Federal Court of Appeal Cour d'appel fédérale

Date: 20151204

Docket: A-565-14

Citation: 2015 FCA 279

CORAM: **RYER J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

OLYMPIA TRUST COMPANY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on November 2, 2015.

Judgment delivered at Ottawa, Ontario, on December 4, 2015.

REASONS FOR JUDGMENT BY: RYER J.A.

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

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal from a decision of Justice Randall Bocock of the Tax Court of Canada (the "Judge"), dated December 19, 2014, cited as 2014 TCC 372.

[2] The Judge was presented with an application for the determination of a question of mixed fact and law, pursuant to Rule 58 of the *Tax Court of Canada Rules* (*General Procedure*) S.O.R./90-688a (the "Rule 58 Question"). The Rule 58 Question reads as follows:

> Whether, on the accepted facts in this matter, as outlined in Exhibit "A" to the Amended Notice of Motion, or such other facts as the Court may accept or direct in the circumstances, Olympia Trust Company ("Olympia Trust") is the purchaser [as defined in subsection 116(3) of the *Income Tax Act* (ITA)] under subsection 116(5) of the ITA.

[3] The Rule 58 Question arose out of a number of assessments (the "Assessments") made by the Minister of National Revenue (the "Minister") against Olympia Trust Company ("Olympia" or the "Appellant"), pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act"), for its 2001, 2002, 2003 and 2004 taxation years (the "Years in Dispute"). All statutory references shall be to the corresponding provisions of the Act that were in force in the Years in Dispute.

[4] The Judge answered the Rule 58 Question in the affirmative. For the reasons that follow, it is my view that he made no reviewable error in doing so.

I. Facts and Assumptions

[5] The parties agreed upon certain facts and assumptions and provided documentation to the Judge to enable him to decide the Rule 58 Question. The record contains documentation with respect to ten individuals (each, an "Annuitant"). While the documentation pertaining to each Annuitant is not identical, neither party asserted that any differences in the documentation in the record should lead to a different answer to the Rule 58 Question. For the purpose of these reasons, the relevant facts and assumptions that apply to the Years in Dispute are summarized below.

[6] The Annuitants set up registered retirement savings plans as defined in subsection 146(1) (“RRSPs”), and transferred funds to Olympia as trustee under those RRSPs, thereby constituting trusts (each an “RRSP Trust”) in each instance.

[7] Each RRSP was “self-directed”. In this regard, the agreed facts stipulate that:

a) Olympia was responsible for implementing the directions of the Annuitants with respect to the treatment of the properties held by their RRSPs;

b) each Annuitant directed the management of the property in his or her RRSP; and

c) each Annuitant directed what property was to be purchased with the funds initially brought into his or her RRSP.

[8] The Annuitants requested cash transfers from their existing RRSPs to their newly created RRSPs. Olympia confirmed to each transferring institution that it would credit the received funds from that institution to the RRSP of each requesting Annuitant. Otherwise, the transferring institution would not have made the transfer of funds without withholding tax, pursuant to paragraph 153(1)(*j*).

[9] In accordance with documents (the “Letters of Indemnity”) such as that located at page 162 of the Appeal Book, each Annuitant:

a) expressed a wish that his or her self-directed RRSP invest a stipulated amount to purchase a stipulated number of shares (the "Private Company Shares") of a private company (in each case, a "Canadian Private Company");

b) acknowledged that he or she had sought all necessary or desirable independent advice with respect to the making of the investment in the Private Company Shares for his or her RRSP;

c) acknowledged that Olympia, by accepting the Private Company Shares into his or her RRSP, had no responsibility for determining either the eligibility of the Private Company

Shares for investment under the RRSP provisions of the Act or the fair market value of such shares; and

d) agreed to indemnify Olympia for any taxes, penalties, fines, levies, costs, expenses or any other actions or claims resulting from his or her instructions to make the investment in the Private Company Shares and hold them in his or her RRSP.

[10] In each instance, the vendor (each a "Non-Resident Vendor") of the Private Company Shares was a non-resident of Canada, for the purposes of the Act.

[11] In accordance with correspondence (the "Directions") such as that located at page 195 of the Appeal Book, each Annuitant:

a) provided to Olympia the documents required to complete the purchase of the Private Company Shares by his or her RRSP;

b) authorized Olympia to transfer the purchase price of the Private Company Shares to the vendor of such shares from the funds in his or her RRSP account; and

c) urged Olympia to transfer the funds and close on the applicable purchase agreement with all reasonable haste.

[12] The Directions refer to documents being provided by the Annuitants to Olympia in relation to the purchase of the Private Company Shares. These included agreements (the "Share Purchase Agreements") such as that located at pages 230 to 232 of the Appeal Book, under which:

a) each Annuitant was described as the purchaser of the Private Company Shares;

b) there was no stipulation as to how payment of the purchase price of the Private Company Shares was to be made to the Non-Resident Vendor;

c) each Annuitant directed that the Private Company Shares were to be registered in the name of Olympia in trust for his or her RRSP account;

d) each Annuitant represented to the Non-Resident Vendor that he or she was purchasing the Private Company Shares as principal, and not as agent for any other person; and

e) pending the registration of the Private Company Shares in the name of Olympia in trust for each Annuitant's RRSP account, the Non-Resident Vendor agreed to hold the Private Company Shares in trust for each Annuitant.

[13] Closings under the Share Purchase Agreements occurred, and:

a) in accordance with the Direction from each Annuitant, Olympia transferred the purchase price of the Private Company Shares out of the account of his or her RRSP to the Non-Resident Vendor of those shares;

b) registration of the Private Company Shares on the securities register of the applicable Canadian Private Company was made in the name of Olympia in trust for the RRSP of each Annuitant; and

c) the Private Company Shares referred to in each Direction were recorded by Olympia as property of the RRSP of the Annuitant who gave that Direction.

[14] In relation to these sales of Private Company Shares, the Non-Resident Vendors failed to give the notices to the Minister that were required by subsection 116(3), no "clearance certificates" were issued by the Minister pursuant to either of subsections 116(2) or (4) and no income tax was remitted to the Minister in accordance with subsection 116(5) by any person falling within the definition of purchaser in subsection 116(3) (a "Section 116 Purchaser").

[15] The Assessments are premised upon the Minister's conclusion that Olympia is the Section 116 Purchaser of taxable Canadian property ("TCP") from a non-resident person (a "Disposing Non-Resident") in accordance with subsection 116(5). However, it is noted that in the Reply to Olympia's Notice of Appeal, the Minister also asserted that Olympia's liability under the Assessments could be justified under subsection 159(1), if it were to be the case that the RRSP Trusts were the Section 116 Purchasers.

[16] The validity of the Assessments is not in issue in this appeal. Rather, the issue is whether the Judge erred when he concluded that Olympia was the Section 116 Purchaser of the Private Company Shares for the purposes of subsection 116(5).

II. Relevant Statutory Provisions

[17] The relevant statutory provisions are subsections 116(3) and (5) which read as follows:

116(3) Every non-resident person who in a taxation year disposes of any taxable Canadian property of that person … shall, not later than 10 days after the disposition, send to the Minister, by registered mail, a notice setting out	**116**(3) La personne non-résidente qui dispose de son bien canadien imposable, … au cours d'une année d'imposition est tenue d'envoyer au ministre, dans les dix jours suivant la disposition, sous pli recommandé, un avis contenant les renseignements suivants :
(*a*) the name and address of the person to whom the non-resident person disposed of the property (in this section referred to as the "purchaser"),	*a*) les nom et adresse de la personne en faveur de qui elle a disposé du bien (appelée l' « acheteur » au présent article);
[…]	[…]
116(5) Where in a taxation year a purchaser has acquired from a non-resident person any taxable Canadian property… of the non-resident person, the purchasers, unless	**116**(5) L'acheteur qui, au cours d'une année d'imposition, acquiert auprès d'une personne non-résidente un bien canadien imposable … d'une telle personne est redevable, pour le compte de cette personne, d'un impôt en vertu de la présente partie pour l'année, sauf si, selon le cas :
(*a*) after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada	*a*) après enquête sérieuse, l'acheteur n'avait aucune raison de croire que la personne ne résidait pas au Canada;
(*a.1*) subsection (5.01) applies to the acquisition, or	*a.1)* le paragraphe (5.01) s'applique à l'acquisition;

(*b*) a certificate under subsection 116(4) has been issued to the purchaser by the Minister in respect of the property,	*b)* le ministre a délivré à l'acheteur, en application du paragraphe (4), un certificat concernant le bien.
is liable to pay, and shall remit to the Receiver General within 30 days after the end of the month in which the purchaser acquired the property, as tax under this Part for the year on behalf of the non-resident person, 25% of the amount, if any, by which	Cet impôt — à remettre au receveur général dans les 30 jours suivant la fin du mois au cours duquel l'acheteur a acquis le bien — est égal à 25 % de l'excédent éventuel du coût visé à l'alinéa c) sur la limite visée à l'alinéa d):
(*c*) the cost to the purchaser of the property so acquired	*c*) le coût pour l'acheteur du bien ainsi acquis;
exceeds	
(*d*) the certificate limit fixed by the certificate, if any, issued under subsection 116(2) in respect of the disposition of the property by the non-resident person to the purchaser,	*d*) la limite prévue par le certificat délivré en application du paragraphe (2) concernant la disposition du bien par la personne non-résidente en faveur de l'acheteur.
and is entitled to deduct or withhold from any amount paid or credited by the purchaser to the non-resident person or otherwise recover from the non-resident person any amount paid by the purchaser as such a tax.	L'acheteur a le droit de déduire d'un montant qu'il a versé à la personne non-résidente, ou porté à son crédit, ou de retenir sur un tel montant, ou de recouvrer autrement d'une telle personne, tout montant qu'il a payé au titre de cet impôt.

III. The Judge's Decision

[18] The Judge considered the steps that were taken to effectuate the purchases of the Private Company Shares, including the relevant documentation, in the context of the statutory regime with respect to RRSPs.

[19] Against this backdrop, the Judge concluded that the Annuitants and Olympia could not have intended that the Annuitants would acquire the Private Company Shares because such acquisitions would have required taxable withdrawals by the Annuitants from their RRSPs, which could not have been contemplated. Instead, the Judge concluded that the Annuitants and Olympia intended that Olympia would acquire and hold the Private Company Shares as trust property under the RRSPs. He concluded that the fact that the Annuitants directed this to occur, pursuant to their "self-direction rights", was not inconsistent with this conclusion.

[20] The Judge went on to find that Olympia was the Section 116 Purchaser of the Private Company Shares. He found that the purchase price in respect of each such purchase of shares was paid out of the funds held by Olympia as trustee of each of the applicable RRSPs and that title to such shares was registered in Olympia's name in that capacity. He determined that none of the Annuitants or Olympia intended that the purchase price of the Private Company Shares would be paid by the Annuitants or that title to those shares would be registered in any of their names. Specifically, he found that the documentation made it clear to all parties – including the Non-Resident Vendors and/or their lawyers – that Olympia would tender the purchase price of, and receive delivery of the share certificates for, the Private Company Shares.

[21] Finally, the Judge concluded that the Private Company Shares were legally acquired by Olympia and were part of the trust corpus of each RRSP, notwithstanding that "the enjoyment and wealth of the RRSP" belonged to each Annuitant. He went on to conclude that if a trustee or any other person is a Section 116 Purchaser who "non-compliantly acquires" TCP from a Disposing Non-Resident, then the Disposing Non-Resident's liability becomes the liability of

whomever is the Section 116 Purchaser. Accordingly, he concluded that the answer to the Rule 58 Question was affirmative and that Olympia was the Section 116 Purchaser of the Private Company Shares pursuant to subsection 116(5).

IV. Issue

[22] The issue in this appeal is whether the Judge erred in concluding that the answer to the Rule 58 Question is that Olympia was the Section 116 Purchaser of the Private Company Shares under subsection 116(5).

V. Standard of Review

[23] The standard of review for questions of law is correctness. Questions of fact and mixed fact and law in respect of which there is no extricable question of law are reviewed on the standard of palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 7-37, [2002] 2 S.C.R. 235).

VI. Analysis

A. Introduction

[24] While the Rule 58 Question is framed as a discrete question of mixed fact and law, it is important to situate the facts and assumptions presented to the Judge in the context of the scheme that is described in the Minister's Reply to Olympia's Notice of Appeal to the Tax Court of Canada (the "Scheme").

[25] Without commenting upon the efficacy of the Scheme, I note that, at a minimum, a tax avoidance motivation on the part of the participants in the Scheme becomes apparent from the way in which the transactions were put together. Suffice it to say that the structure of the transactions and the drafting of the documents used to implement them demonstrate a noticeable departure from ordinary commercial practices.

[26] In *Coast Capital Savings Credit Union v. Canada*, 2015 TCC 195, [2015] T.C.J. No. 161 (QL), the taxpayer, a trustee that found itself in circumstances that are quite similar to those of Olympia in this appeal, requested an order permitting it to amend its pleadings to allege that the persons analogous to the Annuitants and the Non-Resident Vendors in this appeal had "deliberately mispresented" the true nature of the transactions in which it became involved and that those transactions were a "sham".

[27] While no such allegations appear in the record that was before the Judge, the fact that such allegations arose in other litigation dealing with quite similar circumstances places the instant circumstances into their context.

B. <u>The Legislative Context</u>

[28] The Rule 58 Question calls for an interpretation of subsections 116(3) and (5). Those provisions are part of Division D of the Act, entitled "Taxable Income Earned in Canada by Non-Residents", which consists of four sections - 115, 115.1, 115.2 and 116.

[29] A good overview of the scope and application of section 116 was provided by Justice Valerie Miller at paragraph 10 of her decision in *Coast Capital Savings Credit Union*. That paragraph reads as follows:

> [10] Section 116 of the *Act* provides a mechanism to facilitate the collection of Part I tax from non-residents who dispose of taxable Canadian property ("TCP"). Subsections 116(1), (2) and (3) provide that the non-resident vendor must give notice to the Minister prior to the disposition of TCP or within ten days after the disposition and pay an amount on account of the tax or furnish security in respect of the disposition. Where the non-resident has complied, the Minister will issue a certificate to the non-resident and the purchaser. However, if the non-resident has not complied, the purchaser becomes vicariously liable for the tax. Subsection 116(5) provides that the purchaser of TCP may be liable for tax owed by the non-resident vendor. It is a collection tool and it allows the Minister to collect the non-resident vendor's tax from the purchaser of TCP.

[30] Subsection 116(3) defines a Section 116 Purchaser as the person to whom the Disposing Non-Resident disposes of TCP. It is apparent that a Section 116 Purchaser is not necessarily a purchaser under commercial law. Rather, the meaning ascribed to the term purchaser in subsection 116(3) must be discerned in accordance with the well known textual, contextual and purposive approach stipulated in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

[31] The text of subsection 116(3) makes it clear that the identity of the Section 116 Purchaser is determined by reference to the Disposing Non-Resident. Thus, the Section 116 Purchaser is the person to whom the Disposing Non-Resident disposes of the TCP.

[32] The statutory context of subsection 116(3) is Division D, which is concerned with the taxability of non-residents such as a Disposing Non-Resident under Part I of the Act. Subsection 116(3) is also contextually proximate to subsection 116(5). That provision imposes a tax on a

Section 116 Purchaser of an amount that is determined by reference to the amount paid by the Section 116 Purchaser to the Disposing Non-Resident to acquire the TCP in question.

[33] This is evident from the reference in paragraph 116(5)(*c*) to the "cost to the purchaser" of the TCP. Additionally, the post-amble to subsection 116(5) makes reference to a deduction or withholding by the Section 116 Purchaser from "any amount paid or credited" by the Section 116 Purchaser to the Disposing Non-Resident.

[34] These references indicate that the Section 116 Purchaser is not only the person who receives the transfer of the TCP from the Disposing Non-Resident but also the person by whom the purchase price of the TCP is paid to the Disposing Non-Resident.

[35] The purpose of subsection 116(3), in defining the Section 116 Purchaser, is then evident – it identifies the person who is liable to pay the tax provided for in subsection 116(5). That person is well situated to facilitate the payment of tax by the Disposing Non-Resident inasmuch as that person is the one who is obligated to pay to the Disposing Non-Resident the amount of the purchase price of the TCP, the disposition of which has the potential to subject the Disposing Non-Resident to tax under section 115.

[36] I say "potential" because the amount paid by a Section 116 Purchaser pursuant to subsection 116(5) is essentially an income tax instalment payment on behalf of the Disposing Non-Resident. Upon filing a Canadian income tax return, the Disposing Non-Resident will stipulate the amount, if any, of its liability for tax under section 115, and will be entitled to a

refund of the excess, if any, of the amount of the subsection 116(5) payment over the amount of the Disposing Non-Resident's actual liability for tax as calculated in its income tax return (assuming that the Minister agrees with that calculation).

[37] This interpretation is readily applicable to a typical purchase and sale transaction involving only two parties. The Section 116 Purchaser is easily identified as the person to whom the Disposing Non-Resident transfers the TCP and from whom the Disposing Non-Resident receives the amount of the purchase price.

[38] In this construct, the application of subsection 116(5) is relatively straightforward. If no "clearance certificate" has been issued by the Minister, the Section 116 Purchaser will be liable to pay a tax of essentially 25% of the purchase price payable for the TCP. The Section 116 Purchaser is free to pay this tax out of its own resources and then seek to recover it from the Disposing Non-Resident, or it can deduct or withhold the requisite amount from the amount payable to the Disposing Non-Resident as the purchase price of the TCP.

[39] While not germane to the issue in the appeal, I note that a Section 116 Purchaser is under no obligation to withhold any amount of the purchase price of the TCP. It follows that the imposition of the tax under subsection 116(5) is not the result of the Section 116 Purchaser's "failure to comply" with a withholding obligation.

[40] This interpretation of subsection 116(3) is consistent with what I believe to be the purpose of subsection 116(5), which is to provide a mechanism by which the Minister can obtain

what amounts to an instalment payment on account of the Part I tax that may be payable by a Disposing Non-Resident under section 115. As stated by Justice Miller in *Coast Capital Savings Credit Union*, subsection 116(5) is a collection tool that allows the Minister to collect an amount on account of a Disposing Non-Resident's tax from the person to whom TCP is transferred and from whom its purchase price is received. The collection facilitation purpose of section 116 has also been affirmed by this Court in *Canada (National Revenue) v. Morris*, 2009 FCA 373, 403 N.R. 106.

[41] Viewed in light of this purpose, the importance of the payment of the purchase price once again looms large. As a matter of commercial practice, in the absence of a "clearance certificate", a Section 116 Purchaser would typically avail itself of the withholding option so that it is in a position to pay the tax imposed upon it under subsection 116(5).

[42] A commercially motivated Section 116 Purchaser would typically follow this course of action, even if it was acting in a representative capacity, such as an agent for an undisclosed principal, a nominee or a "bare trustee". In any of those instances, it would be arguable that the representative would not acquire any beneficial interest in the TCP. Nonetheless, an acquisition by a Section 116 Purchaser of a beneficial interest in each property is not the determinative feature of the subsection 116(5) mechanism. Rather, subsection 116(5) imposes a tax upon the person to whom the Disposing Non-Resident transfers its interest in the TCP and from whom the Disposing Non-Resident receives the purchase price of such property.

[43] The simple application of subsection 116(5) in a two-party transaction can be complicated by the introduction of an additional party, such as is the case in the circumstances under appeal.

[44] Here, each Non-Resident Vendor entered into a Share Purchase Agreement under which an Annuitant was described as the purchaser of Private Company Shares. However, each Non-Resident Vendor transferred the Private Company Shares to Olympia, in trust for an RRSP, and received payment of the purchase price for such shares from Olympia, in trust for such RRSP.

[45] This is the factual context in which the issues in this appeal must be decided, having regard to the interpretations of subsections 116(3) and (5) referred to above.

C. Did the Judge Err in concluding that the Annuitants were not the Section 116 Purchasers of the Private Company Shares?

[46] The Appellant asserts that the Judge erred in his interpretation of the Share Purchase Agreements when he concluded that the Annuitants were not the Section 116 Purchasers of the Private Company Shares under those agreements.

[47] The Appellant acknowledges that since the decision of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the interpretation of a contract is now a question of mixed fact and law in respect of which the standard of review is that of palpable and overriding error. However, the Appellant correctly

asserts that if a question of law can be extricated from such a question of mixed fact and law, then the standard of review in respect of such a question remains that of correctness.

[48] In this regard, the Appellant asserted at the hearing that the Judge erred in law in his interpretation of the Share Purchase Agreements by looking beyond the specific words of those agreements.

[49] While this argument is not found in the Appellant's factum, it is nonetheless readily disposed of.

[50] First, in interpreting the Share Purchase Agreements, it was permissible for the Judge to consider the circumstances that surrounded those agreements. Of particular relevance in this regard is the location of the agreements in the context of the RRSP regime under the Act. Each Share Purchase Agreement refers to Olympia as trustee under an RRSP. Moreover, the facts presented to the Judge for the purposes of the Rule 58 Question contain numerous references to RRSPs.

[51] Secondly, the Judge referred to the additional documents that were related to the Share Purchase Agreements. Of these, the Directions are significant in that they demonstrate how and by whom the purchase price was to be paid under each of those agreements. Reference to the Directions was required because, as acknowledged by counsel for the Appellant, none of those agreements contain any provision stipulating how the purchase price of the Private Company Shares was to be paid.

[52] Thus, I conclude that the Judge committed no error of law in his approach to the interpretation of the Share Purchase Agreements.

[53] The Appellant asserts that the Judge should have accepted that the Annuitants were the Section 116 Purchasers of the Private Company Shares because they were named as such in the Share Purchase Agreements and those agreements contained representations to the effect that the Annuitants were purchasing such shares as principals and not as agents.

[54] The Judge found that these contractual stipulations were not determinative and that the Appellant's proposed interpretation could not have been intended by the Annuitants or Olympia because they would have resulted in taxable withdrawals from the Annuitants' RRSPs.

[55] The Judge was clear in his finding that the Annuitants were not intended to be the Section 116 Purchasers of the Private Company Shares. At paragraph 34 of his reasons, he states:

> [34] … However, in the present case, the documents in aggregate determined Olympia would tender the purchase money, take title and receive delivery of the shares: all of which facts were known, acknowledged and consistent within the documents executed by the vendors or their agents and counsel.

[56] The Directions that were before the Judge contradict the contractual stipulations relied upon by the Appellant. Under the Directions that the Annuitants gave to Olympia, the Annuitants stipulated that they were providing documents to Olympia that are "… required by your firm to complete a purchase of shares of a privately held corporation by my RRSP account." The Directions go on to admonish Olympia to "… proceed to transfer and close on the purchase agreement with all reasonable haste."

[57] These stipulations in the Directions support the Judge's conclusion that the Annuitants participated in the Share Purchase Agreements in a representative capacity and not as purchasers of the Private Company Shares in their own right. In addition, if the Annuitants had been the Section 116 Purchasers of such shares, then RRSP withdrawals would have occurred and Olympia would have been obligated to make the tax withholdings contemplated by paragraph 153(1)(*j*). The fact that no such withholdings were made by Olympia provides additional support for the Judge's conclusion.

[58] The Appellant also asserts that the Annuitants must have been the Section 116 Purchasers of the Private Company Shares because they acquired all of the incidents of ownership of those shares, such as use, possession and risk, citing *R. v. Wardean Drilling Ltd.*, [1969] 2 Ex C.R. 166, [1969] C.T.C. 265 as support for this assertion. At the same time, the Appellant's counsel asserted that the funds that emanated from Olympia, as trustee of the RRSP Trusts, constituted payment of the purchase price of the Private Company Shares. With respect, these two assertions are contradictory and both cannot be valid.

[59] In the circumstances, the latter assertion is by far the more plausible. As noted above, if it were otherwise, the emanation of funds from the RRSP Trusts would have to be characterized as taxable withdrawals by the Annuitants from their RRSPs, a consequence that could not have been intended. In my view, the Appellant's assertion that the purchase price was paid out of the RRSP Trusts belies the Appellant's other assertion that the Annuitants acquired "use, possession and risk" in respect of the Private Company Shares. Instead, the Appellant's assertion that the purchase price of the Private Company Shares was paid out of the RRSP Trusts fully supports

the Judge's conclusion that the Annuitants were not the Section 116 Purchasers of the Private Company Shares.

[60] For these reasons, it is my view that the Judge made no reviewable error in concluding that the Annuitants were not the Section 116 Purchasers of the Private Company Shares under the Share Purchase Agreements.

D. **Did the Judge Err in concluding that Olympia was the Section 116 Purchaser of the Private Company Shares?**

[61] Assuming that the Annuitants were not the Section 116 Purchasers of the Private Company Shares, the Appellant asserts that it could only be regarded as the Section 116 Purchaser in its capacity as trustee of the RRSP Trusts and not in its "personal" capacity. In effect, the Appellant is essentially arguing that the Section 116 Purchasers were the RRSP Trusts.

[62] The Appellant asserts that the RRSP Trusts have independent existence, for the purposes of, and are taxable under the Act either because they are deemed by subsection 104(2) to be individuals in respect of trust property or because they fall within the definition of person in subsection 248(1).

[63] While these assertions may well be valid, the RRSP Trusts have no independent legal existence at common law. Parliament recognized this important limitation when it enacted subsection 104(1), which provides that a reference in the Act to a trust shall, unless the context

otherwise requires, be a reference to the trustee having control of the trust property. Thus, as was recognized by Justice Sharlow in *St. Michael Trust Corp. v. Canada*, 2010 FCA 309, 411 N.R. 125, subsection 104(1) provides a linkage between a trust and its trustee for the purpose of solving "practical problems of tax administration that would necessarily arise" out of the taxability of trusts under the Act, given their lack of an independent legal existence.

[64] The independent status of the RRSP Trusts under the Act, and their taxability as such, is a practical reality only by virtue of the efforts of Olympia, as their trustee and the person through which they meet their statutory obligations under the Act.

[65] The issue then becomes how the taxability of trusts under the Act, facilitated by a deemed or statutorily imposed persona or independent existence, fits in with respect to the obligations of a Section 116 Purchaser under the Act.

[66] As a practical matter, the critical element of subsection 116(5) is the paying or crediting of an amount to a Disposing Non-Resident as the purchase price or acquisition cost of the TCP that has been transferred by the Disposing Non-Resident. This action cannot be taken by a fictional person.

[67] Another important element of subsection 116(5) is the remittance to the Minister of the amount of the tax payable by the Section 116 Purchaser. Again, this is an action that a fictional person cannot perform. Thus, it is apparent that the separate legal existence of a trust under the Act has its practical limitations.

[68] Such limitations make it difficult to conceive of the RRSP Trusts as the Section 116 Purchasers of the Private Company Shares. It may well be the case that, for the purposes of the Act, the RRSP Trusts acquired the beneficial ownership of those shares. Nonetheless, in my view, the identity of the Section 116 Purchaser, which it must be remembered is a construct that exists in the context of the non-resident tax collection mechanism in subsection 116(5), is determined by reference to the Disposing Non-Resident who transfers the TCP and receives the purchase price of such property.

[69] Accordingly, it is my view that the existence of a deemed or fictional legal independence of trusts under the Act, including the RRSPs, precludes them from being Section 116 Purchasers. Because they lack legal personality, trusts cannot receive transfers of TCP or pay its purchase price. Importantly, trusts cannot perform the function of a Section 116 Purchaser, which is to facilitate the collection of tax from Disposing Non-Residents who dispose of TCP. While it is the case that there is no obligation on a Section 116 Purchaser to "withhold" any portion of the purchase price payable for the TCP, typically that is what is done in commercial transactions. It is possible that there may be circumstances in which a Section 116 Purchaser would pay the purchase price of such property without withholding. However, that would leave the Section 116 Purchaser in the very position that subsection 116(5) is intended to prevent the Minister from being in, namely, having to try to collect an amount from a person who is outside of Canada. In the commercial world, withholding by the Section 116 Purchaser is the rule, not the exception.

[70] The Appellant asserts that to impose liability in Olympia is impermissible because Parliament intended that trustees would be liable for tax only in the limited circumstances set

forth in section 159. In my view this assertion must be rejected because it is inconsistent with Parliament's intention in establishing the collection mechanism in subsection 116(5).

[71] The Appellant further asserts, at paragraph 66 of its factum, that "[i]n the context of the Act, the person that is primarily responsible for the action taken by the trust is the trust itself as a separate individual taxpayer…" This assertion is inconsistent with the common law notion that a trust has no legal personality and cannot undertake actions otherwise than through its trustee. This is so even though it has a fictional or deemed legal existence that enables the Minister to impose tax, to the extent stipulated in the Act, upon income generated by or from the use of trust property.

[72] The Judge found that the Private Company Shares were transferred to Olympia by the Non-Resident Vendors and that Olympia paid the purchase price of those shares to those vendors. In making these findings, the Judge made no palpable and overriding error. The application of the interpretation of subsections 116(3) and (5), described above, to these findings leads to the conclusion that Olympia was the Section 116 Purchaser. As such, in my view, the Judge's conclusion to that effect contains no reviewable error.

[73] I would add that the transactions that were undertaken had a decidedly non-commercial flavour. Funds were paid to the Non-Resident Vendors in the absence of "clearance certificates" issued under either of subsection 116(2) or (4) and no withholdings from those funds were made. The facts provided in relation to the Rule 58 Question provide no explanation for this departure from normal commercial practises.

[74] While it may be the case that Olympia was to some extent reliant upon the Annuitants and their advisors with respect to the documentation and implementation of the transactions relating to the purchases of the Private Company Shares, as found by the Judge and affirmed in these reasons, Olympia purchased such shares for and on behalf of the RRSP Trusts and, as between itself and those trusts, Olympia was the only person with legal existence (as opposed to deemed or fictional existence under the Act) who was able to ensure that such transactions were carried out in a commercial fashion that would meet the requirements of subsection 116(5).

[75] It is noteworthy that Olympia obtained indemnifications from the Annuitants to protect it from any taxes, penalties and other costs resulting from the implementation of such purchases in accordance with instructions from the Annuitants. Whether such indemnifications led Olympia to permit the transactions to be implemented in such a non-commercial fashion is a matter that is not before us in this appeal.

[76] For the sake of completeness, I note that in its factum the Appellant asserted that the RRSP Trusts were "bare trusts" with the result that they should essentially be ignored for the purposes of the Act. In my view, this assertion is unpersuasive. First, Olympia as trustee of the RRSP Trusts has meaningful powers and responsibilities. In particular, it is clear that while the Annuitants have "self-direction" rights, Olympia has the power to countermand directions to sell trust property. In addition, Olympia is responsible for tax reporting and withholding obligations in respect of such trusts. Finally, each RRSP Trust has a beneficiary other than its Annuitant. These factors are sufficient to negate the "bare trust" assertion.

VII. Disposition

[77] For the foregoing reasons, I would dismiss the appeal. Costs of this appeal shall be in the cause.

"C. Michael Ryer"
J.A.

"I agree
Richard Boivin J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-565-14

(APPEAL FROM A DECISION OF JUSTICE RANDALL BOCOCK, DATED JUNE 25, 2014, DOCKET NO: 2013-189(IT)G)

STYLE OF CAUSE:	OLYMPIA TRUST COMPANY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	NOVEMBER 2, 2015
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	BOIVIN J.A. RENNIE J.A.
DATED:	DECEMBER 4, 2015

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