Docket: 2011-3732(IT)G

BETWEEN:

J.K. READ ENGINEERING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard with the appeals of J.M. Hutton Enterprises Ltd. (2012-541(IT)G), J.M. Hutton Holdings Ltd. (2012-542(IT)G) and J.M. Hutton Engineering Ltd. (2012-543(IT)G) on April 30 and May 1 and 2, 2014, at Edmonton, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	James C. Yaskowich
Counsel for the Respondent:	David Everett

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2007 taxation year is dismissed, with costs to the Respondent, in accordance with the attached reasons for judgment.

Signed at Toronto, Ontario, this 21st day of October 2014.

"Robert J. Hogan"

Hogan J.

Docket: 2012-541(IT)G

BETWEEN:

J.M. HUTTON ENTERPRISES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of J.K. Read Engineering Ltd. (2011-3732(IT)G), J.M. Hutton Holdings Ltd. (2012-542(IT)G) and J.M. Hutton Engineering Ltd. (2012-543(IT)G) on April 30 and May 1 and 2, 2014, at Edmonton, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	James C. Yaskowich
Counsel for the Respondent:	David Everett

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2007 taxation year is dismissed, without costs, in accordance with the attached reasons for judgment.

Signed at Toronto, Ontario, this 21st day of October 2014.

"Robert J. Hogan"

Hogan J.

Docket: 2012-542(IT)G

BETWEEN:

J.M. HUTTON HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of J.K. Read Engineering Ltd. (2011-3732(IT)G), J.M. Hutton Enterprises Ltd. (2012-541(IT)G) and J.M. Hutton Engineering Ltd. (2012-543(IT)G) on April 30 and May 1 and 2, 2014, at Edmonton, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	James C. Yaskowich
Counsel for the Respondent:	David Everett

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2007 taxation year is dismissed, without costs, in accordance with the attached reasons for judgment.

Signed at Toronto, Ontario, this 21st day of October 2014.

"Robert J. Hogan"

Hogan J.

Docket: 2012-543(IT)G

BETWEEN:

J.M. HUTTON ENGINEERING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of J.K. Read Engineering Ltd. (2011-3732(IT)G), J.M. Hutton Enterprises Ltd. (2012-541(IT)G) and J.M. Hutton Holdings Ltd. (2012-542(IT)G) on April 30 and May 1 and 2, 2014, at Edmonton, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	James C. Yaskowich
Counsel for the Respondent:	David Everett

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2007 taxation year is dismissed, without costs, in accordance with the attached reasons for judgment.

Signed at Toronto, Ontario, this 21st day of October 2014.

"Robert J. Hogan"

Hogan J.

Citation: 2014 TCC 309
Date: 20141021
Dockets: 2011-3732(IT)G
2012-541(IT)G
2012-542(IT)G
2012-543(IT)G

BETWEEN:

J.K. READ ENGINEERING LTD.,
J.M. HUTTON ENTERPRISES LTD.,
J.M. HUTTON HOLDINGS LTD.,
J.M. HUTTON ENGINEERING LTD.,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Overview

[1] These appeals concern the calculation of arrears interest in the context of the application of the general anti-avoidance rule (the "GAAR"). The Appellants implemented a series of transactions (the "Transactions") resulting in capital losses used to offset capital gains realized by J.K. Read Engineering Ltd. ("Read") and J.M. Hutton Engineering Ltd. ("Hutton") earlier in their 2007 taxation year. Read and Hutton produced their income tax returns for the 2007 taxation year on the basis that the Transactions gave rise to a nil tax liability.

[2] In 2011, the Appellants were reassessed by the Minister of National Revenue (the "Minister"). The Minister found the steps taken by the Appellants to

be abusive avoidance transactions and, as a result, applied the GAAR to disallow the capital losses claimed by Read and Hutton in their 2007 tax returns.[1]

[3] The Appellants do not dispute the application of the GAAR or the resulting tax liability. What is in dispute, however, is the date on which the liability arose and from which interest began to accrue thereon.

[4] The Appellants argue that subsection 245(7) of the *Income Tax Act* (the "Act") requires the Minister to issue a notice of assessment based on the GAAR before section 245 can be applied to redetermine the tax consequence of abusive avoidance transactions. The essence of the Appellants' position is that the capital losses purportedly created as a result of the implementation of the Transactions continue to offset the capital gains realized by Read and Hutton up until the date that the Minister assessed the Appellants on the basis of the GAAR (the "GAAR Assessments"). According to the Appellants, interest began to accrue only from the date of the GAAR Assessments, which is the moment in time GAAR tax liability is said to arise.

[5] The Respondent does not see it quite the same way. According to the Respondent, the GAAR applies without the intervention of the Minister. Consequently, the Appellants had unpaid income tax as of their respective balance-due dates, on which arrears interest began to accrue.

II. Factual Background

[6] I heard the four appeals on the basis of the Agreed Statements of Facts reproduced in their entirety in Appendix A hereto.

[7] Because the Appellants acknowledge that the GAAR applies to disallow the capital losses claimed by Hutton and Read, it is sufficient for me to observe that the Appellants used high-low preferred shares to create capital losses, employing a strategy similar to that used by the appellants in three recent appeals.[2] In those appeals, the Federal Court of Appeal (the "FCA") found that the GAAR applied,

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[1] The reassessments issued against J.M. Hutton Enterprises Ltd. ("Enterprises") and J.M. Hutton Holdings Ltd. ("Holdings") were made as a consequence of the disallowance of the capital losses claimed by Hutton. A refundable dividend tax on hand ("RDTOH") amount was added to Hutton's RDTOH balance for its 2007 taxation year because Hutton owed Part I tax on its capital gains. Hutton paid taxable dividends to Enterprises and Holdings in the amount of $10,973,778. The Minister allowed Hutton a dividend refund and assessed Part IV tax on the aforementioned dividends. Enterprises and Holdings concede that they owe Part IV tax. However, they contest the Minister's calculation of interest.

[2] *Canada v. Global Equity Fund Ltd*, 2012 FCA 272, leave to appeal to the SCC refused, 35147 (April 11, 2013); *1207192 Ontario Limited v. Canada*, 2012 FCA 259, leave to appeal to the SCC refused, 35116 (March 28, 2013); *Triad Gestco Ltd. v. Canada*, 2012 FCA 258.

describing the capital losses as artificial such that they could not be used to offset the capital gain of each of the appellants.

III. Issues

[8] The issue in these appeals as it emerges from the written submissions of the parties can be framed as follows:

> Under the GAAR does interest begin to accrue on tax under Part I of the Act from the date of the assessments?

IV. Analysis

A. Does *Copthorne* support the Appellants' position?

[9] The Appellants directed my attention to the decision of the Tax Court of Canada (the "TCC") in *Copthorne Holdings Ltd. v. The Queen*.[3] In that case, predecessor corporations to the appellant, Copthorne, entered into a series of transactions to preserve the paid-up capital (the "PUC") of shares that they had issued. The non-resident shareholder of Copthorne was found to have received a deemed dividend following a recharacterization of the transactions under the GAAR. The withholding tax under section 212 of the Act that is generally imposed when a Canadian corporation pays a dividend to a non-resident person was not deducted by Copthorne, resulting in its being assessed the amount of that tax as well as a penalty for failure to deduct or withhold under subsection 227(8) of the Act.

[10] Campbell J. confirmed that Copthorne was liable for its shareholder's Part XIII tax; however, she struck out the penalty that had been assessed.

[11] In their written submissions, the Appellants summarize Campbell J.'s decision in *Copthorne* as follows:[4]

> The Tax Court of Canada, in *Copthorne Holdings Ltd. v. H.M.Q.*, held that a taxpayer cannot self-assess on the basis that the GAAR applies because of subsection 245(7). In *Copthorne*, the GAAR applied to reduce the PUC available to shelter a cross-border share repurchase from Part XIII tax. As a result, the Tax

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[3] 2007 TCC 481, affirmed in 2009 FCA 163, affirmed in 2011 SCC 63.
[4] Written Submissions of the Appellants at para. 2.

> Court also found that the taxpayer was not liable for the automatic penalty under subsection 227(8) that typically results from failing to withhold Part XIII tax, because the taxpayer technically was not required to withhold Part XIII tax at the time the shares were repurchased. The Part XIII liability arose after the fact, when the Minister assessed pursuant to the GAAR.
>
> [Emphasis added.]

[12] Later on in their written submissions, the Appellants observe:[5]

> . . . It was not until the reassessment under the GAAR was raised by the Minister that the non-resident's requirement to pay Part XIII tax arose. As a result, there was no withholding obligation that existed at that time under subsection 215(1).

[13] Finally, the Appellants' draw the following conclusion:[6]

> The natural extension of *Copthorne*, in the context of subsection 161(1), is that:
>
> (a) income taxes assessed pursuant to GAAR are payable only after the Minister has issued the assessment, and
>
> (b) the period during which such "taxes payable" are outstanding commences on the date of the GAAR assessment.

[14] With respect, I do not agree with the Appellants' analysis of *Copthorne* because it fails to take into account the fact that the Court actually found that Copthorne failed to fulfil its withholding obligations under subsection 215(1) of the Act.

[15] As is often the case under Part XIII, the Minister assessed Copthorne, the dividend payer, rather than its shareholder, the dividend recipient. Dividend payers are liable for Part XIII tax only if they fail to deduct or withhold tax that is payable on the dividend payment. Section 215 of the Act is clear on this matter. The relevant parts of that provision read as follows:

> 215(1) When a person pays, credits or provides, or is deemed to have paid, credited or provided, an amount on which an income tax is payable under this Part, or would be so payable if this Act were read without reference to subparagraph 94(3)(*a*)(viii) and to subsection 216.1(1), the person shall, notwithstanding any agreement or law to the contrary, deduct or withhold from it the amount of the tax and forthwith remit that amount to the Receiver General on

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[5] *Ibid*. at para. 14.
[6] *Ibid*. at para. 3.

> behalf of the non-resident person on account of the tax and shall submit with the remittance a statement in prescribed form.
>
> . . .
>
> (6) Where a person has failed to deduct or withhold any amount as required by this section from an amount paid or credited or deemed to have been paid or credited to a non-resident person, that person is liable to pay as tax under this Part on behalf of the non-resident person the whole of the amount that should have been deducted or withheld, and is entitled to deduct or withhold from any amount paid or credited by that person to the non-resident person or otherwise recover from the non-resident person any amount paid by that person as tax under this Part on behalf thereof.
>
> [Emphasis added.]

[16] The Appellants' submission that Copthorne did not fail to withhold tax because the deemed dividend did not arise until the GAAR assessment was issued is irreconcilable with Campbell J.'s finding that Copthorne was liable for its non-resident shareholder's Part XIII tax under section 215(6) of the Act. The GAAR had to apply beforehand to reduce the PUC of the shares redeemed by Copthorne, otherwise the Court could not have found that Copthorne failed to fulfil its withholding obligation under subsection 215(1) of the Act. If Part XIII tax had not been payable at the time of the share redemption, Copthorne would not have been liable for such tax under subsection 215(6) of the Act. Therefore, it is implicit in the Court's finding in that case that the GAAR operated as the abusive avoidance transactions were being carried out, and not, as argued by the Appellants, when the GAAR-based assessment was issued by the Minister.

[17] In light of the above, did the Court arrive at a contradictory decision in *Copthorne*? I do not believe so. Subsection 215(6) of the Act is a charging provision that makes the payer liable for the payee's tax if the payer fails to deduct or withhold at the time of payment tax that is payable by the payee. In contrast, subsection 227(8) of the Act is a penalty provision. A due diligence defence can be mounted against the latter but not the former. In my opinion, Campbell J. struck out the subsection 227(8) penalty assessed against Copthorne because, in the circumstances, she found that Copthorne had acted diligently with respect to its withholding obligations under section 215 of the Act.

B. What is the proper interpretation of subsection 245(7) of the Act?

[18] As noted above, the Appellants' position is also based on subsection 245(7) of the Act, which reads as follows:

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

[19] The Appellants submit that this provision precludes all taxpayers from self-assessing tax consequences under the GAAR.

[20] According to the Appellants, taxpayers should not be liable for interest before an assessment based on the GAAR is issued if they cannot self-assess under the GAAR. While, in *Copthorne*, Campbell J. appears to endorse the interpretation against self-assessment put forward by the appellants, I note that her decision to strike out the penalty was not appealed by the Respondent.[7] In contrast, her conclusion that Copthorne was liable for the Part XIII tax of its non-resident shareholder was affirmed on appeal by the FCA and the Supreme Court of Canada (the "SCC").

[21] The Appellants' interpretation of subsection 245(7) of the Act also conflicts with comments made in *obiter* in *S.T.B. Holdings Ltd. v. The Queen*.[8] In that case, Judge Miller was called upon to decide two issues: (1) whether an assessment issued under subsection 245(7) requires a specific reference to the GAAR; and (2) whether subsection 245(7) precludes the use of the GAAR by the Minister as an alternative assessing tool. He answered "no" to both issues. Interestingly, while, for the purpose of his finding on these issues, he was not required to rule on the matter. Judge Miller found during the course of his analysis that subsection 245(7) of the Act applies to a taxpayer in respect of whom a GAAR assessment is issued (referred to as the "targeted taxpayer") and to a taxpayer affected by the assessment of that targeted taxpayer (referred to as a "third party taxpayer").[9] On appeal to the FCA, Létourneau J. A. affirmed the trial judge's findings, but found that subsection 245(7) of the Act was limited to third party taxpayers only,[10] namely, those taxpayers who seek an adjustment under subsection 245(6) of the Act because they have been affected by a GAAR-based assessment of a targeted taxpayer. An application for leave to appeal to the SCC was dismissed.[11]

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[7] *Supra* note 3 (FCA) at para. 3.
[8] 2002 DTC 1254.
[9] *Ibid*. at para. 35.
[10] *S.T.B. Holdings Limited v. The Queen*, 2002 FCA 386.
[11] *Ibid*.; leave to appeal to the SCC refused, 29517 (March 27, 2003).

[22] It is well accepted that an *obiter dictum* is not a binding judicial opinion. Author Michael Zander states as much in these terms:[12]

> . . . The most carefully considered and deliberate statement of law by all five Law Lords which is dictum cannot bind even the lowliest judge in the land. Technically, he is free to go his own way. . . .

[23] This is because:[13]

> Courts are instituted to decide questions which must be resolved to end controversies. Therefore, advisory opinions and obiter dicta in opinions are not recognized as bases for decisions, and they are not encouraged. The law abhors opinions written without conflict. Such opinions do not receive the benefit of the full contest of opposing briefs, arguments, or full consideration by the court.[14]
>
> [Emphasis added.]

[24] However, Zander notes that the persuasiveness of *dicta* generally strengthens as they ascend the judicial hierarchy:[15]

> . . . In practice, of course, weighty obiter pronouncements from higher courts are likely to be followed and will certainly be given the greatest attention, but in strictest theory they are not binding. . . .

[25] In 1980, the SCC, in *Sellars v. The Queen*,[16] made comments that were perceived to be supportive of the notion that *obiter dicta* in majority SCC opinions can establish precedents and bind lower courts.[17] This became known as the "*Sellars* principle". For a time, this interpretation was shared by some observers[18] but dismissed by others.[19]

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12 Michael Zander, *The Law-Making Process*, 4th ed. (London, Uk: Butterworths, 1994) at pp. 262-263.

13 Joyce J. George, *Judicial Opinion Writing Handbook*, 2nd ed. (Buffalo: William S. Hein, 1986) at p. 109.

14 Intuitively, therefore, one could conclude that *obiter* pronouncements that do receive the benefit of "the full contest of opposing briefs, arguments, or full consideration by the court" may serve as an acceptable basis for subsequent judicial opinions.

15 *Supra* note 12 at p. 263.

16 [1980] 1 S.C.R. 527.

17 *Ibid*. at 529-530.

18 Gisèle Laprise, Les outils du raisonnement et de la rédaction juridiques (Montreal : Thémis, 2000) at p. 55.

19 Arthur Peltomaa, "Obiter Dictum of the Supreme Court of Canada: Does it Bind Lower Courts?", (1982)60 Bar Rev. 823 at p. 825.

[26] In 2005, the SCC in *R. v. Henry*[20] clarified the "*Sellars* principle" and rejected its seemingly far-reaching application.[21] Binnie J., writing for a unanimous Court, began by confirming that an SCC *obiter* cannot effectively bind lower courts, stating that:[22]

> . . . the effect would be to deprive the legal system of much creative thought on the part of counsel and judges in other courts in continuing to examine the operation of legal principles in different and perhaps novel contexts, and to inhibit or skew the growth of the common law. This would be a consequence totally unforeseen and unintended by the Court that decided *Sellars*. . . .

[27] He then provided guidance on the weight to be accorded to *obiter dicta* expressed by the SCC:[23]

> . . . All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. . . .

[28] Thus, to paraphrase, it could be said that *obiter dicta* move along a continuum and diminish in weight the further they stray from the dispositive point of a judicial opinion:[24]

> *Obiter dicta* will move along a continuum. A legal pronouncement that is integral to the result or the analysis that underlies the determination of the matter in any particular case will be binding. *Obiter* that is incidental or collateral to that analysis should not be regarded as binding, although it will obviously remain persuasive.

[29] In my opinion, the reasons for judgment in *S.T.B. Holdings* – both in first instance and on appeal – clearly establish that *obiter dicta* pronounced by the courts constitute, in the words of the SCC, a "wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative".[25] For the reasons that follow, I do not agree with the Appellants that *obiter dicta* are akin to "commentary, examples or exposition"[26] that are merely persuasive. In

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20 [2005] 3 S.C.R. 609.

21 Mathieu Devinat, "The Trouble with *Henry*: Legal Methodology and Precedents in Canadian Law", (2006)32: Queen's L.J. 278 at p. 279.

22 *Supra* note 20 at para. 56.

23 *Ibid*. at para. 57.

24 *R. v. Prokofiew*, 2010 ONCA 423, [2010] G.S.T.C. 87 at para. 20, affirmed by *R. v. Prokofiew*, 2012 SCC 49, [2012] 2 S.C.R. 639. See also: *Reilly v. British Columbia* (*Attorney General*), 2008 BCCA 167, 2008 10 W.W.R. 287 at para. 69.

25 *Prokofiew, supra* note 24 (Ontario Court of Appeal) at para. 18 (citing *Henry*, *supra* note 20, at para. 57).

26 *Ibid*.

S.T.B. Holdings, the third party application of subsection 245(7) of the Act was fully argued and the courts' construction of the provision had evolved from a comprehensive analysis.

[30] First, it is obvious from the TCC judgment in *S.T.B. Holdings* that both parties submitted arguments either for or against an application of subsection 245(7) of the Act to taxpayers at large:[27]

> *Applicant's Argument*
>
> [7] The Applicant's suggested interpretation of subsection 245(7) is that, firstly, it requires that any assessment involving the application of the GAAR must clearly indicate on the face of the notice of assessment that GAAR is being applied;
>
> . . .
>
> [27] . . . learned counsel for the Applicant most ably argued for a broader interpretation of [subsections 245(6), (7), and (8) of the Act].
>
> *Respondent's Position*
>
> [12] Regarding the general application of subsection 245(7) to all taxpayers as opposed to a more limited application the Respondent argued that this subsection was limited to a third party application. . . .
>
> [Emphasis added.]

[31] Similar arguments were made before the FCA:[28]

> 7 When teleological, purposive or contextual interpretation is made of these words, counsel argues, it leads to a series of conclusions:
>
> . . .
>
> (b) subsection 245(7) covers not only third parties affected by GAAR, but also targeted taxpayers;
>
> . . .
>
> 8 . . . Counsel for the respondent submits that, on this issue, the Judge erred when he ruled that the subsection applies both to the targeted taxpayer and third parties.
>
> [Emphasis added.]

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27 Supra note 8.

28 *Supra* note 10.

[32] These submissions were given full judicial consideration. At first instance, Judge Miller pointedly dissects subsection 245(7) of the Act using the modern rule of statutory interpretation,[29] assisted in part by the explanatory notes accompanying the enactment of the GAAR.[30] With respect to those notes, I find it worthwhile to reproduce the following excerpt therefrom as quoted by Judge Miller:[31]

> New subsection 245(7) of the Act provides that a person may not rely on subsection 245(2) in order to determine his income, taxable income, or taxable income earned in Canada of, tax or other amount payable by, or amount refundable to, any person under the Act as well as any other amount under the Act which is relevant for the purposes of the computation of the foregoing, except through a request for adjustment under subsection 245(6). This prevents a person from using the provisions of subsection 245(2) in order to adjust his income, or any of the above-mentioned amounts without requesting that adjustment following the procedures set out in subsection 245(6).
>
> [Emphasis added.]

[33] It was largely on the basis of these reasons that the FCA found that subsection 245(7) of the Act applies to third parties, to the exclusion of taxpayers assessed under the GAAR:[32]

> . . . The reference to the procedure set out in subsection 245(6) for a person mentioned in subsection 245(7) certainly tends to confirm that subsection 245(7) was intended to apply only to third parties seeking a tax relief.

[34] At the appeal stage, Létourneau J. A. of the FCA, writing for a unanimous court, acknowledged the carefulness with which Judge Miller addressed the parties' submissions:[33]

> The Tax Court Judge made a thorough analysis of the parties' submissions. My summary of his decision, although longer than usual, does not give full credit to his thoughtful examination of the issues. . . .

[35] After reviewing the trial judge's reasons for judgment, Létourneau J. A. dismissed the appeal before the FCA and affirmed the TCC judgment, save the

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29 *Supra* note 8 at para. 28.
30 *Ibid*. at para. 35. I would also note that subsections 245(6) through (8) of the Act have remained unchanged since their enactment in 1988.
31 *Ibid*. at para. 15.
32 *Supra* note 10 at para. 23.
33 *Ibid*. at para. 15

finding that subsection 245(7) of the Act applied to a taxpayer assessed under the GAAR:[34]

> . . . I am in general agreement with his interpretation of subsection 245(7), except as regards his application to the targeted taxpayer. . . .

[36] As can be seen from the foregoing, the application – or non-application – of subsection 245(7) of the Act to taxpayers assessed under the GAAR was given significant consideration in *S.T.B. Holdings*. In my view, the determination of this issue by both the TCC and the FCA was essential to the conclusions that they reached in that case. As a result, I find that the FCA's conclusion that subsection 245(7) of the Act is limited to third party taxpayers is an authoritative *obiter* which should be followed. It is at the very least an *obiter dictum* that is highly persuasive and compelling.

[37] Even if I was inclined to endorse the Appellants' view of subsection 245(7), the language of that subsection is unhelpful to their position. The key words are "the tax consequences to any person [according to the Appellants, Hutton or Engineering], following the application of this section, shall only be determined through a notice of assessment" (emphasis added).

[38] The *Oxford English Dictionary* (online)[35] defines the term "following" as meaning "[t]hat follows or moves after another", "[t]hat comes after or next in order or in time; succeeding, subsequent, ensuing", or "[a]s a sequel to, in succession to (an event), after". Similarly, that term is defined in the Merriam-Webster English Dictionary[36] as signifying "being next in order or time" or "listed or shown next".

[39] These definitions clearly indicate that the notice of assessment does not trigger the application of the GAAR, but is rather subsequent to it. This view is supported by a plain interpretation of the French version of the provision:

> 245(7) Malgré les autres dispositions de la présente loi, les attributs fiscaux d'une personne, par suite de l'application du présent article, ne peuvent être déterminés que par avis de cotisation, de nouvelle cotisation ou de cotisation supplémentaire ou que par avis d'un montant déterminé en application du paragraphe 152(1.11), compte tenu du présent article.
>
> [Emphasis added.]

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34 *Ibid*.

35 http://www.oed.com/search?searchType=dictionary&q=following&_searchBtn=Search.

36 http://www.merriam-webster.com/dictionary/following.

[40] The *Nouveau Petit Robert*[37] considers "*par suite de*" to be synonymous with "*à cause de*" or "*en conséquence de*". In the *Larousse,*[38] it is defined as meaning "*en raison de*". These synonyms unequivocally point towards a determination that an application of the GAAR must precede the notice of assessment.

[41] In light of both the English and French definitions above, it cannot be said that the tax liability pursuant to the GAAR is incurred as of the date of the notice of assessment.

[42] If I am wrong on this point and an assessment or reassessment is needed in order to deny tax benefits arising from abusive avoidance transactions, it appears to me that the GAAR would still be retrospective in its application. For example, in *Copthorne*, the PUC reduction had to be considered as occurring before the share redemption in order for there to be a deemed dividend that was subject to withholding tax. Why then, under the Appellant's theory, would the GAAR not be retrospective in application with respect to the accrual of interest on tax payable in respect of the Appellants' 2007 taxation years? I strongly doubt that Parliament intended taxpayers to benefit from a deferral of interest in respect of abusive avoidance transactions.

[43] I see nothing in the rest of section 245 of the Act to suggest that the application of the GAAR is suspended until an assessment is issued. On the contrary, subsection 245(2) of the Act uses mandatory language to provide that the tax consequences of abusive avoidance transactions shall be recast to deny tax benefits that are not reasonable in the circumstances.

C. Consideration of the Interest Provision

[44] The provision governing the imposition and accrual of interest operates in a straightforward manner regardless whether or not the assessment is based on the GAAR. Subsection 161(1) of the Act provides that interest accrues at the prescribed rate on the excess of the taxpayer's tax payable under Parts I, I.3, VI and VI.1 of the Act for a taxation year over the total amount paid on account of that tax liability. That provision reads as follows:

> 161(1) Where at any time after a taxpayer's balance-due day for a taxation year
>
> (*a*) the total of the taxpayer's taxes payable under this Part and Parts I.3, VI and VI.1 for the year

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37 *Le Nouveau Petit Robert*, 2008, *sub verbo* "*suite*".

38 http://www.larousse.fr/dictionnaires/francais/suite/75305/locution?q=par+suite+de#175502.

> exceeds
>
> > (*b*) the total of all amounts each of which is an amount paid at or before that time on account of the taxpayer's tax payable and applied as at that time by the Minister against the taxpayer's liability for an amount payable under this Part or Part I.3, VI or VI.1 for the year,
>
> the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess, computed for the period during which that excess is outstanding.
>
> [Emphasis added.]

[45] It is clear from the wording of this provision that interest accrues from the taxpayer's balance-due day, if the taxpayer has "tax payable" outstanding at that time.

[46] In *The Queen v. Whent*,[39] the FCA held that the word "outstanding" used in subsection 161(1) of the Act means an amount "that stands over; that remains undetermined, unsettled, or unpaid".

[47] The term "tax payable" is defined in subsection 248(2) as meaning the amount of tax fixed by assessment or reassessment, subject to variation on objection or appeal. No exception is made in that definition for an assessment of tax based on the GAAR. In the instant appeals, because the capital losses are denied under subsection 245(2) of the Act, Read and Hutton had outstanding "tax payable" under Part I of the Act as of their respective balance-due days. Similarly, because Hutton paid assessable dividends to each of the other Appellants in their 2007 taxation years, those other Appellants had unpaid Part IV tax payable on which interest accrued under subsection 187(2) of the Act.

V. Conclusion

[48] On the basis of the foregoing, I conclude that the Transactions did not give rise to capital losses that could be used by Hutton and Read to offset their capital gains for their 2007 taxation years. Consequently, arrears interest was properly calculated on the Appellants' tax debts owing after their respective balance-due days.

[49] For all these reasons, the appeals are dismissed.

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[39] 2000 DTC 6001 at para. 44.

[50] With regard to the appeals numbered 2012-541(IT)G, 2012-542(IT)G and 2012-543(IT)G, the parties agreed that there would be no costs awarded to any party regardless of the final result.

[51] With regard to the Read appeal, numbered 2011-3732(IT)G, the parties agreed that costs would be awarded according to the final result. Therefore, costs are awarded to the Respondent.

Signed at Toronto, Ontario, this 21st day of October 2014.

"Robert J. Hogan"

Hogan J.

APPENDIX A

2011-3732(IT)G

TAX COURT OF CANADA

BETWEEN:

J.K. READ ENGINEERING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AGREED STATEMENT OF FACTS

The parties agree that, for the purposes of this Appeal and any Appeal therefrom or any other proceeding taken in this matter after the conclusion of this Appeal, the facts set out herein in this Agreed Statement of Facts are true. This Agreed Statement of Facts is agreed to by the parties for the purpose of this Appeal and any appeal therefrom but shall not bind the parties in any other judicial proceedings. No evidence inconsistent with this Agreed Statement of Facts may be adduced at the hearing of this appeal or any appeal therefrom except through further agreement by the parties.

1. The appellant was resident in Canada for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended.[1]

2. In December 2007, John K. Read Investments Ltd. was the sole shareholder of the appellant.[2]

3. John K. Read controls John K. Read Investments Ltd.[3]

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[1] Notice of Appeal, para. 3, Amended Reply, para. 3.
[2] Notice of Appeal, para. 4, Amended Reply, paras. 4 and 14(a).

4. The appellant owned partnership units in the Colt Companies Partnership (the "Partnership").[4]

5. Michael Trent Read and Rhett Tyler Read are the adult children of John K. Read.[5]

6. On December 5, 2007, the appellant incorporated a wholly-owned subsidiary, Picante Capital Corp. ("Picante") in accordance with the laws of Alberta.[6]

7. John K. Read was the sole director of Picante.[7]

8. On December 18, 2007, the appellant subscribed for 22,618,025 class A common shares and 22,618,025 class B common shares of Picante for an aggregate cost of $45,236,050.[8]

9. The Michael Trent Read Family Trust (the "Michael Trust") and the Rhett Tyler Read Family Trust (the "Rhett Trust") were established on December 19, 2007. The Michael Trust and the Rhett Trust were irrevocable trusts. The beneficiaries of the Michael Trust were Michael Trent Read and any of his children or grandchildren. The beneficiaries of the Rhett Trust were Rhett Tyler Read and any of his children or grandchildren.[9]

10. On December 19, 2007, Picante declared and paid a stock dividend on its class A and class B common shares. Accordingly, Picante issued 45,236,050 class D shares to the appellant, as the sole shareholder of the class A and class B common shares.[10]

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[3] Amended Reply, para. 14(b).
[4] Amended Reply, para. 5.
[5] Notice of Appeal, para. 10, Amended Reply, paras. 7 and 14(g).
[6] Amended Reply, para. 14(c).
[7] Amended Reply, para. 14(d).
[8] Amended Reply, paras. 6 and 14(e).
[9] Amended Reply, paras. 7 and 14(f).
[10] Amended Reply, paras. 8 and 14(h).

11. The class D shares were redeemable for $1.00 per share, or an aggregate redemption amount of $45,236,050, and had an aggregate stated capital of $100.[11]

12. On December 20, 2007, the appellant sold the class A and class B common shares to the Michael Trust and the Rhett Trust, respectively, for aggregate proceeds of $100.[12]

13. In its 2007 income tax return, the appellant reported a capital gain of $45,624,604 in respect of the disposition of its partnership units in the Partnership, and a capital loss in the amount of $45,235,950 from the disposition of the class A and class B common shares of Picante which it used to offset the capital gain.[13]

14. On April15, 2011, the Minister of National Revenue reassessed the appellant to deny its claimed capital loss of $45,235,950 on the basis that the general anti-avoidance rule in section 245 of the *Income Tax Act* applied.[14]

This Agreed Statement of Facts is dated April 30, 2014.

James Yaskowich
Counsel for the Appellant

David Everett
Counsel for the Respondent

[11] Amended Reply, paras. 8 and 14(h).
[12] Amended Reply, paras. 8 and 14(i).
[13] Amended Reply, paras. 5, 9 and 14(j).
[14] Amended Reply, paras. 10 and 11.

2012-541(IT)G
2012-542(IT)G
2012-543(IT)G

TAX COURT OF CANADA

BETWEEN:

J.M. HUTTON ENTERPRISES LTD.,
J.M. HUTTON HOLDINGS LTD.,
J.M. HUTTON ENGINEERING LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AGREED STATEMENT OF FACTS

The parties agree that, for the purposes of this Appeal and any Appeal therefrom or any other proceeding taken in this matter after the conclusion of this Appeal, the facts set out herein in this Agreed Statement of Facts are true. This Agreed Statement of Facts is agreed to by the parties for the purpose of this Appeal and any appeal therefrom but shall not bind the parties in any other judicial proceedings. No evidence inconsistent with this Agreed Statement of Facts may be adduced at the hearing of this appeal or any appeal therefrom except through further agreement by the parties. Either party may adduce other evidence or documents not inconsistent with this Agreed Statement of Facts.

1. J.M. Hutton Engineering Ltd. ("Engineering"), J.M. Hutton Enterprises Ltd. ("Enterprises") and J.M. Hutton Holdings Ltd. ("Holdings") were resident in

Canada for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended.[1]

2. Enterprises, Holdings and Engineering were all "Canadian controlled private corporations" within the meaning of the *Income Tax Act*.[2]

3. In Engineering's taxation year ending October 1, 2007, Holdings and Enterprises each held 50% of Engineering's shares.[3]

4. In Enterprises' taxation year ending September 30, 2007, James Hutton, Nancy Hutton and the Kimberley Nicole Hutton Family Trust were its only shareholders.[4]

5. In Holdings' taxation year ending September 30, 2007, James Hutton, Nancy Hutton and the Christopher James Hutton Family Trust were its only shareholders.[5]

6. Immediately prior to the transactions described below, Enterprises and Holdings each owned 49.5 of the class A common shares of Engineering, while the remaining class A common share of Engineering was owned by James Hutton.[6]

7. During the 2007 taxation years of Enterprises and Holdings, they each owned more than 10% of the issued share capital of Engineering, and shares of the capital stock of Engineering having a fair market value of more than 10% of the fair market value of all the issued shares of the capital stock of Engineering.[7]

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[1] Engineering Notice of Appeal, paras. 3 and 5, Engineering Reply, para. 4; Enterprises Notice of Appeal, paras. 3, 6 and 7, Enterprises Reply, para. 3; Holdings Notice of Appeal, paras. 3, 6 and 7, Holdings Reply, para. 3.
[2] Engineering Notice of Appeal, paras. 3 and 5, Engineering Reply, para. 4; Enterprises Notice of Appeal, paras. 3, 6 and 7, Enterprises Reply, paras. 3 and 18(d); Holdings Notice of Appeal, paras. 3, 6 and 7, Holdings Reply, paras. 3 and 18(d).
[3] Engineering Reply, para. 17(a).
[4] Enterprises Reply, para. 4.
[5] Holdings Reply, para. 4.
[6] Enterprises Reply, para. 5; Holdings Reply, para. 5.
[7] Enterprises Reply, para. 18(h); Holdings Reply, para. 18(h).

8. James Hutton and Nancy Hutton have at all times controlled Engineering, Holdings and Enterprises.[8]

9. Christopher James Hutton and Kimberly Nicole Hutton are the adult children of James Hutton and Nancy Hutton.[9]

10. Engineering owned partnership units in the Colt Companies Partnership (the "Partnership").[10]

11. On September 27, 2007, Engineering incorporated a wholly-owned subsidiary, 1352751 Alberta Ltd. ("Newco") in accordance with the laws of Alberta.[11]

12. James Hutton and Nancy Hutton were the directors of Newco.[12]

13. Effective at 1:00 a.m. on September 28, 2007, James Hutton transferred:

    a) ½ of a class A common share of Engineering to Holdings pursuant to subsection 85(1) of the *Income Tax Act* for an agreed amount of $1.00 in exchange for 1,000 class H shares of Holdings; and

    b) ½ of a class A common share of Engineering to Enterprises pursuant to subsection 85(1) of the *Income Tax Act* for an agreed amount of $1.00 in exchange for 1,000 class H shares of Enterprises.[13]

14. The James and Nancy Hutton Family Trust was established effective at 10:50 a.m. on September 28, 2007 (the "Family Trust"). The Family Trust was an irrevocable trust, the beneficiaries of which were Christopher James Hutton and

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[8] Engineering Reply, para. 17(b).
[9] Engineering Notice of Appeal, para. 14; Engineering Reply, paras. 8 and 17(g); Enterprises Notice of Appeal, para. 15, Enterprises Reply, para. 9; Holdings Notice of Appeal, para. 15, Holdings Reply, para. 9.
[10] Engineering Reply, para. 5; Enterprises Reply, para. 6; Holdings Reply, para. 6.
[11] Engineering Reply, para. 17(c); Respondent's Book of Documents, Tab 11.
[12] Engineering Reply, para. 17(d).
[13] Engineering Reply, paras. 6 and 17(e); Enterprises Reply, para. 7; Holdings Reply, para. 7.

Kimberly Nicole Hutton, and their children, grandchildren or great grandchildren born or adopted at any time before or after the date of the settlement of the trust.[14]

15. Effective at 11:15 a.m. on September 28, 2007, Engineering subscribed for 40,238,114 class A common shares of Newco for an aggregate cost of $40,238,114.[15]

16. Effective at 11:25 a.m. on September 28, 2007, Newco declared and paid a stock dividend to Engineering on its class A common shares. Accordingly, Newco issued 40,238,114 class D shares to Engineering, as the sole shareholder at that time of the class A common shares.[16]

17. The class D shares were redeemable for $1.00 per share, or an aggregate redemption amount of $40,238,114 and had an aggregate stated capital of $100.[17]

18. Effective at 11:30 a.m. on September 28, 2007, Engineering elected to pay a capital dividend on its class A common shares in the amount of $18,290,557.25.[18]

19. Effective at 11:30 a.m. on September 28, 2007, Engineering declared and paid taxable dividends in the amount of $21,947,556.76 on its class A common shares.[19]

20. Accordingly, Enterprises and Holdings each received taxable dividends in the amount of $10,973,778.38.[20]

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[14] Engineering Reply, paras. 8 and 17(f); Enterprises Reply, para. 9; Holdings Reply, para. 9.
[15] Engineering Reply, paras. 7 and 17(h)(i); Enterprises Reply, para. 8; Holdings Reply, para. 8.
[16] Engineering Reply, paras. 9 and 17(h)(ii); Enterprises Reply, para. 10; Holdings Reply, para. 10.
[17] Engineering Reply, paras. 9 and 17(h)(ii); Enterprises Reply, para. 10; Holdings Reply, para. 10.
[18] Engineering Notice of Appeal, para. 15, Engineering Reply, paras. 9 and 17(h)(iii); Enterprises Notice of Appeal, para. 16, Enterprises Reply, para. 10; Holdings Notice of Appeal, para. 16, Holdings Reply, para. 10.
[19] Engineering Notice of Appeal, para. 15, Engineering Reply, paras. 9 and 17(h)(iv); Enterprises Notice of Appeal, para. 16, Enterprises Reply, paras. 10 and 18(e); Holdings Notice of Appeal, para. 16, Holdings Reply, paras. 10 and 18(e).
[20] Enterprises Reply, para. 18(e); Holdings Reply, para. 18(e).

21. Effective at 11:35 a.m. on September 28, 2007, the directors of Engineering (i.e. James Hutton and Nancy Hutton) resolved to borrow $40,238,114 from Newco.[21]

22. Effective at 11:40 a.m. on September 28, 2007, Engineering sold its 40,238,114 class A common shares of Newco to the Family Trust for aggregate proceeds of $100.[22]

23. Effective at 11:50 a.m. on September 28, 2007, the directors of Newco (i.e. James Hutton and Nancy Hutton) resolved to loan $40,238,114 to Engineering.[23]

24. Effective at 11:50 a.m. on September 28, 2007, James Hutton and Nancy Hutton executed a promissory note to pay Newco $40,238,114.[24]

25. As a result of the foregoing transactions, Holdings and Enterprises were the only shareholders of the Appellant at 1:00 a.m. on September 28, 2007.[25]

26. In Engineering's 2007 income tax return, it reported a capital gain of $36,898,853 in respect of the disposition of its partnership units in the Partnership, and a capital loss in the amount of $40,238,014 from the disposition of the class A common shares of Newco – which it used to offset the capital gain.[26] Engineering reported an aggregate capital loss of $3,026,946 in its 2007 taxation year, which included other capital gains and losses not in issue in these appeals.

27. Engineering reported aggregate investment income of $135,123 in its 2007 taxation year, and a refundable portion of Part I tax in the amount of $38,219.[27]

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[21] Engineering Reply, para. 17(h)(v).
[22] Engineering Notice of Appeal, para. 15, Engineering Reply, paras. 9 and 17(h)(vi); Enterprises Notice of Appeal, para. 16, Enterprises Reply, para. 10; Holdings Notice of Appeal, para. 16, Holdings Reply, para. 10.
[23] Engineering Reply, para. 17(h)(vii).
[24] Engineering Reply, para. 17(h)(viii).
[25] Engineering Notice of Appeal, para. 12, Engineering Reply, para. 1; Enterprises Notice of Appeal, para. 13, Enterprises Reply, para. 1; Holdings Notice of Appeal, para. 13, Holdings Reply, para. 1.
[26] Engineering Reply, paras. 5, 10 and 17(i); Enterprises Reply, paras. 6, 11 and 18(a); Holdings Reply, paras. 6, 11 and 18(a).
[27] Enterprises Reply, para. 12; Holdings Reply, para. 12.

28. Engineering had a Part IV tax liability of $4,105 in respect of taxable dividends it received in the 2007 taxation year, and it was entitled to a dividend refund of $47,157 pursuant to subsection 129(1) of the *Income Tax Act* in respect of the taxable dividend of $21,947,556.76 that it declared and paid on its class A common shares.[28]

29. In their 2007 income tax returns, Enterprises and Holdings deducted the taxable dividends they each received from Engineering under section 112 of the *Income Tax Act*.[29]

30. Also, in their 2007 income tax returns:

    a) Enterprises reported Part IV tax payable in the amount of $847,444 and that $19,110 of which arose as a result of receiving a taxable dividend paid by Engineering in its 2007 taxation year;[30] and

    b) Holdings reported Part IV tax payable in the amount of $971,724 and that $19,110 of which arose as a result of receiving a taxable dividend paid by Engineering in its 2007 taxation year.[31]

31. The Minister of National Revenue (the "Minister") initially assessed the 2007 taxation years of Enterprises, Holdings and Engineering on April 8, 2008, April 9, 2008 and April 10, 2008, respectively.[32]

32. The Minister reassessed Engineering to deny its claimed capital loss of $40,238,014 on the basis that the general anti-avoidance rule in section 245 of the *Income Tax Act* applied.[33]

33. The Minister also added the amount of $4,961,476 to Engineering's refundable dividend tax on hand balance on account of the capital gain it had reported in the

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[28] Enterprises Reply, para. 12; Holdings Reply, para. 12.
[29] Enterprises Reply, para. 18(f); Holdings Reply, para. 18(f).
[30] Enterprises Notice of Appeal, para. 20, Enterprises Reply, para. 12.
[31] Holdings Notice of Appeal, para. 20, Holdings Reply, para. 12.
[32] Respondent's Book of Documents, Tabs 1, 3 and 5.
[33] Engineering Reply, para. 11; Enterprises Reply, para. 13; Holdings Reply, para. 13.

same year from the disposition of its interest in the Partnership, and it was entitled to a dividend refund of the same amount.[34]

34. The Minister added the amount of $4,309,649 to Enterprises' Part IV tax payable pursuant to paragraph 186(1)(b) of the *Income Tax Act* and added a corresponding amount to Enterprises' refundable dividend tax on hand account.[35]

35. The Minister added the amount of $3,971,225 to Holdings' Part IV tax payable pursuant to paragraph 186(1)(b) of the *Income Tax Act* and added a corresponding amount to Holdings' refundable dividend tax on hand account.[36]

36. Enterprises and Holdings were each entitled to an additional dividend refund of $1,806,314 based on the taxable dividends they paid to their shareholders that was set-off against their respective Part IV tax payable in accordance with subsection 129(2) of the *Income Tax Act*.[37]

This Partial Agreed Statement of Facts is dated April 30, 2014.

James Yaskowich
Counsel for the Appellant

David Everett
Counsel for the Respondent

[34] Enterprises Notice of Appeal, para. 22, Enterprises Reply, paras. 13 and 18(g); Holdings Notice of Appeal, para. 22, Holdings Reply, paras. 13 and 18(g).
[35] Enterprises Notice of Appeal, para. 23, Enterprises Reply, para. 14.
[36] Holdings Notice of Appeal, para. 23, Holdings Reply, para. 14.
[37] Enterprises Notice of Appeal, para. 23, Enterprises Reply, para. 14; Holdings Notice of Appeal, para. 23, Holdings Reply, para. 14.

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PLACE OF HEARING:	Edmonton, Alberta
DATES OF HEARING:	April 30 and May 1 and 2, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	October 21, 2014

APPEARANCES:

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