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A-392-16, 2018 CAF 3, 2018 FCA 3 – Noël C.J. (Gauthier and de Montigny JJ.A. concurring) – 18/01/09 – Tax – Income tax – Tax avoidance – General anti-avoidance rule (GAAR) – Miscellaneous – Taxpayer accepted offer to purchase his shares – Taxpayer arranged series of transactions purportedly to recognize his spouse's contributions to business – Taxpayer sold half of his shares to spouse for fair market value of $1,043,889 and waived application of rollover in s. 73(1) of Income Tax Act so he realized capital gain of $1 million and spouse's adjusted cost base (ACB) of shares was equal to purchase price of $1,043,889 – Taxpayer gifted other half of his shares to spouse and allowed rollover in s. 73(1) of Act to operate, so he was deemed to have disposed of shares, and spouse was deemed to acquire them, at amount equal to their ACB of $43,889 – Spouse sold all of her shares to purchaser for $2,087,778 – As shares had different ACB and were identical property within s. 47(1) of Act, their ACB was deemed to be equal to average cost of $1,087,778 – Spouse realized capital gain of $1 million, half of which was taxable – Given rollover with respect to shares that were gifted, s. 74.1 of Act attributed to taxpayer half of that capital gain realized by spouse – Minister reassessed taxpayer under general anti-avoidance rule (GAAR) in s. 245 of Act to attribute to taxpayer taxable capital gain of $250,000 that had been realized by spouse – Tax Court judge dismissed taxpayer's appeal but allowed spouse's appeal – Judge concluded that three conditions required to apply GAAR were met – Judge held that series of transactions resulted in taxpayer obtaining tax benefit by avoiding tax on half of gain on sale of shares – Judge dismissed argument that purpose of transactions was to reward spouse for her contribution to business and held that avoidance transaction had been established – Judge concluded that purpose of s. 74.2(1) of Act was defeated because capital gain that should have been taxpayer's was split in half and shared with his spouse – Taxpayer appealed – APPEAL DISMISSED – Judge was correct in holding that attribution to taxpayer of entire taxable capital gain realized on sale of shares was justified under GAAR – Judge was correct in finding that taxpayer received personal benefit by avoiding paying taxes on portion of capital gain that would otherwise have been his – Purpose of making gift to spouse in recognition of her contribution to business coexisted with that of tax minimization – Judge did not err in finding that sale to spouse was quest to obtain tax benefit for taxpayer, which was avoidance transaction – Judge was correct in concluding that there was abuse – Splitting of capital gain that had accrued in shares while held by taxpayer prior to implementation of transactions by using s. 47(1) of Act and fact that he was taxed on only part of this gain frustrated purpose of ss. 73(1) and 74.2(1) of Act, which was to ensure that gain or loss deferred by reason of rollover between spouses be attributed back to transferor.

Date: 20180109

Docket: A-392-16

Citation: 2018 FCA 3

[ENGLISH TRANSLATION]

CORAM: NOËL C.J.

GAUTHIER J.A.

DE MONTIGNY J.A.

BETWEEN:

GUY GERVAIS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on November 14, 2017.

Judgment delivered at Ottawa, Ontario, on January 9, 2018.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: GAUTHIER J.A.

DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal brought by Guy Gervais (Mr. Gervais or the appellant) from a decision rendered by Jorré J. of the Tax Court of Canada (the TCC Judge) confirming reassessments issued by the Minister of National Revenue (the Minister) under the general anti#avoidance rule (GAAR) set forth in section 245 of the *Income Tax Act,* R.S.C. (1985), ch. 1 (5th supp.) (the ITA) with respect to the appellant's 2002, 2003 and 2004 taxation years. These reassessments reconfigured the tax consequences arising from a sale of shares by attributing to the appellant a capital gain of $500,000, which had been realized by his spouse, Ms. Gendron.

[2] In support of his appeal, the appellant maintains that the GAAR does not apply in this case because none of the conditions precedent to its application are present. He suggests that the TCC Judge committed a number of legal errors in coming to the contrary conclusion.

[3] For the reasons which follow, I am of the view that no such error has been demonstrated and that the appeal should accordingly be dismissed.

[4] The legislative provisions relevant to the analysis are reproduced in the appendix to these reasons.

THE RELEVANT FACTS

[5] The facts, for the most part, are described in the agreed statement of facts filed by the parties, as complemented by the detailed description of the evidence set out in the reasons of the TCC Judge (reasons, at paras. 27 to 80). They need not be repeated. The following summary is sufficient for present purposes.

[6] The appellant and his brother, Mario Gervais, were shareholders in Vulcain Alarme Inc. (Vulcain) until 2002, when they received an offer to purchase from an arm's length corporation by the name of BW Technologies Ltd. (BW Technologies). The offer was accepted on or before September 22, 2002. At the time it was accepted, the share capital held by Mr. Gervais included 790,000 Class "A" common shares.

[7] Knowing that a sale was imminent, Mr. Gervais and his spouse consulted a law firm with the view of obtaining information about the tax implications of the planned sale and for advice as to how to transfer $1,000,000 from the proceeds to Ms. Gendron, in recognition for the contribution which she had made to the business over the years. The appellant and his spouse claim that it was solemnly with this purpose in mind that the following steps were undertaken.

[8] First, on September 26, 2002, a reorganization of the share capital of Vulcain was completed and the 790,000 common shares held by Mr. Gervais were converted into 2,087,778 Class "E" preferred shares.

[9] That same day, Mr. Gervais sold 1,043,889 of the 2,087,778 preferred shares that he held to Ms. Gendron for $1,043,889, or $1 per share. With respect to the sale, Mr. Gervais elected to waive the application of the rollover provided for in subsection 73(1) of the ITA. Thus, as the adjusted cost base (ACB) of the shares was $43,889, he realized a capital gain of $1,000,000. That election also meant that the ACB of the shares purchased by Ms. Gendron was equal to the actual purchase price – *i.e.*: $1,043,889 or $1 per share. It is common ground that this price reflects the fair market value of the shares sold, as it coincides with the price stated in the arm's length offer to purchase made by BW Technologies which was eventually accepted.

[10] On September 30, 2002, Mr. Gervais gifted the remaining 1,043,889 preferred shares to Ms. Gendron. Regarding this second transfer, he allowed the rollover provided for in subsection 73(1) of the ITA to operate by opting not to exclude it. Mr. Gervais was therefore deemed to have disposed of these shares for a consideration equal to their ACB, – *i.e.*: $43,889, and Ms. Gendron was deemed to have acquired them at that same price.

[11] On October 7, 2002, Ms. Gendron sold all the shares that she held, – *i.e.*: 2,087,778 shares to BW Technologies for $2,087,778. As these shares had a different ACB and were "identical property" within the meanings of subsection 47(1), their ACB was deemed to be equal to their average cost, – *i.e.*: $1,087,778.

[12] Ms. Gendron thus realized a capital gain of $1,000,000, half of which was taxable. Given the rollover that took place under subsection 73(1) with respect to the shares that were gifted, section 74.1 of the ITA attributed to Mr. Gervais a portion of the taxable capital gain realized by Ms. Gendron. Consequently, half of the taxable capital gain realized by Ms. Gendron following the sale of the shares which had been gifted to her, – *i.e.*: $250,000, was attributed to Mr. Gervais, leaving the other half in the hands of Ms. Gendron.

[13] The end result is that part of the capital gain that Mr. Gervais would have realized if he had sold the shares without first transferring them to his spouse was realized by her, thus giving her the opportunity to claim her $250,000 lifetime capital gains exemption pursuant to subsection 110.6(2.1) of the ITA.

[14] In assessing Mr. Gervais under the GAAR, the Minister reconfigured the tax consequences arising from these transactions by attributing to him the taxable capital gain of $250,000 realized by his spouse on the sale to BW Technologies.

TAX COURT OF CANADA DECISION

[15] The TCC Judge concluded that the three conditions required to apply the GAAR were met and that the Minister correctly relied on section 245 in attributing the capital gain realized by Ms. Gendron to Mr. Gervais.

[16] He first asked if the series of transactions resulted in a tax benefit for Mr. Gervais. According to *Copthorne Holdings Ltd. v. Canada,* 2011 SCC 63*,* [2011] 3 S.C.R. 721 [*Copthorne*], the presence of a tax benefit is determined by comparing what the taxpayer could reasonably have done with what was actually done. Using that approach, the TCC Judge found that, instead of selling his shares directly to BW Technologies, as he could have done, Mr. Gervais created a structure that allowed him to avoid the tax on half of the gain that was ultimately realized. The series of transactions thus resulted in Mr. Gervais obtaining a tax benefit.

[17] Second, the TCC Judge considered whether the existence of avoidance transaction had been established. The appellant argued in this regard that the purpose of the series of transactions was not tax-related, as the sole objective was to reward Ms. Gendron for her contribution to the business over the years. The TCC Judge dismissed this argument. He first held that the reorganization of the share capital, the sale of the first block of shares, the subsequent gift of a second block of shares, and the sale of shares to BW Technologies were part of the series of transactions. According to him, each of these transactions was planned in advance to produce the desired result. Moreover, the transactions which formed part of the series were avoidance transactions, as one of the steps – *i.e.*: the sale to his spouse – would not have been necessary if the sole purpose of the series was to reward Ms. Gendron. Citing *Copthorne*, the TCC Judge concluded that the lack of a *bona fide* purpose in relation to one of the steps was sufficient to hold that the existence of a series of avoidance transactions had been established (*Copthorne*, at para. 40).

[18] As to the abusive nature of the series, the TCC Judge relied on the decision of the Supreme Court of Canada in *Lipson v. Canada,* 2009 SCC 1, [2009] 1 S.C.R. 3 [*Lipson*]. According to that decision, the purpose of subsection 73(1) is to defer the gain or loss from a transfer of property between spouses and sections 74.1 and 74.5 are specific anti-avoidance rules aimed at preventing spouses from benefiting from their non-arm's length relationship by splitting their income.

[19] Relying on that analysis, the TCC Judge concluded that the purpose of subsection 74.2(1) was defeated because a capital gain that should have been Mr. Gervais' was split in half and shared with his spouse, a result which this provision is intended to prevent.

THE PARTIES' POSITIONS

- The appellant

[20] The appellant submits that the TCC Judge erred in finding that the GAAR applied in this case. More specifically, he argued that none of the three conditions needed to trigger the application of the GAAR are present.

[21] Regarding the tax benefit, the appellant submitted that it was not he who received a tax benefit, but rather his spouse, Ms. Gendron (appellant's factum, at paras. 26, 27). It was she who was able to avoid the tax payable on the taxable capital gain that she realized by using her exemption. That result, however, is consistent with the intent of Parliament (appellant's factum, at para. 29).

[22] Regarding the avoidance transaction, the appellant emphasized that the TCC Judge recognized that the series of transactions had been undertaken in order to recognize Ms. Gendron's contribution to the company by giving her a portion of the proceeds of the sale (appellant's factum, at paras. 35, 38). That being the true objective, he erred in finding that the transactions within the series were avoidance transactions (appellant's factum, at para. 46). Moreover, the finding that the sale was not necessary if the sole objective was to provide a benefit to Ms. Gagnon is contrary to

the well#established principle that taxpayers may organize their affairs in order to minimize their taxes (appellant's factum, at paras. 43, 44).

[23] In any event, the appellant argued that there was no abuse of any provision used to obtain the tax benefit. Subsection 73(1) provides for an election that taxpayers can exercise to their advantage; the exercise of that election cannot itself be abusive (appellant's factum, at paras. 52, 53). As sections 74.1 to 75.5 do not apply to this case, they also cannot have been abused (appellant's factum, at para. 55). Moreover, subsection 47(1) applies automatically, so that no abuse can be said to result from its application (appellant's factum, at para. 56).

[24] The appellant closed his arguments by stating that the conclusions drawn from *Lipson* are incorrect, as that case involved [translation] "transactions that were clearly prohibited by law", while the transactions in issue are "permitted by law" (appellant's factum, at para. 60). Simply minimizing the taxes that otherwise would have been payable cannot constitute an abuse (appellant's factum, at para. 64).

- The respondent

[25] According to the respondent, the TCC Judge was correct in finding that there was a tax benefit. The appellant could have sold his shares directly to BW Technologies without the interposition of his spouse, in which case he would have realized a capital gain of $2,000,000 (respondent's factum, at para. 38). The series of transactions allowed the appellant to split the capital gain, thus reducing the portion that would otherwise have been taxable in his hands. From the appellant's perspective, this reduction gives rise to a tax benefit (respondent's factum, at para. 41).

[26] The respondent also argued that the reorganization of the share capital, the sale, the gift, the election made under subsection 73(1) and the triggering of the averaging mechanism set out in section 47 constitute a series of avoidance transactions because, as noted by the TCC Judge, each of those steps was planned in advance to produce the desired result (respondent's factum, at paras. 43 and 44). In that regard, the TCC Judge was correct in finding that the sale of the shares to his spouse was not necessary in order to reward Ms. Gendron for her past services (respondent's factum, at para. 48). This suffices in order to qualify the transactions within the series as avoidance transactions (respondent's factum, at para. 49).

[27] Finally, the respondent argues that *Lipson* is determinative of the outcome in this case, as it defines the object, spirit and purpose of subsection 73(1) and sections 74.1 to 74.5 (respondent's factum, at para. 54). In this regard, the fact that Mr. Gervais was only taxed on a portion of the capital gain realized on the sale to BW Technologies defeats the object, spirit and purpose of subsection 73(1). This provision provides for a deferral of the taxes which would otherwise be payable, not their elimination (respondent's factum, at para. 60). Moreover, subsections 74.2(1) and 74.5(1) were used to allow the appellant to split the capital gain between him and his spouse, which is contrary to the object, spirit and purpose of those provisions (respondent's factum, at paras. 61 to 63).

STANDARD OF REVIEW

[28] In order for the GAAR to apply, there must be a tax benefit, an avoidance transaction and abuse of a provision of the Act: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 17 [*Trustco*]. The question whether there is a tax benefit or whether the existence of a series of avoidance transactions has been established gives rise to a question of fact with respect to which the trial court is entitled to deference: *Trustco* at paras. 19, 44; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10 [*Housen*]. The overall analysis regarding abuse gives rise to a question of mixed fact and law as it involves the application of the provisions of the Act to the facts: *Trustco*, at para. 44. However, the construction of the relevant provisions gives rise to a question of law which is to be reviewed on a standard of correctness (*Trustco*, at para. 44; *Housen* at para. 8).

THE RELEVANT STATUTORY PROVISIONS

[29] Before beginning the analysis, it is useful to briefly review the provisions relied upon by the appellant in order to obtain the result that he did.

[30] Paragraphs 69(1)(*b*) and (*c*) provide that, when there is a transfer of property between persons who do not deal at arm's length—including spouses or common-law partners—at a price that is less than the fair market value of the property transferred, the transferor and the transferee are respectively deemed to have disposed of and acquired the property at that fair market value with the resulting tax consequences.

[31] The attribution rules set out in sections 73 to 74.5 (the attribution rules) allow spouses to depart from that rule. First, subsection 73(1) provides that, when a transfer takes place between spouses or common-law partners, the realization of a gain or loss, as the case may be, is deferred through the operation of a rollover until the property is sold outside the family unit, at which time subsection 74.2(1) attributes the gain or loss realized back to the transferor.

[32] However, the attribution rules need not apply when the transfer occurs at a price that is at least equal to the fair market value of the property transferred and the transferor elects to waive the application of subsection 73(1) in his or income tax return (subsection 74.5(1)). In this case, the appellant made that election with respect to the shares which were sold but not with respect to the shares which were gifted, with the result that the attribution rules only applied to the latter.

[33] Moreover, as the shares sold and gifted to Ms. Gendron were identical property and had a different ACB, the application of subsection 47(1) was triggered, so that the ACB of the 2,087,778 shares that were sold to BW Technologies was deemed to be their average cost, rather than their actual cost. As noted by the TCC Judge, the sole purpose of this provision is to facilitate the calculation of the capital gain (or loss), resulting from the disposition of identical property. The rationale being that in the end – i.e.: once all are sold – the result will be the same whether the ACB is calculated based on the actual cost of each property or their average cost.

[34] It is not disputed that based on the relevant provisions as they read, a taxable capital gain of $500,000 was realized by Ms. Gendron following the sale of her shares to BW Technologies, half of which was taxable in the hands of Ms. Gendron and the other half in the hands of Mr. Gervais. It is also not disputed that if this taxable capital gain was properly hers, Ms. Gendron is entitled to the capital gains deduction provided for in subsection 110.6(2.1).

[35] The effect of the reassessments issued against Mr. Gervais under section 245 of the ITA is to attribute to him the taxable capital gain realized by Ms. Gendron, thus increasing his income accordingly and depriving Ms. Gendron of the opportunity to use her capital gains deduction.

ANALYSIS AND DISPOSITION

[36] In support of his appeal, Mr. Gervais argues that the TCC Judge committed errors of law at each step of the analysis, by holding that the planning resulted in a tax benefit, that the series of transactions was not undertaken for *bona fide* non-tax purposes, and that provisions used to achieve the tax benefit were abused.

[37] Mr. Gervais first argues that he did not obtain a tax benefit. Rather, it was Ms. Gendron who derived a benefit. The appellant adds that, even then, it is inaccurate to say that Ms. Gendron avoided paying taxes. She incurred liability for tax on the capital gain that she realized and simply used the deduction which she was entitled to pursuant to subsection 110.6 (2.1).

[38] In short, [translation] "the economic tax benefit" derived by Ms. Gendron is not one that section 245 of the ITA is intended to prevent and, in any event, is not a tax benefit for the appellant.

[39] In making this argument, Mr. Gervais disregards the finding made by the TCC Judge that he received a personal benefit because he avoided paying taxes on the portion of the capital gain that would otherwise have been his, had he

disposed of his shares without the interposition of his spouse (reasons, at paras. 96, 114). The appellant did not explain why this finding would be incorrect.

[40] Second, Mr. Gervais argued that there were no avoidance transactions because the series was undertaken primarily for *bona fide* non-tax reasons. In this respect, the appellant emphasized that the gift which he made was in recognition of Ms. Gendron's contribution to the business over the years and that the TCC Judge acknowledged this purpose (reasons, at para. 112).

[41] That is so. However, as the TCC Judge explained, this purpose coexisted with that of tax minimization, such that the analysis must go further (reasons, at paras. 112, 113). The TCC Judge went on to observe, citing *Copthorne* at para. 40, that if one of the transactions in the series is carried out primarily to obtain a tax benefit, that is sufficient to establish the existence of an avoidance transaction (reasons, at para. 113). In this case, the sale to his spouse cannot be explained otherwise than by a quest to obtain the tax benefit which he derived. There was therefore an avoidance transaction (reasons, at paras. 114 and 115). There is no error in this regard.

[42] Third, Mr. Gervais argued that even if there was an avoidance transaction, it cannot be qualified as abusive (appellant's factum, at paras. 48 to 69). More specifically, none of the provisions relied upon to achieve the tax benefit were used to obtain a result that those provisions aim to prevent or that is contrary to their purpose or spirit.

[43] Specifically, Mr. Gervais challenged the finding that an abusive use of the attribution rules had been made, particularly subsection 74.2(1) of the ITA. According to Mr. Gervais, the TCC Judge's textual, contextual and purposive analysis of the relevant provisions did not lead to a correct appreciation of their purpose.

[44] The essential part of the TCC Judge's analysis in this regard is found in the following three paragraphs:

[134] When we consider subsections 73(1), 74.2(1) and 74.5(1) together, the scheme of the Act thus provides that when an individual transfers property to his or her spouse or common-law partner, the tax payable may [92] be deferred. If the tax is deferred, when the spouse or common-law partner disposes of the property, the taxable capital gain will be attributed to the individual who made the transfer. [93]

[92] This triggers a rollover and, accordingly, a tax deferral, unless the individual who made the transfer elects not to exercise the rollover provision.

[93] As the Supreme Court stated in *Lipson*, 2009 SCC 1, the object and spirit of the attribution rules specifically seek to prevent spouses from benefiting from their non-arm's length relationship to reduce the tax payable.

[135] Here, we must consider all the circumstances surrounding the series: the transfer of the two blocks of class E shares, one of which was sold, the other gifted; the choice not to roll over the shares sold to Ms. Gendron; the choice to allow the rollover of the shares gifted to Ms. Gendron with the result that subsection 47(1) of the Act applied when Ms. Gendron sold her shares. Obviously this leads to a result that subsection 74.2(1) aims to prevent and defeats the purpose of subsection 74.2(1) and the scheme of the Act by avoiding the attribution of part of the taxable capital gain to Mr. Gervais, which normally would have occurred when Ms. Gendron sold her shares.

[136] It follows that there is an abuse in the application of the provisions of the Act and, consequently, subsection 245(2) applies.

(Emphasis added)

[45] In my opinion, the TCC Judge was correct in concluding that there was abuse. More specifically, the splitting of the capital gain that had accrued in the shares while they were held by Mr. Gervais prior to the implementation of the series and the fact that he was eventually taxed on only part of this gain frustrates the object, spirit and purpose of subsections 73(1) and 74.2(1).

[46] A review of the tax implications that arise from the sale of the first block of shares and the gift of the second block of shares is useful in making this demonstration. I use rounded figures to facilitate this exercise.

[47] The sale was made for a consideration equal to the fair market value of the shares, which is consistent with the consideration which would otherwise have been deemed pursuant to paragraph 69(1)(*b*). With respect to the sale, Mr. Gervais made the election available to him under paragraph 73(1)(*a*). In those circumstances, subsection 74.5(1) applied and both the rollover provided for in subsection 73(1) and the attribution rule set out in subsection 74.2(1) were excluded. The tax consequences of the sale of the first block of shares were therefore determined based on the normally applicable rules (sections 39, 40 and 54). Under those rules, Mr. Gervais realized a capital gain of $1,000,000, that being the difference between the proceeds of disposition ($1,000,000.00) and the ACB of the shares sold (close to 0 cents) (reasons, at para. 69). The normal rules also applied to deem the ACB of the shares acquired by Ms. Gendron to be equal to their cost – *i.e.*: $1,000,000.00 or $1 per share (*Ibid.*).

[48] This transaction is not in itself problematic. The accrued gains in the shares sold to Ms. Gendron were realized by Mr. Gervais as a result of that sale. That is why, under those circumstances, subsection 73(1) allows the transferor to opt out of the rollover as Mr. Gervais did and why the application of subsection 74.2(1) is also excluded (see subsection 74.5(1)).

[49] The gift of the second block of shares to Ms. Gendron took place without Mr. Gervais excluding the application of subsection 73(1). That provision thus deferred the tax consequences resulting from the gift. Specifically, the deferral is achieved by deeming the transferor – *i.e.*: M. Gervais – to have received a consideration equal to the ACB of the gifted shares in his hands (for present purposes, close to 0 cents) and, at the same time, Ms. Gendron was deemed to have acquired the gifted shares at the same price. The result is that the capital gain of $1,000,000 which would otherwise have resulted from the transfer by reason of paragraph 69(1)(*b*),was deferred.

[50] It can quickly be seen that the ACB of close to 0 cents which was deemed to be Ms. Gendron's with respect to the gifted shares would have resulted in the deferred gain being attributable in full to Mr. Gervais on the subsequent sale to BW Technologies. However, this did not happen. Subparagraph 40(1)(*a*)(i) required that the ACB of the shares sold by Ms. Gendron be computed "immediately before the disposition" to BW Technologies and subsection 47(1) which had been brought into operation as a result of the gift deemed the ACB of the shares at that time to be 50 cents per share, that is the average cost of the shares which Ms. Gendron acquired by way of the gift – 0 cents – and by way of the share purchase – $1,00. The result is that the deferred gain attributed back to Mr. Gervais turned out to be half of what it would have been had subsection 47(1) not applied.

[51] That result, although it flows from the text of the relevant provisions, is contrary to the object, spirit and purpose of subsections 73(1) and 74.2(1), the purpose of which is to ensure that a gain (or loss) deferred by reason of a rollover between spouses or common-law partners be attributed back to the transferor. Maintaining the transferor's ACB as provided for in subsection 73(1) and then attributing the gain (or loss) to the transferor, under subsection 74.2(1), evidences this objective. In this case, the offer to purchase made by BW Technologies before the series of transactions was initiated demonstrates unequivocally that the gifted shares had an accrued gain of $1,000,000.00 when they were transferred to Ms. Gendron. Because the rollover provided for in subsection 73(1) deferred this accrued gain in its entirety, the whole of the gain realized on the sale to BW Technologies had to be attributed back to Mr. Gervais when regard is had to the object, spirit and purpose of subsection 74.2(1). It follows that the splitting of that gain, by reason of the astute use that was made of subsection 47(1), frustrates the rationale underlying these provisions or their reason for being.

[52] The TCC Judge therefore came to the correct conclusion in holding that the attribution to the appellant of the entire taxable capital gain realized on the sale of the shares to BW Technologies was justified under the GAAR.

[53] I would dismiss the appeal with costs.

"Marc Noël"

Chief Justice

"I agree.

Johanne Gauthier, J.A."

"I agree.

Yves de Montigny, J.A."

APPENDIX

Income Tax Act **, R.C.S. 1985 c. 1 (5th Supp.)**	***Loi de l'impôt sur le revenu,*** **L.R.C. 1985, ch. 1 (5 e suppl.)**
Identical properties	**Biens identiques**
47(1) Where at any particular time after 1971 a taxpayer who owns one property that was or two or more identical properties each of which was, as the case may be, acquired by the taxpayer after 1971, acquires one or more other properties (in this subsection referred to as "newly-acquired properties") each of which is identical to each such previously-acquired property, for the purposes of computing, at any subsequent time, the adjusted cost base of the taxpayer of each such identical property,	**47(1)** Lorsque, à un moment donné après 1971, un contribuable qui est propriétaire d'un bien acquis par lui après 1971 ou de plusieurs biens identiques dont chacun a été acquis par lui après 1971 acquiert un ou plusieurs autres biens (appelés « les biens nouvellement acquis » au présent paragraphe) dont chacun est identique à chaque bien acquis antérieurement, pour le calcul, à un moment ultérieur, du prix de base rajusté, pour le contribuable, de chacun de ces biens identiques :
(a) the taxpayer shall be deemed to have disposed of each such previously-acquired property immediately before the particular time for proceeds equal to its adjusted cost base to the taxpayer immediately before the particular time;	**a)** le contribuable est réputé avoir disposé de chaque bien acquis antérieurement, immédiatement avant le moment donné, pour un produit égal à son prix de base rajusté, pour le contribuable, immédiatement avant le moment donné;
(b) the taxpayer shall be deemed to have acquired the identical property at the particular time at a cost equal to the quotient obtained when	**b)** le contribuable est réputé avoir acquis chacun de ces biens identiques au moment donné, à un coût égal au quotient de la division :
(i) the total of the adjusted cost bases to the taxpayer immediately before the particular time of the previously-acquired properties, and the cost to the taxpayer (determined without reference to this section) of the newly-acquired properties	**(i)** du total des prix de base rajustés, pour le contribuable, immédiatement avant le moment donné, des biens acquis antérieurement et du coût supporté par lui (déterminé compte non tenu du présent article) des biens nouvellement acquis,
is divided by	**par :**
(ii) the number of the identical properties owned by the taxpayer immediately after the particular time;	**(ii)** le nombre de biens identiques appartenant au contribuable immédiatement après le moment donné.
(c) there shall be deducted, after the particular time, in computing the adjusted cost base to the taxpayer of each such identical property, the amount determined by the formula	**c)** le résultat du calcul suivant est à déduire, après le moment donné, dans le calcul du prix de base rajusté, pour le contribuable, de chacun de ces biens identiques :

A/B

where

A is the total of all amounts deducted under paragraph 53(2)(g.1) in computing immediately before the particular time the adjusted cost base to the taxpayer of the previously-acquired properties, and

B is the number of such identical properties owned by the taxpayer immediately after the particular time or, where subsection 47(2) applies, the quotient determined under that subsection in respect of the acquisition; and

(d) there shall be added, after the particular time, in computing the adjusted cost base to the taxpayer of each such identical property the amount determined under paragraph 47(1)(c) in respect of the identical property.

…

Inadequate considerations

69(1) Except as expressly otherwise provided in this Act,

(a) where a taxpayer has acquired anything from a person with whom the taxpayer was not dealing at arm's length at an amount in excess of the fair market value thereof at the time the taxpayer so acquired it, the taxpayer shall be deemed to have acquired it at that fair market value;

(b) where a taxpayer has disposed of anything

(i) to a person with whom the taxpayer was not dealing at arm's length for no proceeds or for proceeds less than the fair market value thereof at the time the taxpayer so disposed of it,

(ii) to any person by way of gift, or

(iii) to a trust because of a disposition of a property that does not result in a change in the beneficial ownership of the property;

the taxpayer shall be deemed to have received proceeds of disposition therefor equal to that fair market value; and

(c) where a taxpayer acquires a property by way of gift, bequest or inheritance or because of a disposition that does not result in a change in the beneficial ownership of the property, the taxpayer is deemed to acquire the property at its fair market value.

A/B

où :

A représente le total des montants déduits en application de l'alinéa 53(2)g.1) dans le calcul, immédiatement avant le moment donné, du prix de base rajusté, pour le contribuable, des biens acquis antérieurement,

B le nombre de ces biens identiques appartenant au contribuable immédiatement après le moment donné ou, en cas d'application du paragraphe (2), le quotient déterminé selon ce paragraphe relativement à l'acquisition;

d) est à ajouter, après le moment donné, dans le calcul du prix de base rajusté, pour le contribuable, de chacun de ces biens identiques le montant déterminé selon l'alinéa c) relativement à ce bien.

[…]

Contreparties insuffisantes

69(1) Sauf disposition contraire expresse de la présente loi :

a) le contribuable qui a acquis un bien auprès d'une personne avec laquelle il avait un lien de dépendance pour une somme supérieure à la juste valeur marchande de ce bien au moment de son acquisition est réputé l'avoir acquis pour une somme égale à cette juste valeur marchande;

b) le contribuable qui a disposé d'un bien en faveur :

(i) soit d'une personne avec laquelle il avait un lien de dépendance sans contrepartie ou moyennant une contrepartie inférieure à la juste valeur marchande de ce bien au moment de la disposition,

(ii) soit d'une personne au moyen d'un don,

(iii) soit d'une fiducie par suite de la disposition d'un bien qui n'a pas pour effet de changer la propriété effective du bien,

est réputé avoir reçu par suite de la disposition une contrepartie égale à cette juste valeur marchande;

c) le contribuable qui acquiert un bien par donation, legs ou succession ou par suite d'une disposition qui n'a pas pour effet de changer la propriété effective du bien est réputé acquérir le bien à sa juste valeur marchande.

Inter vivos transfers by individuals

73(1) For the purposes of this Part, where at any time any particular capital property of an individual (other than a trust) has been transferred in circumstances to which subsection (1.01) applies and both the individual and the transferee are resident in Canada at that time, unless the individual elects in the individual's return of income under this Part for the taxation year in which the property was transferred that the provisions of this subsection not apply, the particular property is deemed

(a) to have been disposed of at that time by the individual for proceeds equal to,

(i) where the particular property is depreciable property of a prescribed class, that proportion of the undepreciated capital cost to the individual immediately before that time of all property of that class that the fair market value immediately before that time of the particular property is of the fair market value immediately before that time of all of that property of that class, and

(ii) in any other case, the adjusted cost base to the individual of the particular property immediately before that time; and

(b) to have been acquired at that time by the transferee for an amount equal to those proceeds

Transfert de biens entre vifs par un particulier

73(1) Pour l'application de la présente partie, lorsque l'immobilisation d'un particulier (sauf une fiducie) a été transférée dans les circonstances visées au paragraphe (1.01) et que le particulier et le cessionnaire résident au Canada au moment du transfert, à moins que le particulier ne choisisse, dans sa déclaration de revenu produite en vertu de la présente partie pour l'année d'imposition du transfert, de soustraire l'immobilisation à l'application du présent paragraphe, celle-ci est réputée :

a) d'une part, avoir fait l'objet d'une disposition par le particulier au moment du transfert, pour un produit égal au montant suivant :

(i) si l'immobilisation est un bien amortissable d'une catégorie prescrite, le produit de la multiplication de la fraction non amortie du coût en capital pour le particulier, immédiatement avant ce moment, des biens de cette catégorie par le rapport entre la juste valeur marchande, immédiatement avant ce moment, de l'immobilisation et la juste valeur marchande, immédiatement avant ce moment, de l'ensemble des biens de cette catégorie,

(ii) dans les autres cas, le prix de base rajusté, pour le particulier, de l'immobilisation immédiatement avant ce moment;

b) d'autre part, avoir été acquise par le cessionnaire à ce moment, pour un montant égal à ce produit.

Gain or loss deemed that of lender or transferor

74.2(1) Where an individual has lent or transferred property (in this section referred to as "lent or transferred property"), either directly or indirectly, by means of a trust or by any other means whatever, to or for the benefit of a person (in this subsection referred to as the "recipient") who is the individual's spouse or common-law partner or who has since become the individual's spouse or common-law partner, the following rules apply for the purposes of computing the income of the individual and the recipient for a taxation year:

(a) the amount, if any, by which

(i) the total of the recipient's taxable capital gains for the year from dispositions of property (other than listed personal property) that is lent or transferred property or

Gain ou perte réputé du prêteur ou de l'auteur du transfert

74.2(1) Lorsqu'un particulier prête ou transfère un bien — appelé « bien prêté ou transféré » au présent article —, directement ou indirectement, par le biais d'une fiducie ou par tout autre moyen, à une personne — appelée « bénéficiaire » au présent paragraphe — qui est son époux ou conjoint de fait ou qui le devient par la suite ou au profit de cette personne, les règles suivantes s'appliquent au calcul du revenu du particulier et du bénéficiaire pour une année d'imposition :

a) est réputé être un gain en capital imposable réalisé par le particulier pour l'année sur la disposition d'un bien, à l'exclusion d'un bien meuble déterminé, l'excédent éventuel du total visé au sous-alinéa (i) sur le total visé au sous-alinéa (ii):

(i) le total des gains en capital imposables réalisés par le bénéficiaire pour l'année sur la disposition de biens (à l'exclusion de biens meubles déterminés) qui sont

property substituted therefor occurring in the period (in this subsection referred to as the "attribution period") throughout which the individual is resident in Canada and the recipient is the individual's spouse or common-law partner

exceeds

(ii) the total of the recipient's allowable capital losses for the year from dispositions occurring in the attribution period of property (other than listed personal property) that is lent or transferred property or property substituted therefor

shall be deemed to be a taxable capital gain of the individual for the year from the disposition of property other than listed personal property;

(b) the amount, if any, by which the total determined under subparagraph 74.2(1)(a)(ii) exceeds the total determined under subparagraph 74.2(1)(a)(i) shall be deemed to be an allowable capital loss of the individual for the year from the disposition of property other than listed personal property;

Transfers for fair market consideration

74.5(1) Notwithstanding any other provision of this Act, subsections 74.1(1) and (2) and section 74.2 do not apply to any income, gain or loss derived in a particular taxation year from transferred property or from property substituted therefor if

(a) at the time of the transfer the fair market value of the transferred property did not exceed the fair market value of the property received by the transferor as consideration for the transferred property;

(b) where the consideration received by the transferor included indebtedness,

(i) interest was charged on the indebtedness at a rate equal to or greater than the lesser of

(A) the prescribed rate that was in effect at the time the indebtedness was incurred, and

(B) the rate that would, having regard to all the circumstances, have been agreed on, at the time the indebtedness was incurred, between parties dealing with each other at arm's length,

(ii) the amount of interest that was payable in respect of the particular year in respect of the indebtedness was paid not later than 30 days after the end of the particular year, and

des biens prêtés ou transférés ou des biens y substitués, pendant la période — appelée « période d'attribution » au présent paragraphe — tout au long de laquelle le particulier réside au Canada et tout au long de laquelle le bénéficiaire est son époux ou conjoint de fait,

[en blanc]

(ii) le total des pertes en capital déductibles subies par le bénéficiaire pour l'année à la disposition, effectuée pendant la période d'attribution, de biens (à l'exclusion de biens meubles déterminés) qui sont des biens prêtés ou transférés ou des biens y substitués;

[en blanc]

b) est réputé être une perte en capital déductible subie par le particulier pour l'année à la disposition d'un bien, à l'exclusion d'un bien meuble déterminé, l'excédent éventuel du total visé au sous-alinéa a)(ii) sur le total visé au sous-alinéa a)(i);

Transfert avec contrepartie à la juste valeur marchande

74.5(1) Malgré les autres dispositions de la présente loi, les paragraphes 74.1(1) et (2) et l'article 74.2 ne s'appliquent pas à un revenu, un gain ou une perte dérivé, au cours d'une année d'imposition donnée, d'un bien transféré ou d'un bien y substitué si les conditions suivantes sont réunies :

a) au moment du transfert, la juste valeur marchande du bien transféré ne dépasse pas la juste valeur marchande du bien que l'auteur du transfert reçoit en contrepartie du bien transféré;

b) dans le cas où la contrepartie reçue par l'auteur du transfert comprend une créance, à la fois :

(i) des intérêts sont comptés sur la créance à un taux égal ou supérieur au moindre des taux suivants :

(A) le taux prescrit qui est en vigueur au moment de l'établissement de la créance,

(B) le taux dont les parties, si elles n'avaient aucun lien de dépendance, seraient convenues à la date d'établissement de la créance, compte tenu des circonstances,

(ii) le montant des intérêts qui était payable sur la créance pour l'année donnée est payé au plus tard 30 jours après la fin de l'année donnée,

(iii) the amount of interest that was payable in respect of each taxation year preceding the particular year in respect of the indebtedness was paid not later than 30 days after the end of each such taxation year; and

(c) where the property was transferred to or for the benefit of the transferor's spouse or common-law partner, the transferor elected in the transferor's return of income under this Part for the taxation year in which the property was transferred not to have the provisions of subsection 73(1) apply.

Capital gains deduction — qualified small business corporation shares

110.6(2.1) In computing the taxable income for a taxation year of an individual (other than a trust) who was resident in Canada throughout the year and who disposed of a share of a corporation in the year or a preceding taxation year and after June 17, 1987 that, at the time of disposition, was a qualified small business corporation share of the individual, there may be deducted such amount as the individual may claim not exceeding the least of

(a) the amount determined by the formula in paragraph (2)(a) in respect of the individual for the year,

(b) the amount, if any, by which the individual's cumulative gains limit at the end of the year exceeds the amount deducted under subsection 110.6(2) in computing the individual's taxable income for the year,

(c) the amount, if any, by which the individual's annual gains limit for the year exceeds the amount deducted under subsection 110.6(2) in computing the individual's taxable income for the year, and

(d) the amount that would be determined in respect of the individual for the year under paragraph 3(b) (to the extent that that amount is not included in computing the amount determined under paragraph (2)(d) in respect of the individual) in respect of capital gains and capital losses if the only properties referred to in paragraph 3(b) were qualified small business corporation shares of the individual.

245(1) In this section,

tax consequences to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount; (*attribut fiscal*)

(iii) le montant des intérêts qui était payable sur la créance pour chaque année d'imposition précédant l'année donnée est payé au plus tard 30 jours après la fin de chacune de ces années d'imposition;

c) dans le cas où le bien est transféré à l'époux ou conjoint de fait de l'auteur du transfert ou au profit de son époux ou conjoint de fait, l'auteur du transfert choisit, dans sa déclaration de revenu produite en vertu de la présente partie pour l'année d'imposition où le bien est transféré, de ne pas se prévaloir du paragraphe 73(1).

Déduction pour gains en capital — actions admissibles de petite entreprise

110.6(2.1) Le particulier — à l'exception d'une fiducie — qui réside au Canada tout au long d'une année d'imposition donnée et qui dispose au cours de cette année donnée ou d'une année d'imposition antérieure et après le 17 juin 1987 d'actions qui sont alors des actions admissibles de petite entreprise peut déduire, dans le calcul de son revenu imposable pour l'année donnée, le montant qu'il peut demander et qui ne dépasse pas le moins élevé des montants suivants :

a) le montant déterminé selon la formule figurant à l'alinéa (2)a) à l'égard du particulier pour l'année;

b) l'excédent éventuel de son plafond des gains cumulatifs à la fin de l'année donnée sur le montant déduit en application du paragraphe (2) dans le calcul de son revenu imposable pour l'année donnée;

c) l'excédent éventuel de son plafond annuel des gains pour l'année donnée sur le montant déduit en application du paragraphe (2) dans le calcul de son revenu imposable pour l'année donnée;

d) l'excédent qui serait calculé selon l'alinéa 3b) à l'égard du particulier pour l'année donnée (dans la mesure où il n'est pas inclus dans le calcul de la somme déterminée selon l'alinéa (2)d) à l'égard du particulier) au titre des gains en capital et des pertes en capital si les seuls biens visés à l'alinéa 3b) étaient des actions admissibles de petite entreprise du particulier.

245(1) Les définitions qui suivent s'appliquent au présent article.

attribut fiscal S'agissant des attributs fiscaux d'une personne, revenu, revenu imposable ou revenu imposable gagné au Canada de cette personne, impôt ou autre montant payable par cette personne, ou montant qui lui est remboursable, en application de la présente loi, ainsi que tout montant à prendre en compte pour

calculer, en application de la présente loi, le revenu, le revenu imposable, le revenu imposable gagné au Canada de cette personne ou l'impôt ou l'autre montant payable par cette personne ou le montant qui lui est remboursable. (*tax consequences*)

tax benefit means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty; (*avantage fiscal*)

avantage fiscal Réduction, évitement ou report d'impôt ou d'un autre montant exigible en application de la présente loi ou augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi. Y sont assimilés la réduction, l'évitement ou le report d'impôt ou d'un autre montant qui serait exigible en application de la présente loi en l'absence d'un traité fiscal ainsi que l'augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi qui découle d'un traité fiscal. (*tax benefit*)

transaction includes an arrangement or event. (*opération*)

opération Sont assimilés à une opération une convention, un mécanisme ou un événement. (*transaction*)

General anti-avoidance provision

(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

Disposition générale anti-évitement

(2) En cas d'opération d'évitement, les attributs fiscaux d'une personne doivent être déterminés de façon raisonnable dans les circonstances de façon à supprimer un avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, de cette opération ou d'une série d'opérations dont cette opération fait partie.

Avoidance transaction

(3) An avoidance transaction means any transaction

Opération d'évitement

(3) L'opération d'évitement s'entend :

(a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit; or

a) soit de l'opération dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable;

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

b) soit de l'opération qui fait partie d'une série d'opérations dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable.

Application of subsection (2)

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

Application du par. (2)

(4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas :

(a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

a) qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants :

(i) this Act,

(i) la présente loi,

(ii) the Income Tax Regulations,

(ii) le Règlement de l'impôt sur le revenu,

(iii) the Income Tax Application Rules,

(iii) les Règles concernant l'application de l'impôt sur le revenu,

(iv) a tax treaty, or

(iv) un traité fiscal,

(v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

(v) tout autre texte législatif qui est utile soit pour le calcul d'un impôt ou de toute autre somme exigible ou remboursable sous le régime de la présente loi, soit pour la détermination de toute somme à prendre en compte dans ce calcul;

(b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

b) qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble.

Determination of tax consequences

Attributs fiscaux à déterminer

(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment,

(5) Sans préjudice de la portée générale du paragraphe (2) et malgré tout autre texte législatif, dans le cadre de la détermination des attributs fiscaux d'une personne de façon raisonnable dans les circonstances de façon à supprimer l'avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, d'une opération d'évitement :

(a) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

a) toute déduction, exemption ou exclusion dans le calcul de tout ou partie du revenu, du revenu imposable, du revenu imposable gagné au Canada ou de l'impôt payable peut être en totalité ou en partie admise ou refusée;

(b) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

b) tout ou partie de cette déduction, exemption ou exclusion ainsi que tout ou partie d'un revenu, d'une perte ou d'un autre montant peuvent être attribués à une personne;

(c) the nature of any payment or other amount may be recharacterized, and

c) la nature d'un paiement ou d'un autre montant peut être qualifiée autrement;

(d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

d) les effets fiscaux qui découleraient par ailleurs de l'application des autres dispositions de la présente loi peuvent ne pas être pris en compte.

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax

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benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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DE MONTIGNY J.A.

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