Federal Court of Appeal Cour d'appel fédérale

Date: 20230705

Docket: A-115-21

Citation: 2023 FCA 157

CORAM: **NOËL C.J.**
BOIVIN J.A.
GLEASON J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MICROBJO PROPERTIES INC.
DAMIS PROPERTIES INC.
SABEL INVESTMENTS II-A LIMITED
ZAGJO HOLDINGS LIMITED
DEVAMM INVESTMENTS II-A LIMITED

Respondents

Heard at Toronto, Ontario, on February 9, 2023.

Judgment delivered at Ottawa, Ontario, on July 5, 2023.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

INTRODUCTION

[1] The Crown appeals from decisions rendered by the Tax Court of Canada *per* Owen J. (the Tax Court) (cited as 2021 TCC 24) vacating, on the basis of a single set of reasons, the

assessments issued by the Minister of National Revenue (the Minister) against each of the five respondents by virtue of subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). The general anti-avoidance rule (GAAR) was also invoked by the Crown before the Tax Court as an alternative basis for confirming the validity of the assessments.

[2] Although a single notice of appeal was filed, five were required as five decisions are in issue (see subsections 27(1.1) and (2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7). As this is the result of a pure oversight and the respondents and the Crown have proceeded on the basis that the five appeals are properly before us, the Court, on its own motion, has treated the matter as involving five consolidated appeals. The reasons that follow dispose of all five.

[3] At issue is whether the participation by the respondents in transactions with a third party aimed at relieving them from a tax liability that ultimately went unpaid gave rise to a transfer for purposes of subsection 160(1) and, if so, whether or not they were dealing at arm's length with this other party at the time of the transfer. In the event that subsection 160(1) does not allow for the full recovery of the assessed amounts, the Court will have to determine whether the assessments can nevertheless be upheld as issued pursuant to section 245 of the Act.

[4] For the reasons that follow, I have come to the conclusion that a transfer did take place, and that the respondents and the third party were not dealing at arm's length when it took place, with the result that the respondents are liable for the outstanding tax debt pursuant to subsection 160(1), but only up to the monetary advantage that they derived from the transfer. I

am also of the view that, contrary to what the Crown asserts, the GAAR does not allow for the collection of the remainder. I therefore propose that the Crown's appeals be allowed in part.

[5] As was the case before the Tax Court, the appeals before us were heard on common evidence and the respondents agreed to be bound by the decision as it pertains to two of them, Microbjo Properties Inc. (Microbjo) and Damis Properties Inc. (Damis) (Reasons, para. 2). The series of transactions, more fully described in the partial agreed statements of fact appended to the Tax Court's reasons, highlight the two types of property that were the subject of the alleged transfer, i.e., property consisting of cash in one case and cash and an intercompany receivable in the other (Reasons, paras. 4-5). The Tax Court held that this was a difference without one as the intercompany receivable had a value equal to its face amount (Reasons, para. 116). The expression "cash" is therefore used throughout to refer to both descriptions of property. As well, like the Tax Court, we have used the amounts at issue for Microbjo to illustrate the mechanics and effect of the transactions as they pertain to all five respondents.

[6] For ease of reference, subsection 160(1) as it read at the relevant time is reproduced in the appendix to these reasons with emphasis on the relevant parts.

BACKGROUND

[7] The five respondents are holding corporations that indirectly owned—each through a 99.99% interest in five respective partnerships—a parcel of a farmland in Brampton, Ontario (Reasons, para. 1). In December 2005, the respondents each agreed to dispose of their undivided interest in the farmland to an arm's length purchaser, with the closure of the sale set for January

16, 2006 (Reasons, para. 20; partial agreed statement of facts pertaining to Microbjo, para. e)). The portion of the agreed upon proceeds of disposition was slated to generate total income approximating $17 million for the respondents (Statement of Adjustments dated January 16, 2006 and appended to the Agreement of Purchase and Sale relating to the Farm Land, Appeal Book, vol. 2, at 397).

[8] Shortly after the agreement was executed, but before the date of the closure, Wilshire Technology Corporation (WTC), an independent third party, approached the respondents and proposed a package deal from which it and the respondents (the parties) could mutually benefit by sharing the amount that was otherwise destined to pay the respondents' income tax liability arising from the disposition of the farmland (Reasons, paras. 21, 22, 33 and 42). It was revealed during the course of the trial before the Tax Court that WTC implemented this type of package deal with as many as 50 other corporations (Reasons, para. 67; memorandum of the respondents, para. 41; letter from the Canadian Revenue Agency (CRA) to Mr. Craig Nerland dated December 8, 2014, Appeal Book, vol. 4, at 873-881; transcript of the examination of Mr. Craig Nerland, Appeal Book, vol. 6, at 1575 to 1580).

[9] The plan required that the respondents rearrange their affairs by moving their partnership interests to a newly formed single-purpose subsidiary and then having the partnerships dispose of the farmland, with the result that the cash received in exchange of the farmland be isolated in the subsidiaries, together with the tax liability (Reasons, para. 44). WTC would then purchase the shares of the subsidiaries for a price substantially in excess of their after-tax value (Reasons, para. 31). The respondents proceeded on the basis that the tax liability of the subsidiaries, once

assumed by WTC, would no longer be theirs, but their expectation was that WTC had the intent and the means to shelter this liability (Reasons, paras. 47 and 51; see also the transcript of the examination of Mr. Paul Bleiwas, Appeal Book, vol. 6, at 1477, lines 15-28 and at 1478, lines 1-3; and the transcript of the cross-examination of Mr. Paul Bleiwas, Appeal Book, vol. 6, at 1502, lines 9-28 and at 1503, lines 1-18).

[10] All the steps underlying the plan were dictated by WTC and presented to the respondents on a “take-it-or-leave-it basis” (Reasons, para. 50 and 135). The respondents did not ask questions (Reasons, paras. 22 and 34) and the only discussions that took place pertained to the time of implementation. The steps, which occurred between January 2006 and December 2006, were, in sequence, the incorporation of the subsidiaries, the tax-free rollover of the partnership interest, the sale of the farmland, the allocation of the partnership income to the subsidiaries, the increase of the stated capital of the shares, the execution a share put option agreement whereby the respondents could compel WTC to buy the shares of the subsidiaries for the agreed upon price, the resignation of the respondents’ designates as directors and officers of the subsidiaries and their replacement by a WTC designate and, finally, the sale of the shares, this last step occurring on December 31, 2006, following the exercise of the share put option by the respondents (Reasons, par. 9; see also the partial agreed statements of facts appended to the Tax Court’s reasons).

[11] WTC insisted on a period of two days between the time when it took control of the subsidiaries and the time at which the share sale would occur, and appointed its designate as their sole director and officer in the interim (Reasons, para. 46). The respondents had no knowledge of

what WTC would do with the subsidiaries during that period (Reasons, paras. 37 and 51). Based on the evidence adduced at trial, the actions taken by WTC in the interim period included the purported purchase of a class 12 computer software by way of an $8.1 million promissory note and the signature of a marketing services agreement through which the software was purportedly to be exploited (see, in the case of Microbjo, the Software Purchase Agreement dated December 30, 2006 between Securitas Video Corp. and Microbjo (Chinguacousy) Inc. (the subsidiary of Microbjo), Appeal Book, vol. 4, at 882; and the Marketing Services Agreement dated December 30, 2006 between NG Global Marketing Corp. and Microbjo (Chinguacousy) Inc., Appeal Book, vol. 4, at 898).

[12] Based on the rounded numbers that pertain to Microbjo, when the shares of the subsidiaries were sold to WTC on December 31, 2006, the subsidiaries each held cash approximating $4 million and carried a tax liability approximating $1.3 million—both resulting from the disposition of the farmland (partial agreed statement of facts pertaining to Microbjo, paras. n), o) and v); Reasons, para. 28).

[13] Despite this tax liability, WTC and the respondents agreed on a purchase price that ignored it, i.e., $3.3 million (partial agreed statement of facts pertaining to Microbjo, para. m); Reasons, para. 31), and to split on a 46/54 basis the amount that would otherwise have been available to discharge it, i.e., roughly $600,000 (46%) going to the respondents and $700,000 (54%) to WTC. The $3.3 million price gave effect to this split (Reasons, para. 132, footnote 46 and para. 186; partial agreed statement of facts pertaining to Microbjo, para. i)). WTC's share of

the split ended up in a bank account in the Cayman Islands by way of a bank transfer made in the days following the share sale (partial agreed statement of facts pertaining to Microbjo, para. u)).

[14] In filing their tax returns for their 2006 taxation year, the subsidiaries claimed capital cost allowance (CCA) in an amount sufficient to offset the tax liability that they bore (partial agreed statement of facts pertaining to Microbjo, para. y)). Although the returns were due in June 2007, they were not filed until late 2009 (transcript of the cross-examination of Mr. Craig Nerland, Appeal Book, vol. 6, at 1619, lines 13-28 and at 1620, lines 1-3).

[15] Reassessments denying the CCA deductions were issued against each of the subsidiaries in November 2012 (partial agreed statement of facts pertaining to Microbjo, para. z)). Objections were filed (see the Crown undertakings #5 and #6 indicating that the subsidiaries' reassessments were confirmed by the Appeals Division between 2015 and 2018: Appeal Book, vol. 5, at 1181), but no challenge was subsequently brought before the Tax Court, with the result that the $1.3 million tax liability ultimately became a tax debt that, to this day, has gone unpaid.

[16] In June 2016, the Minister, relying on subsection 160(1) of the Act, assessed the respondents for the totality of the subsidiaries' unpaid tax debt. These assessments were issued on the basis that a transfer took place when the cash belonging to the subsidiaries ended up in the hands of the respondents and that the consideration given by the respondents in return—i.e., the shares of the subsidiaries—had no value (amended reply to the notice of appeal filed by Microbjo, paras. 7.54 and 7.56, Appeal Book, vol. 1, at 176).

[17] Appeals were subsequently filed by each of the respondents. Although not invoked at the time of the assessments, the Crown raised the GAAR in its replies to the notices of appeal.

DECISIONS UNDER APPEAL

[18] The Tax Court first addressed the question whether subsection 160(1) applies independently of the GAAR. It considered whether each of the underlying requirements were met: specifically, if a transfer of property had taken place; if so, whether the parties were at arm's length at the time of the transfer; and whether the shares given in return constituted fair market value consideration. After answering each of these questions, the Tax Court went on to consider whether the subsidiaries' outstanding tax liability had been offset by the purported shelter implemented by WTC.

The transfer

[19] The Tax Court first asked whether property was transferred from the subsidiaries to the respondents "either directly or indirectly, by means of a trust or by any other means whatever", as these words appear in subsection 160(1) (Reasons, paras. 117-139). After reviewing the case law, it held that the cornerstone for this broad language is the existence of "a connection between the diminishment of the property of one person and the increase in the property of another person" (Reasons, para. 131). The Tax Court then identified the relevant property as the subsidiaries' cash and found that there was indeed a two-step transfer of the property so constituted, first between the subsidiaries and WTC, and second between WTC and the respondents (Reasons, paras. 132-133, 181 and 195 *in fine*). Specifically, this two-step transfer

began when the subsidiaries assigned or directed that the cash that they held be paid to WTC, and ended when WTC discharged the purchase price of the shares by turning over the cash to the respondents (less the $700,000 that it retained), these two steps occurring one immediately after the other (Reasons, para. 138).

The arm's length relationship and the value of the consideration

[20] The Tax Court next addressed whether the respondents were dealing at arm's length with WTC and the subsidiaries at the time of the transfer, specifically when WTC discharged the purchase price (Reasons, paras. 148 and 154). The Tax Court first considered whether the respondents were, at that time, deemed not to be dealing at arm's length with their former subsidiaries, by virtue of being "related" pursuant to paragraph 251(1)(*a*) of the Act. The Tax Court answered the question in the negative after explaining that the transfer took place during the course of the day on December 31, 2006 and that the respondents were deemed by subsection 256(9) of the Act to have relinquished control of the subsidiaries at the commencement of that day (Reasons, paras. 155-157; see also paras. 181 and 184).

[21] After pointing out that there was "no evidence that after December 29, 2006, the [respondents] acted in concert with WTC to direct the actions of the subsidiaries" (Reasons, para. 185), the Tax Court went on to consider whether the respondents were in fact dealing at arm's length with WTC at the time of the transfer (Reasons, paras. 185-202). It conducted an extensive review of the case law, including *Swiss Bank Corp. et al. v. Minister of National Revenue,* [1971] C.T.C 427, 71 D.T.C. 5235 [*Swiss Bank* (Ex. Ct.)], aff'd in 1974 S.C.R. 1144,

72 D.T.C. 6470 [*Swiss Bank* (SCC)], and concluded that "the thread that holds the [factual] arm's length test together is the concept of independent interests" (Reasons, para. 176).

[22] Equipped with this conclusion, the Tax Court went on to conduct a "risks and rewards" analysis (Reasons, para. 198) focussing on the "economic profit" that the respondents and WTC were each seeking (Reasons, paras. 186-187 and 191). WTC sought to make a profit by purchasing the shares of the subsidiaries for an amount equal to the cash that they held, less 54% of their tax liability (Reasons, para. 186). The Tax Court found that WTC assumed all the risks inherent in the implementation and operation of the proposed shelter and stood to gain 54% of the amounts destined to pay the tax liability, i.e., $700,000 (Reasons, para. 186-187 and 201-202).

[23] The respondents for their part sought to profit by selling the shares that they held in the subsidiaries for an amount exceeding the after-tax value of the subsidiaries, specifically by an additional $600,000 representing 46% of the subsidiaries' outstanding tax liability (Reasons, paras. 31 and 191; see also para. 309). As such, the respondents, in addition from being relieved from the tax liability that was theirs, stood to gain $600,000 in the process.

[24] Based on these findings, the Tax Court concluded that the respondents and WTC were in fact dealing at arm's length since they each acted in the pursuit of their own separate and independent interests when the deal was struck (Reasons, para. 197; see also para. 188). The fact that the economic profit being sought was determined by reference to the subsidiaries' tax liability did not alter this result (Reasons, para. 198 *in fine*; see also para. 192), nor did the

"questionable efficacy" of the shelter that WTC purported to implement (Reasons, para. 187). Specifically, this, in and of itself, was not indicative of a non-arms' length relationship as "taxes" are an important consideration in many commercial transactions (Reasons, para. 192). As well, it was not important that the respondents knew that the amount that they were to receive would be paid using the funds of the subsidiaries, because it is reasonable to expect a vendor of property to be indifferent as to the source of the purchase price of property "provided that it is legal" (Reasons, para. 196).

[25] The Tax Court further found that the transactions were structured so as to protect the separate and independent interests of the parties (Reasons, para. 194 *in fine*; see also para. 185 *in fine*), pointing specifically to the share put option agreement which, in its view, "served the purpose of giving WTC the opportunity to take actions in the subsidiaries while protecting the interests of the [respondents]" (Reasons, para. 346; see also paras. 188 and 194). The fact that the plan involved pre-sale steps that seemed unusual and that these steps were without exception dictated by WTC did not alter this finding, because arm's length parties do transact in similar circumstances (Reasons, paras. 188 and 196-197). The Tax Court supported this affirmation by using a car rental analogy (Reasons, para. 197).

[26] Finally, the Tax Court held that, just as the respondents were in fact dealing at arm's length with WTC, they were in fact dealing at arms' length with the subsidiaries at the time of the transfer (Reasons, para. 203), with the result that subsection 160(1) could find no application.

[27] Despite this conclusion, the Tax Court went on to assess the fair market value of the consideration (Reasons, para. 205). Given its finding that the parties were dealing at arm's length at the time of the transfer, the Tax Court held that the fair market value of the consideration given—the shares held by the respondents in the subsidiaries—was "by definition" equal to the cash that was transferred to the respondents (Reasons, para. 220; see also para. 221).

The purported tax shelter

[28] The Tax Court then turned to the purported tax shelter. Before addressing its validity, the Tax Court considered at length the question as to who bore the burden of proving that the underlying reassessments denying the CCA deductions claimed by the subsidiaries were right or wrong (Reasons, paras. 222-261). I note that nothing turns on this discussion in the matter before us because regardless of who bore the burden, the Tax Court had no difficulty in finding that no shelter was in place based on the evidence and this finding is not challenged on appeal.

[29] Indeed, the Tax Court found that the "purported" purchase of the software—using this expression or a variation as many as seven times (Reasons, paras. 263-268)—was not in the furtherance of a *bona fide* business venture undertaken by the subsidiaries to earn income, but was "solely to allow the subsidiaries to claim [CCA] in their T2 tax returns to reduce the tax liability of the subsidiaries" (Reasons, para. 266). As a result, the tax debts remained despite the purported shelter.

[30] In coming to this conclusion, the Tax Court noted that Mr. Nerland—the person designated by WTC to act as sole director of the subsidiaries during the three days leading to the

time of the transfer—had displayed a “striking lack of knowledge and/or memory” about the transactions undertaken by the subsidiaries following the sale of their shares to WTC (Reasons, para. 262). In fact, Mr. Nerland had no idea why the deal was structured the way it was. His simple understanding was that everybody involved would get some money and that the respondents would get the shelter they were looking for (Reasons, paras. 63-64). He signed the documents that had to be signed, without knowing what the software was or what it did (Reasons, paras. 60, 69 and 263-265). As to whether the software was actually purchased, Mr. Nerland testified that he “[did not] recall there ever being any payments made” on the promissory note, and that he “just [did not] think earnest money ever changed hands” (Reasons, paras. 70 and 263).

[31] The Tax Court also highlighted the fact that Mr. Nerland repeatedly confirmed that the subsidiaries had no employees so that no source deductions were to be withheld and made no sales that would attract goods and services tax (GST). Only this allowed him to sign the subsidiaries’ 2006 tax returns as he was satisfied that he could not be held personally liable in his capacity as director for any unpaid taxes (Reasons, paras. 74 and 265).

[32] In addition to Mr. Nerland’s testimony, the Tax Court pointed to independent evidence showing that the shelter was nothing but an idle rumination, including the absence of revenue over the six years following the incorporation of the subsidiaries, the absence of any marketing reports by the purported marketer of the software and the fact that the subsidiaries did not have a bank account nor any employees (Reasons, para. 268). None of the findings underlying the Tax Court’s denial of the claimed CCA are challenged in these appeals and, as noted (see para. 15

above), there is no indication that the reassessments denying these deductions were even challenged by the subsidiaries before the Tax Court.

The GAAR

[33] The Tax Court then considered whether, despite its initial conclusion, the application of section 245 of the Act could save the assessments. It asked whether the three conditions underlying the GAAR had been met, i.e., whether there was a tax benefit (Reasons, paras. 294-301); if so, whether the tax benefit resulted from an avoidance transaction (Reasons, paras. 303-311); and, if so, whether there had been an abuse of subsection 160(1)'s underlying rationale (Reasons, paras. 314-350). The Tax Court found that none of these conditions was met.

[34] The Tax Court began by explaining that although multiple tax benefits had been obtained as a result of the series of transactions, the analysis must be limited to the tax benefit identified by the Crown in support of its case, because "the taxpayer cannot defend against a GAAR assessment without knowing the tax benefit that is in issue" (Reasons, para. 310). It identified the tax benefit as the avoidance of the derivative liability under subsection 160(1) (Reasons, para. 294). According to the Crown, a reasonable alternative arrangement to the transactions undertaken would have been for the subsidiaries to distribute their cash by way of dividend to the respondents, in which case subsection 160(1) would have applied to the resulting transfer (Reasons, para. 295).

[35] The Tax Court noted that this alternative arrangement would have required the respondents to incorporate the subsidiaries and retain ownership of them (Reasons, para. 296 *in*

fine). It went on to discard the benefit so described after explaining that "[t]he subsidiaries were either created and sold to WTC, or they were not created. These two circumstances are not alternatives but are mutually exclusive" (Reasons, para. 299).

[36] The Tax Court also found that the Crown failed to demonstrate the existence of an avoidance transaction, holding that neither the series of transactions, nor any of the transactions within it, were undertaken to avoid subsection 160(1) (Reasons, paras. 307-308).

[37] The Tax Court went on to consider the object, spirit and purpose of subsection 160(1), which is to "vet transfers of property between non-arm's length (and certain other) persons and to collect from transferees the lesser of the amount owed by the transferor under the ITA and the amount by which the transferee is enriched by the transfer" (Reasons, para. 337).

[38] In light of its previous conclusion that the transfer took place between arm's length parties and that fair market value consideration was given in return, the Tax Court found that the object, spirit and purpose of subsection 160(1) were not frustrated (Reasons, paras. 343 and 350). It therefore concluded that the GAAR could find no application in this case (Reasons, para. 355).

[39] On a final note, the Tax Court suggested that the Minister would have been better off to invoke subsection 160(1) against WTC rather than the respondents. In its view, the recovery efforts made by the Minister failed not because of any shortcoming in subsection 160(1), but because she pursued the wrong person (Reasons, paras. 204, 219, 309, 350 and 352).

[40] The Tax Court therefore allowed the appeals and vacated the assessments in their entirety (Reasons, para. 356).

<u>POSITION OF THE PARTIES</u>

The Crown

[41] The Crown argues that the Tax Court erred in concluding that subsection 160(1), whether construed on its own or in light of the GAAR, did not apply in this case. In a non-GAAR context, the Crown first submits that the Tax Court committed an error of law in proceeding on the basis that it was required to determine whether the parties were dealing at arm's length only "[u]pon the conclusion of the final step" of the transfer (memorandum of the Crown, para. 47, citing Reasons, para. 148). This would have led the Tax Court to ignore "facts of crucial relevance to the analysis" (memorandum of the Crown, para. 47; see also paras. 57 and 61), including the fact that the transactions were solely carried out to avoid tax on a substantial economic gain and therefore had no underlying commercial purpose (memorandum of the Crown, paras. 1, 17, 61, 63, 71 and 121). At the hearing before us, counsel for the Crown went further, arguing that from WTC's perspective, "this was just a tax structure designed, marketed [and] promoted to remove the assets [of the subsidiaries] and walk away, and take a percentage of the cash" (transcript of the February 9, 2023 appeal hearing, at 03:15:41-03:15:54).

[42] The Crown submits that the Tax Court further erred when it held that the "notion of an 'ordinary commercial transaction' is not helpful" in addressing the arm's length issue,

commerciality not being “a necessary hallmark of a transaction carried out at arm’s length” (memorandum of the Crown, para. 48, citing Reasons, para. 178; see also paras. 62-64).

[43] The Crown submits that absent these errors, the Tax Court would have had to conclude that the respondents were not in fact dealing at arm’s length with WTC and the subsidiaries given that “the Respondents and WTC acted in concert, and in the same interest (i.e., splitting the benefit of the avoided tax), to direct the bargaining or dictate the conduct of the subsidiaries” (memorandum of the Crown, para. 61).

[44] Turning to the adequacy of the consideration given, the Crown submits that the Tax Court committed a palpable and overriding error in holding that the fair market value of the shares given as consideration was equal to the cash transferred in return (memorandum of the Crown, paras. 68-71). According to the Crown, there is no basis for the Tax Court’s rejection of the unchallenged expert opinion produced by the respondents establishing the fair market value of the shares of the subsidiaries at $2.7 million, being the amount of cash that they held less their outstanding tax liability (memorandum of the Crown, para. 72). The Crown maintains that no arm’s length purchaser would agree to pay a price that ignores the tax liability being assumed (memorandum of the Crown, para. 73).

[45] The Crown therefore submits that subsection 160(1) finds application with the result that the respondents are liable for the tax debt up to the excess in value of the property transferred over the consideration given, i.e., $600,000 (memorandum of the Crown, para. 75).

[46] In the weeks leading to the date of the hearing before us, the Crown sought leave to raise a novel argument in support of its view that the respondents are further liable for the remaining portion of the outstanding tax liability, i.e., $700,000. Specifically, the Crown argues that the Tax Court erred in holding that the words “consideration given for the property” in subsection 160(1) mean “consideration given by the transferee regardless of who receives that consideration” (supplementary written submissions of the Crown, para. 1, citing Reasons, para. 209). In order to be validly given, consideration must “flow to, or for the benefit of, the transferor” (supplementary written submissions of the Crown, para. 1). Since the share consideration was given to WTC and no part flowed to or for the benefit of the subsidiaries, it follows that no valid consideration was given and that the respondents’ derivative liability under subsection 160(1) extends to $1.3 million, being the totality of the subsidiaries’ unpaid tax debt (supplementary written submissions of the Crown, para. 16).

[47] Relying on the GAAR, the Crown adds that regardless of its new argument, subsection 160(1), when construed in light of its object, spirit and purpose, allows for the recovery of the $700,000 difference in the hands of the respondents without regard to the limitation set out in subparagraph 160(1)(*e*)(i) (memorandum of the Crown, para. 76). Specifically, the Crown argues that the respondents undertook the series of transactions jointly with WTC in order to avoid or reduce their liability under subsection 160(1) (memorandum of the Crown, paras. 94 and 108). It further submits that this resulted in an abuse given that the object, spirit and purpose of subsection 160(1) is to protect the tax authorities from any vulnerability that may result from transfers taking place without adequate consideration between non-arm’s length parties (memorandum of the Crown, para. 112). Emphasizing the importance

of “preserv[ing] the CRA’s right to collect” (memorandum of the Crown, para. 116), the Crown submits that consideration given must be held to be inadequate “where it results in the intentional depletion of the assets of a tax debtor, at the expense of the tax authorities” (memorandum of the Crown, para. 117). It follows, according to the Crown, that subsection 160(1)’s underlying rationale would be frustrated if the respondents got credit for the consideration they gave to WTC, because the transactions were pre-ordained to deplete the assets of the subsidiaries and leave the tax collector dry (memorandum of the Crown, paras. 120-123).

The respondents

[48] The respondents stand by the reasons given by the Tax Court, both as they relate to subsection 160(1) construed on its own or in light of the GAAR. They add that in any event, the assessments should have been vacated on the basis that no transfer of property took place, be it direct or indirect. Indeed, the respondents submit that the Tax Court made a palpable and overriding error in failing to note that the cash held by the subsidiaries was replaced by a receivable of an equivalent amount payable by WTC. As such, there was no reduction or depletion of the assets of the subsidiaries (memorandum of the respondents, paras. 66-67 and 73) and since a loan does not give rise to a transfer, the first transfer identified by the Tax Court never took place (memorandum of the respondents, paras. 68-72 and 75).

[49] Turning to the nature of the relationship between the parties, the respondents maintain that the Crown’s attack on the Tax Court’s conclusion that the parties were dealing at arm’s length amounts to nothing more than an invitation to re-weigh the evidence and come to the opposite conclusion (memorandum of the respondents, paras. 35-45). In this respect, the

evidence is clear that the parties sought to realize their respective profit (memorandum of the respondents, paras. 39 and 60).

[50] WTC for its part relied on "its own ingenuity" to reduce or eliminate the tax liability in the subsidiaries (memorandum of the respondents, para. 40). Far from acting solely as an accommodating party, WTC carried out similar transactions with as many as 50 other corporations (memorandum of the respondents, paras. 40-41; see also para. 8 above). The respondents for their part had the assurance that they could realize their profit upon exercising their share put option (memorandum of the respondents, para. 44). A financial gain was realized and nothing was done by the respondents to "avoid the payment of taxes in the [s]ubsidiaries"; rather, it was WTC that took steps towards that end (memorandum of the respondents, para. 42, citing Reasons, para. 200).

[51] Turning to the value of the consideration given, the respondents submit that it was derived by the "premium" that WTC was willing to pay based on the risks and rewards of the transactions (memorandum of the respondents, para. 53 *in fine*). Since the bargain was struck between arm's length parties, the respondents submit that the Tax Court correctly disregarded their expert evidence as to the fair market value of the shares at the time of the transfer (memorandum of the respondents, paras. 51-62). They insist that this expert evidence was only introduced as a precautionary measure in order to limit their liability in the event that they were found not to be dealing at arm's length with WTC (memorandum of the respondents, para. 63).

[52] Turning to the new argument advanced by the Crown, the respondents maintain that it is baseless and ask—invoking *Canada v. Global Equity Fund Ltd.*, 2012 FCA 272, [2013] D.T.C. 5007 [*Global Equity*] at paragraph 40—that the costs incurred by reason of the Crown's motion to advance this argument be awarded to them regardless of the outcome of these appeals (written submissions of the respondents on motion, paras. 15-19).

[53] Finally, the respondents adopt as their own the reasons of the Tax Court rejecting the Crown's GAAR argument and submit that none of the requirements set out in section 245 of the Act are met. They add that even if they and WTC successfully avoided their subsection 160(1) liability as the Crown contends in advancing its GAAR argument, it has not been shown that this was the result of an avoidance transaction nor that this provision's underlying rationale was frustrated (memorandum of the respondents, paras. 88-120). The respondents insist that this result does not point to any flaw in subsection 160(1) as such; rather, it shows that the Minister should instead have sought to recover the tax debt from WTC (memorandum of the respondents, paras. 102 and 120).

ANALYSIS

The standard of review

[54] Errors of law are to be reviewed on a standard of correctness whereas findings of fact or of mixed fact and law cannot be overturned in the absence of a palpable and overriding error, unless an extricable question of law is shown to exist (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 8, 10 and 36).

Was there a transfer?

[55] The Tax Court found that a transfer took place between the subsidiaries and the respondents, but held that its form was of “no consequence” (Reasons, para. 134), which led to some ambiguity. I agree with the respondents when they say that based on the Tax Court’s analysis, two distinct transfers took place—the first between the subsidiaries and WTC, and the second between WTC and the respondents (Reasons, paras. 132-133, 181, 183 and 195 *in fine*)—and that “the proper interpretation of [subs.] 160(1) requires giving effect to each individual transfer” (supplementary written submissions of the respondents, para. 14).

[56] Indeed, subsection 160(1) applies to successive transfers by treating a transferee as a transferor where it is itself a tax debtor either on its own account or as a joint and several debtor with the first transferor (see subparagraph 160(1)(*e*)(ii) of the Act as it read on December 31, 2006 which provides that the amount the transferee and the transferor are jointly and severally liable to pay under the Act include “an amount that the transferor is liable to pay under this Act”; see also *Jurak v. Canada*, 2003 FCA 58, 57 D.T.C. 5145, para. 1). In the present case, the Tax Court found that the property of the subsidiaries first moved from the subsidiaries to WTC, and then from WTC to the respondents by way of two successive transfers. It follows that the respondents can only be found to be jointly and severally liable for the tax liability of the subsidiaries if the conditions for the application of subsection 160(1) against WTC are also met.

[57] In this respect, the respondents take the position that subsection 160(1) cannot apply to the first transfer. Specifically, they maintain that the Tax Court, in holding otherwise, lost sight

of the fact that the cash that was initially paid out of the subsidiaries to WTC was replaced by a loan of an equivalent amount from WTC, as evidenced by the "accounts receivable" entry recorded in the books of the subsidiaries (memorandum of the respondents, para. 73, citing Reasons, para. 52). As it is well established that a loan does not give rise to a transfer, the respondents submit that the Tax Court made an error in failing to take into account this receivable and holding that the first transfer took place.

[58] The Tax Court made no such error. The question whether the book entry reflected a true receivable was at the forefront of the debate before the Tax Court, the Crown taking the position that if a debt had indeed been recorded, it was never to be paid (Reasons, paras. 95-96). The Tax Court, after pointing out that Mr. Nerland could not recall if the receivable existed and after noting that no mention was made of any consideration advanced by WTC in the assignment executed in its favour by the subsidiaries (Reasons, paras. 53 and 78), accepted the Crown's proposition that no loan was in place (Reasons, paras. 133, 136 and 138-139; see also para. 352). The record fully supports this conclusion and there is no basis for the respondents' contention that the Tax Court ignored the evidence in reaching it.

[59] As was found by the Tax Court, since the first transfer took place for no consideration and WTC was related to the subsidiaries within the meaning of paragraph 251(1)(*a*) of the Act at that time, WTC's derivative liability for the subsidiaries' outstanding tax liability is engaged (Reasons, paras. 349-350). Whether the respondents are also liable depends on whether they dealt at arm's length with WTC at the time of the second transfer.

Were the respondents dealing at arm's length with WTC?

[60] The respondents and WTC were not "related" within the meaning of paragraph 251(1)(*a*) at the time of the second transfer. Where persons are otherwise unrelated, paragraph 251(1)(*c*) provides that "it is a question of fact whether persons … are, at a particular time, dealing with each other at arm's length". The issue to be decided is therefore whether the respondents and WTC were in fact dealing at arm's length at the time of the second transfer.

– *The relevant facts*

[61] I first observe that although the Tax Court correctly states that the issue to be determined is whether WTC and the respondents were dealing at arm's length "at a particular time" being the time of the transfer (Reasons, para. 182, citing paragraph 251(1)(*c*)), it remains that all the facts that bear on the relationship at that time, including those that relate to pre-sale transactions, must be taken into account. As was explained by the Supreme Court in *Canada v. McLarty,* 2008 SCC 26, [2008] 2 S.C.R. 79 [*McLarty*] (para. 61; see also *Swiss Bank* (Ex. Ct.), p. 438): "while the initial focus is on the transaction between the [parties], all the relevant circumstances must be considered to determine if the acquiring taxpayer was dealing with the vendor at arm's length". There is therefore no basis for the suggestion that preserving the certainty and predictability of the "relationship rules" requires courts to turn a blind eye on facts that bear on the relationship as it exists at the time of the transfer only because they took place in the past, at a time when the subsidiaries were legally controlled by the respondents (Reasons, para. 182).

[62] The respondents did make the additional argument that Parliament, by resorting to a deeming rule in the recent amendment to section 160 (see new subs. 160(5) of the Act enacted by subs. 38(4) of the *Fall Economic Statement Implementation Act, 2022*, S.C. 2022, c. 19), signalled that absent this fiction, prior facts taking place when the parties were not at arm's length should be ignored in determining whether they were in fact dealing at arm's length at the time of the transfer. I disagree. New enactments cannot be presumed to alter the state of the law or involve a declaration as to the previous state of the law (see *Canada v. Oxford Properties Group Inc.*, 2018 FCA 30, [2018] 6 C.T.C. 1, paras. 46 and 86, citing subsections 45(2) and (3) of the *Interpretation Act,* R.S.C. 1985, c. I-21; see also *Canada v. Remai,* 2009 FCA 340, [2009] D.T.C. 5188 [*Remai*], para. 24), and the binding authorities, including *McLarty* and *Swiss Bank* (Ex. Ct.), make it clear that no facts are to be ignored in applying subsection 160(1) as it read before this amendment if they can be shown to have an impact on the relationship at the time of the transfer. It follows that the amendment, as it relates to the precise issue with which we are concerned, can only be read as a measure that confirms the prior state of the law.

– *The transactions*

[63] Based on the plan and the parties' expectations, the totality of the amount paid out to the respondents and WTC was to be funded by the proceeds of $4 million received from the sale of the farmland (Reasons, para. 195). Because the plan contemplated that the subsidiaries have no other assets (Reasons, para. 44) and that the distribution was to be funded by amounts that would otherwise have been used to discharge the subsidiaries' $1.3 million outstanding tax liability, it follows that in the absence of a tax shelter this liability would go unpaid.

[64] The parties agreed that the respondents would receive 46%—$600,000—of the amount that would otherwise have been available to pay the $1.3 million tax liability and that WTC would keep the remaining 54%—$700,000. These amounts and the corresponding tax liability of $1.3 million are the only figures that need to be kept in mind in the analysis that follows since the value of the shares given as consideration was at least equal to $2.7 million, that is cash of $4 million less the $1.3 million tax liability.

[65] In effect, the respondents got rid of a $1.3 million tax liability for a payment of $700,000 and pocketed the $600,000 difference. Whether the respondents get to keep this difference depends on whether they are found to be vicariously liable under subsection 160(1), a conclusion that, in turn, hinges on whether they were dealing at arm's length at the time of the transfer. This is the issue that the Tax Court was called upon to decide.

– *The errors of the Tax Court*

[66] Strangely, the Tax Court found that the parties each obtained the economic return that they were seeking in the course of the analysis leading to its arm's length conclusion (Reasons, paras. 198 and 203). Although this may be the result of an unfortunate slip, the Tax Court could not logically hold that the respondents obtained their share of the payout without first deciding the arm's length issue as whether the respondents did obtain what they were looking for turns on how the arm's length issue is ultimately decided.

[67] Beyond this, the critical flaw in the Tax Court's arm's length analysis lies in the fact that it was conducted on the basis that the plan proposed by WTC was carried out by the parties with

the expectation that the plan could offset the tax liability generated by the sale of the farmland. Based on Mr. Nerland's evidence and the Tax Court's own factual findings, there was no such prospect.

[68] Indeed, the devastating findings made by the Tax Court about the purported shelter show unequivocally that from WTC's perspective, it was nothing more than a purported exercise designed to give its plan a semblance of legitimacy (Reasons, paras. 262-268; see also the account of Mr. Nerland's testimony at paras. 63-64, 69-72 and 74-79). Among other things, the Tax Court found that (Reasons, para. 266):

> …the purported purchase of computer software by the subsidiaries was not in furtherance of a *bona fide* business venture undertaken by the subsidiaries but was solely to allow the subsidiaries to claim capital cost allowance in their T2 tax returns to reduce the tax liability of the subsidiaries resulting from the sale of the farmland. [my emphasis]

In so holding, the Tax Court recognized that those behind WTC were not concerned with setting up a *bona fide* business in which the purported software could be exploited (see para. 1102(1)(*c*) of the *Income Tax Regulations*, C.R.C., c. 945). Their sole purpose was to fulfill WTC's contractual undertaking pursuant to which the subsidiaries would file T2 tax returns showing the use of a shelter, and provide the respondents with copy of the relevant returns evidencing the CCA claims (see the Share Put Agreement dated December 29, 2006 between WTC and Microbjo, clause 6.7, Appeal Book, vol. 2, at 520). Significantly, this was the only element of the purported shelter that the respondents were contractually entitled to verify; as the Tax Court accurately noted, any further information about the implementation of the purported shelter was off limits (Reasons, para. 261).

[69] The Tax Court's findings as to the true nature of the shelter are unescapable when regard is had to Mr. Nerland's testimony who, "[w]hen asked why it was necessary to go beyond selling the software, … stated that he did not know and could not recall" (Reasons, para. 64). He further indicated that he agreed to act as the sole director of the subsidiaries on the condition that they make no sales and hire no employees because he did not want to be exposed to any tax liability for unremitted source deductions or GST. These conditions were accepted when Mr. Nerland was made a director in December 2006 with the result that the subsidiaries could not possibly have envisaged exploiting the purported software on their own (transcript of the cross-examination of Mr. Craig Nerland, Appeal Book, vol. 6, at 1616, lines 23-28, at 1617, lines 1-8, at 1618, lines 13-28 and at 1619, lines 1-3; Reasons, paras. 74 and 265).

[70] Mr. Nerland was also unaware of the marketing services agreement pursuant to which the software was to be marketed by a third party (Reasons, paras. 71-72 and 264). He went so far as to say that while a promissory note of $8.1 million was issued for the purchase of the software, he did not believe that money ever changed hands (Reasons, paras. 77 and 263).

[71] Mr. Nerland's testimony and the Tax Court's findings make it clear that despite the representations made to that effect, WTC contemplated no real tax shelter. Although WTC "took steps" (Reasons, para. 187; see also paras. 200-201), these were ephemeral at best and solely intended to allow the subsidiaries to take a tax return position reflecting the use of the purported shelter. From WTC's perspective, the so-called "tax strategy" (Reasons, para. 353) amounted to nothing more than emptying the subsidiaries of their cash, putting its hands on its share of the payout, allowing as many years as possible to pass before the revenue authorities could become

aware that the tax liability had turned into a tax debt (see paras. 14-15 above) and leaving the tax collector dry.

[72] Oddly enough, although a finding that the plan was validly undertaken would have been dispositive of the five appeals, the Tax Court did not address this issue until the tail end of its reasons, after having found that the parties were dealing at arm's length (Reasons, paras. 203 and 261 *in fine*-268). Indeed, the Tax Court conducted its arm's length analysis as though WTC was engaged in a *bona fide* attempt to eliminate the tax liability of the subsidiaries. Specifically, it found that WTC assumed the "tax risk" (Reasons, paras. 186, 201-202 and 204) and that as a result, preserving its part of the payout depended on its ability to implement a valid shelter (Reasons, para. 193). Based on the evidence, nothing of the sort was going on insofar as WTC is concerned.

[73] When asked why the Tax Court did not factor the findings that it made as to the true nature of WTC's plan into its arm's length analysis, counsel for the respondents was unable to provide an explanation (see the transcript of the February 9, 2023 appeal hearing, at 01:58:22-02:02:33). The reason why the Tax Court proceeded as it did is indeed difficult to explain, although it did make the point that the fundamental shortcomings of the plan were not relevant to the arm's length determination because these would only have become apparent with the passage of time, through hindsight, well after the time of the transfer (Reasons, para. 187; see also para. 353). I accept that this may be so for the respondents, but certainly not for WTC and those behind it.

[74] The Tax Court's failure to take into account the true nature of the plan amounts to an error of law. Indeed, as was explained by the Supreme Court in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 (paras. 39 and 41), a tribunal that fails to consider evidence that the law requires it to consider commits an error of law. In this respect, the task in conducting a factual arm's length analysis is to assess the precise nature of the relationship between the parties at the time of the transfer. As a result, there is no justification for addressing the issue without regard to both parties' perspectives. This is particularly so as WTC was the mastermind behind the plan and only it was aware of its true nature.

[75] I should point out at this stage of the analysis that although the parties' state of mind is essential to the arm's length component of the analysis, subsection 160(1) applies objectively so that liability accrues regardless of whether the parties were well intended or not when they embarked on the transactions underlying the plan (*Eyeball Networks Inc. v. Canada*, 2021 FCA 17 [*Eyeball Networks*], para. 39; *Wannan v. Canada*, 2003 FCA 423, 57 D.T.C. 5715, para. 3).

[76] When regard is had to the true nature of the plan, the Tax Court's suggestion that the Minister would have been better off to invoke subsection 160(1) against WTC rather than the respondents seems, with great respect, somewhat naïve (Reasons, para. 204; see also Reasons, paras. 219, 309, 350 and 352). Although it is true that the Minister was free to pursue either party, there is no basis for believing for a moment that WTC and those behind it would have left assets in Canada within the reach of the tax collector (see, for example, the partial agreed statement of fact pertaining to Microbjo, para. u), which indicates that WTC's share of the

payout ended up offshore in a bank account in the Cayman Islands in January 2007, a few days following the transactions; see also Crown undertaking #7 indicating that WTC was not assessed under s. 160 because it acted solely as a conduit: Appeal Book, vol. 5, at 1181). Significantly, the Minister could not have been aware that the tax liability of the subsidiaries became an acknowledged tax debt until 2014 or 2015 when the subsidiaries, after filing two years late and objecting to the reassessments issued against them, abandoned their right of appeal to the Tax Court (see para. 15 above). It is telling that to this day, some 17 years after the fact, we still do not know based on the record as constituted before us who was actually behind WTC (see the transcript of the February 9, 2023 appeal hearing, at 01:49:44-01:50:45, where counsel for the respondents informed the Court that the person who they presented as the person behind WTC—Robert J. MacRae (see memorandum of the respondents, para. 8; Reasons, paras. 40 and 59)—was not a principal of WTC but an external advisor).

[77] When the scheme is viewed from WTC's perspective as it must be given that it conceived and implemented it without the respondents being even allowed to ask questions as to it nature, it becomes clear that the "economic profit" that both parties were looking for was to be funded by money that was not theirs. This, as shown in the paragraphs that follow, has a decisive impact on the factual arm's length analysis.

– *The factual arm's length analysis*

[78] The purpose of the arm's length test is to verify whether the relationship between transacting parties is such that courts can have the assurance that the terms of the deal "will reflect ordinary commercial dealing[s] between parties acting in their separate interests" (*Swiss*

Bank (SCC), p. 1152; *McLarty*, para. 43; *Remai*, para. 34). Such assurances cannot be found unless parties not only seek a profit, but also transact with their own property or money with the result that what is at stake is their own patrimony or property. Human behaviour being what it is, this combination allows for the presence of the tension that drives each party to “seek[] to get the best possible terms for himself” (*Minister of National Revenue v. Kirby Maurice Company Limited*., 58 D.T.C. 1033, [1958] C.T.C. 41 (Ex. Ct.), p. 1037). It is the existence of this tension that provides the assurance that the terms of the deal reflect ordinary commercial dealings.

[79] A cogent demonstration can be found in the Supreme Court’s decision in *Swiss Bank* (SCC), where the issue was whether non-resident lenders were dealing at arm’s length with a Canadian borrower, pursuant to then clause 106(1)(*b*)(iii)(A) of the *Income Tax Act*, R.S.C. 1952, c. 148 (now clause 212(1)(*b*)(i)(A) of the Act). The Supreme Court asked whether the lender-borrower relationship presented “the assurance that the interest rate will reflect ordinary commercial dealing between parties acting in their separate interests” (*Swiss Bank* (SCC), p. 1152) and found that it did not because the borrower was “captive to the interests” of the lenders and, therefore, no tension was in play (*Swiss Bank* (SCC), p. 1151). Subsequent rulings have reiterated the need for this tension to exist by insisting on the presence of “ordinary market forces” (*Canada v. GlaxoSmithKline Inc.*, 2012 SCC 52, [2012] 3 S.C.R. 3, para. 1) or “commercial safeguard[s]” (*Petro-Canada v. Canada*, 2004 FCA 158, 58 D.T.C. 6329 [*Petro-Canada*], para. 59) before a factual arm’s length relationship can be found to exist.

[80] Whether and the extent to which this tension exists in any given case is an issue that must be addressed in light of the relevant facts (*McLarty*, para. 62) and the particular provision of the

Act pursuant to which the issue arises (*Keybrand Foods Inc. v. Canada*, 2020 FCA 201 [*Keybrand Foods*], paras. 35; see also para. 46). Just as the applicable provision in *Swiss Bank* (SCC) was concerned with interest rate manipulations, subsection 160(1) is concerned with price manipulations in the context of non-arm's length property transfers. As affirmed by this Court, subsection 160(1) was enacted to "protect the tax authorities against any vulnerability that may result from a transfer of property between non-arm's length persons for a consideration that is less than the fair market value of the transferred property" (*Eyeball Networks*, para. 44, citing *Canada v. 9101-2310 Québec Inc.*, 2013 FCA 241, [2013] D.T.C. 5170, para. 60; see also *Canada v. 594710 British Columbia Ltd.*, 2018 FCA 166, [2019] 5 C.T.C. 1, para. 3).

[81] Turning to the facts of this case, it is true that WTC and the respondents each sought to enrich themselves and that they were, in theory at least, at odds as to how to split the payout. However, because they were splitting amounts earmarked to pay a tax liability that was bound to become a tax debt rather than their own money, the resulting split does not provide the assurance that it reflects an ordinary commercial dealing between parties acting in their separate interests. Specifically, the tension that provides that assurance did not exist to the extent that it would had the parties been dealing with their own money.

[82] Perhaps the best illustration of this significantly abated tension is provided by the Tax Court's own "risks and rewards" analysis. The Tax Court correctly posited that, by assuming ownership of the subsidiaries, WTC assumed the totality of the tax risk that they bore (Reasons, paras. 186, 201-202 and 204) and yet, WTC determined that the rewards would be shared on a close to 50/50 basis. As a matter of first impression, no arm's length party assuming all the risks

and acting in the belief that its own money is at stake would have agreed to such a split, let alone impose it (compare *Keybrand Foods* at para. 66, citing *Petro-Canada*, para. 55).

[83] The Tax Court did not confront this price anomaly. It recognized that WTC, "[f]or its own reasons", undervalued the tax liability of the subsidiaries (Reasons, para. 201) but did not ask why; it simply held, based on its prior conclusion that the parties were at arm's length, that the price at which they transacted was "by definition" reflective of fair market value (Reasons, para. 220; see also para. 221). In the face of the Tax Court's own analysis, this price was out of whack.

[84] A transaction that takes place at a price far removed from the price that one would expect based on the risks assumed and the rewards sought can provide a strong indication that the parties are not dealing at arm's length (*Keybrand Foods*, para. 68; *Remai*, para. 34). To be clear, the fact that the adequacy of the price is addressed in the "second part" of subsection 160(1) rather than in the "first part", as the Tax Court points out (Reasons, paras. 104 and 106), is not a reason for ignoring significant price anomalies in conducting a factual arm's length analysis. After all, price manipulation is the very concern that the arm's length test seeks to curtail under that provision.

[85] Although there are circumstances that can explain price anomalies, for instance when one party plainly outsmarts the other contracting party, nothing of the sort can explain the lopsided price in the present case. Quite clearly, the fact that the parties were splitting money that was not

theirs and believed that they could profit without putting at risk their own patrimony or property took away one of the fundamental safeguards that is inherent in an arm's length relationship.

[86] Further, once the respondents were swayed to buy into WTC's plan by the thought of turning an unexpected profit out of their crystallized tax liability through what they viewed as a risk-free exercise, they became the instruments through which WTC, acting as the sole mastermind, would lay its hands on the $1.3 million, isolate it with the remaining cash in the subsidiaries and share it with the respondents in the proportion that it imposed. Contrary to what the Tax Court asserts, no part of the contractual arrangement lessened the respondents' state of subservience.

[87] In this respect, the Tax Court held that the share put agreement shows that the respondents acted in their own independent interests throughout (Reasons, paras. 185 *in fine*, 188 and 194), but it evidences the exact opposite. Like all the other terms of the deal, this agreement was imposed by WTC—it was "always" inserted as part of WTC's scheme (Reasons, para. 62)—because no one, including the respondents, would have agreed to transfer control of the subsidiaries to WTC while remaining the controlling shareholders without such an agreement being in place (Reasons, paras. 32, 47 and 188). Indeed, proceeding without it would be no different than leaving the keys to one's home to a total stranger with no way of ensuring that the furniture would remain. With respect, the share put agreement was incorporated into the plan by WTC simply because its scheme could not have been sold without it. If anything, it is a further manifestation of the respondents' total state of subservience.

[88] The Tax Court also relied on a car rental analogy to assert that take-it-or-leave-it arrangements with no questions asked are not unusual (Reasons, para. 197). The fundamental difference, however, is, first, that the car rental payments are made by the clients with their own money, and second, that however asymmetrical the bargaining relationship between car rental companies and their clients might be, one never becomes the other's instrument as occurred here.

[89] Finally, although I agree with the Tax Court that "[t]he fact that the economic return [is] determined with reference to a tax liability" is not necessarily indicative of a non-arm's length relationship (Reasons, para. 198 *in fine*; see also para. 192), questions necessarily arise about the arm's length nature of the bargain when the added value contemplated by the proponents of the deal is derived from the non-payment of a tax debt and the transaction price is clearly off the mark when assessed in the light of normal financial considerations.

[90] In the end, the absence of the arm's length tension caused by the fact that the parties were splitting money that did not belong to them and revealed by the respondents' disproportionate share of the payout and their absolute willingness to blindly abide by WTC's every term in order to obtain it lead me to conclude that the respondents were not in fact dealing at arm's length with WTC at the time of the transfer.

The fair market value of the consideration given

[91] The task of determining the fair market value of the consideration given by the respondents pursuant to paragraph 160(1)(*e*) is not controversial as the respondents have conceded that if they were not dealing at arm's length with WTC, the fair market value of the

shares that they gave as consideration must be discounted by $600,000, from $3.3 million to $2.7 million (oral submissions of the respondents, Appeal Book, vol. 6, at 1716, lines 7-28 and at 1717, lines 1-7). This is in line with the respondents' own expert opinion (Reasons, para. 81) and consistent with the case law which unequivocally holds that an arm's length purchaser of shares would discount any existing tax liability of the underlying corporation in determining their value (*626468 New Brunswick Inc. v. Canada*, 2019 FCA 306, para. 39, referring to *Deuce Holdings Ltd. v. Canada*, 51 D.T.C. 921, [1998] 1 C.T.C. 2550 (TCC), paras. 30 and 32).

[92] Giving effect to the limit set out in paragraph 160(1)(*e*), the respondents are therefore liable for the outstanding tax debt of the subsidiaries up to the amount of $600,000, being the lesser of the monetary advantage that they derived from the transfer and the outstanding $1.3 million tax debt (subparas. 160(1)(*e*)(i) and 160(1)(*e*)(ii) respectively).

Can the remaining $700,000 be recovered from the respondents?

– *The Crown's new argument*

[93] Relying on its new argument, the Crown maintains that the Tax Court erred in holding that the words "consideration given for the property" in subsection 160(1) mean "consideration given by the transferee regardless of who receives that consideration" (supplementary written submissions of the Crown, para. 1, citing Reasons, para. 209). According to the Crown, the consideration must "flow to, or for the benefit of, the transferor" (supplementary written submissions of the Crown, para. 1) and since no part of the consideration given by the respondents flowed to or for the benefit of the subsidiaries, it follows that consideration was not

validly given for purposes of subsection 160(1). The result is that the respondents' derivative liability would extend to the full amount assessed, $1.3 million.

[94] In advancing this argument, the Crown ignores the fact that we are dealing with two successive transfers (see paras. 55-59 above) and that the one with which we are concerned involved consideration in the form of the shares of the subsidiaries moving from the respondents as transferees to WTC as transferor.

[95] In addition, there is no basis for the proposition that consideration must be ignored unless it flows to or for the benefit of the transferor. Subparagraph 160(1)(*e*)(i) refers to "consideration given" rather than "consideration received". The words "consideration given" were added in 1983 when the scope of subsection 160(1) was expanded to apply beyond transfers made between family members (*An Act to amend the statute law relating to income tax (No. 2)*, S.C. 1980-81-82-83, c. 140, s. 107 (Bill C-139)). Prior to this amendment, the derivative liability imposed by subsection 160(1) extended to the lesser of the transferor's tax liability and the monetary value of the property transferred, without credit being given for any consideration given in return. Bill C-139 changed that by limiting the liability of a transferee "to the amount by which the fair market value of the property at the time of transfer exceeds the fair market value of any consideration given in return" (*Explanatory Notes to Bill C-139*, 32nd Parliament, 1st Session, December 1982, clause 107). In this context, the use of the words "consideration given" rather than "consideration received"—as they appeared in the former version of the Act—can only be viewed as a deliberate choice reflecting Parliament's intention to limit the derivative

liability of transferees to the monetary advantage that they derive from the transfer (compare *Eyeball Networks*, paras. 67-68).

[96] The Crown's attempt to recover the remaining $700,000 from the respondents pursuant to this new argument must therefore be rejected.

– *The GAAR*

[97] The Crown pursues its quest to recover the remaining $700,000 from the respondents by invoking the GAAR. Specifically, the Crown submits that the respondents embarked on the plan with the primary purpose of avoiding their own derivative liability under subsection 160(1) as well as allowing for the same result with respect to WTC's share of the payout. According to the Crown, the respondents' success in depleting the assets of the subsidiaries for their benefit and that of WTC defeats subsection 160(1)'s underlying rationale. Hence, the Crown argues that the Minister should be entitled to recover the whole of the outstanding tax debt from the respondents without regard to the limit set out in paragraph 160(1)(*e*).

[98] The difficulty with the Crown's GAAR argument is that the factual premise on which it rests runs directly against the Tax Court's finding that the respondents did not undertake the transactions in order to avoid the application of subsection 160(1) (Reasons, paras. 307-308). In so holding, the Tax Court accepted Mr. Bleiwas' testimony to the effect that legitimate tax shelters capable of erasing the tax liability of the subsidiaries were prevalent at the time when the plan was presented to the respondents, and that they embarked on the plan in the unverified but genuine belief that WTC was contemplating the implementation of such a shelter (transcript of

the cross-examination of Mr. Paul Bleiwas, Appeal Book, vol. 6, at 1502, lines 9-28 and at 1503, lines 1-18; Reasons, para. 51). The Crown has not even attempted to show that a palpable and overriding error was committed in this regard, and I can detect none.

[99] The Crown's attempt to recover the remaining $700,000 from the respondents by invoking the GAAR must therefore also be rejected.

DISPOSITION

[100] For the above reasons, I would allow the five appeals in part and giving the judgments that the Tax Court ought to have given, I would refer the assessments back to the Minister for reconsideration and reassessment on the basis that the respondents are liable for the tax debt of the subsidiaries up to the amount by which the cash or the cash and the intercompany receivable transferred to them exceeds the fair market value of the consideration that they gave in return, the resulting liability being $605,290 for Microbjo; $644,217 for Damis; $385,350 for Zagjo Holdings Limited; $598,714 for Sabel Investments II-A Limited; and $377,835 for Devamm Investments II-A Limited.

[101] Because success is otherwise almost evenly divided, the Crown and the respondents should assume their respective costs before both courts.

[102] I note before closing that the respondents did ask, relying on *Global Equity*, for a special award with respect to costs incurred in responding to the Crown's motion to raise its new argument. I am not inclined to grant this request because the Crown's new argument, in contrast

with the new arguments raised in *Global Equity* (paras. 33 and 36-40), was fully advanced before the Tax Court (see the oral submissions of the Crown, Appeal Book, vol. 6, at 1800, lines 3-28 and at 1801, lines 1-3; and the oral submissions of the respondents (then the appellants), Appeal Book, vol. 6, at 1740, lines 27-28 and at 1741, lines 1-9) and, as a result, could be addressed on the basis of the existing evidentiary record without the need to argue anything more than what was argued before the Tax Court.

"Marc Noël"
Chief Justice

"I agree.
Richard Boivin J.A."

"I agree.
Mary J.L. Gleason J.A."

APPENDIX

160 (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

160 (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

(a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

(b) a person who was under 18 years of age, or

b) une personne qui était âgée de moins de 18 ans;

(c) a person with whom the person was not dealing at arm's length,

c) une personne avec laquelle elle avait un lien de dépendance,

the following rules apply:

les règles suivantes s'appliquent :

(d) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor [*sic*], and

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts revisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

(e) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

[Emphasis added.]

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années;

aucune disposition du présent paragraphe n'est toutefois réputée limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi.

[Non soulignés dans l'original.]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-115-21

APPEAL FROM FIVE AMENDED JUDGMENTS OF JUSTICE JOHN R. OWEN DATED MARCH 26, 2021, DOCKET NOS. 2016-4783(IT)G, 2016-4785(IT)G, 2016-4787(IT)G, 2016-4788(IT)G AND 2016-4789(IT)G.

DOCKET:	A-115-21
STYLE OF CAUSE:	HIS MAJESTY THE KING v. MICROBJO PROPERTIES INC., DAMIS PROPERTIES INC., SABEL INVESTMENTS II-A LIMITED, ZAGJO HOLDINGS LIMITED, DEVAMM INVESTMENTS II-A LIMITED
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 9, 2023
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	BOIVIN J.A. GLEASON J.A.
DATED:	JULY 5, 2023

APPEARANCES:

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