpose of these transactions will be considerably limited. The Appellant will be blocked in presenting a proper defense against one of the three (3) criteria that need to be met for GAAR to apply.

[51] The inability of the Appellant to bring forward key witnesses and to submit relevant documents that would have supported its claim will negatively impact its chances of success in that hypothetical appeal.

[52] In the Appellant's view, pre-trial steps such as pleadings, list of documents and examinations for discovery are meant to crystalize the issues. They must be given a sense and a purpose. Parties must be held accountable for the choices they make in litigating or not issues. Taxpayers are entitled to certainty and Parties should not be allowed to revert the issues and arguments they knowingly and freely chose to forgo, but for exceptional circumstances. No such exceptional circumstances exist about the Respondent's case.

Part IV. Analysis and Conclusion

[53] The case law on this matter is clear, the decision whether to allow an amendment to a pleading is discretionary and the controlling principle is that an amendment should be allowed at any stage of an action if it assists in determining the real questions in controversy between the parties, provided it would not result in an injustice not compensable in costs and that it would serve the interests of justice (*Pomeroy*).

[54] In my view, the proposal amendments in respect of the GAAR argument will assist the Court in determining the real questions in controversy between the parties and will not result in an injustice to the Appellant or fail to serve the interests of justice.

[55] The proposed amendments in respect of the GAAR argument are permissible in this case because they are consequential on the facts already alleged in the pleadings, including the Notice of Appeal and the assumptions in the Reply.

[56] The proposed amendments would not result in prejudice, non-compensable in costs, to the Appellant. The prejudice alleged by the Appellant arose from the fact that the three (3) majority shareholders whom authorized the corporate reorganization between 2003 and 2005 were at all times non-residents of Canada and were not shareholders of the Appellant in the taxation years under appeal.

[57] In this particular case, I am not convinced that the fact of not having a potential access to the shareholders who approved the reorganization constitutes a real problem because Mr. Cosimo Modafferi, as Chief Executive Officer of the Appellant since February of 2003, will be able to adduce evidence on the object and purpose of the transactions forming part of the reorganization. In his professional functions as Chief Executive Officer of the Appellant, and as President and Chief

Executive Officer of 0698817 BC Ltd, 0698829 BC Ltd and of 0698824 BC Ltd and as trustee of PolarSat Financial Trust, Mr. Modafferi had a direct and personal knowledge of all the transactions that took place in the course of the reorganization and he had access to all the corporate and financial records of the parties involved in the reorganization, including corporate planning strategies, tax opinions and implementation documents. Mr. Modafferi played an active and a crucial role in the corporate reorganization.

[58] The determination if a transaction forming part of a series of transactions was undertaken for *bona fide* purposes other than to obtain the tax benefit must be determined by reference to all the facts and surrounding circumstances and not by the stated intention of the parties who approved it (*OSFC Holdings Ltd. v. Canada*, 2001 FCA 260 at para. 46).

[59] The change of mind of the Minister concerning the use of the GAAR argument is certainly very disappointing for the Appellant but it does not come as a surprise. Taxpayers entering into aggressive tax planning, as the one in this case, are normally made aware of the possibility that the plan may be attacked by the Minister by the application of the GAAR rules. The tax opinions concerning the proposed transactions usually refer to that possibility. In this case, the possible use of GAAR has been raised at the audit level and has been raised in Court in *Solutions MindReady R&D Inc. v. the Queen*, 2015 TCC 17, para. 39 in respect of a tax structure similar to the one used by the Appellant.

[60] The affidavit filed in support of the Respondent's motion is satisfactory in its present form because no new facts requiring personal knowledge by the deponent and not already mentioned in the pleadings have been advanced in the notice of motion. Furthermore, the Attorney General of Canada is not required to justify why the decision has been made to refer to the GAAR argument, an alternative argument. In my view, the Attorney General of Canada should not be precluded from adding an alternative argument in a reply because some officers of the CRA, no matter how important they are, have decided not to do so in the pre-trial steps.

[61] For all these reasons, the motion is allowed without costs and the Court grants leave for the Respondent to file the Amended Reply to the Notice of Appeal.

Signed at Montréal, Québec, this 25th day of January 2023.

"Réal Favreau"

Favreau J.

CITATION:	2023 TCC 10
COURT FILE NO.:	2018-2771(IT)IG
STYLE OF CAUSE:	POLARSAT INC. AND THE KING
PLACE OF HEARING:	Montréal, Québec
DATE OF HEARING:	November 21, 2022
REASONS FOR ORDER BY:	The Honourable Justice Réal Favreau
DATE OF ORDER:	January 25, 2023

APPEARANCES:

Counsel for the Appellant:	Jonathan Lafrance
Counsel for the Respondent:	Natalie Labbé

COUNSEL OF RECORD:

For the Appellant:

Name:	Jonathan Lafrance
Firm:	Norton Rose Fullbright Canada LPP
For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada