Docket: 2007-2583(IT)G

BETWEEN:

PETER SOMMERER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on December 6, 7, 8, 9 and 10, 2010,
January 25 and 26, 2011, and February 7 and 8, 2011, at Ottawa, Ontario

Before: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Roger Taylor, Daniel Sandler and Louis Tassé
Counsel for the Respondent:	Luther P. Chambers, Q.C. and Ryan Hall

---

AMENDED JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* (the "*Act*") for the 1996, 1997, 1998, 1999 and 2000 taxation years are allowed and the reassessments **are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the Reasons for Judgment.**

Costs to the Appellant.

Signed at Ottawa, Canada, this 13th day of May 2011.

"Campbell J. Miller"

C. Miller J.

Citation: 2011 TCC 212
Date: 20110513
Docket: 2007-2583(IT)G

BETWEEN:

PETER SOMMERER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

C. Miller J.

[1] Mr. Sommerer is one of those energetic individuals whose mind is so full of business ideas, specifically connected to the hi-tech industry, that he cannot seem to actuate them fast enough. He left me with the impression of someone who cannot sit still for long, evidenced by standing throughout his three and a half days of testimony. He sees one project up and going and is on to the next, be it a business venture or a Phd. With his strong Austrian roots he, with his father, took advantage of the newly minted Private Foundation legislation in Austria, and in 1996, the Sommerer Private Foundation ("SPF") was founded by Mr. Sommerer's father. It is the tax treatment in Canada of the subsequent gains on the sale of shares held by the SPF, having purchased those shares from Mr. Sommerer at fair market value, that is the issue before me. The Government assessed on the basis there was a trust in Austria and that the attribution rules (subsection 75(2) of the *Income Tax Act* (the "*Act*")) attributed the gains on the sale of shares to Mr. Sommerer, or to his wife. The Appellant argues that there was no trust, and in any event if there was, subsection 75(2) of the *Act* was still not applicable. Further, even if subsection 75(2) of the *Act* was applicable, the *Canada-Austria Income Tax Convention* (the "*Convention*") precluded Canada from taxing the gains on the disposition of the shares. In the alternative, the Respondent argues that the SPF acted as agent for Mr. Sommerer on the disposition of the shares, triggering the tax on the gain from the sale of shares in

Mr. Sommerer's hands. Finally, there is an issue with respect to the timing of the sale of shares by Mr. Sommerer to the SPF, although this was not the Respondent's initial assessing position. There is a smorgasbord of issues regarding trusts, corporations, agency, the definition of shares, Treaty interpretation and Austrian law all flowing into the determination of the correctness of the assessments before me.

Facts

[2] Mr. Sommerer grew up in Austria, the oldest of six children. He obtained an engineering designation and in the late 1960s went to work for IT&T in Austria. While working, he studied towards the equivalent of an MBA, which he obtained from the University of World Trade in 1975. In 1974, he married a United Kingdom citizen, who had one child, and together they had two children born in Austria in 1975 and 1977. The Sommerers lived in an apartment initially but moved to a larger co-op housing arrangement as the family expanded.

[3] While working in Austria with IT&T, Mr. Sommerer heard of Nortel. His interest was piqued in the North American way of business. In 1977, he applied to emigrate to Canada as a Landed Immigrant and, in 1978, the Sommerer family moved to Canada. According to Mr. Sommerer, they sold everything though kept the right to live in the co-op housing in Austria for a year, just in case he was unable to find work in Canada. This right was given up after a year. Mr. Sommerer kept a bank account in Austria to cover vacation expenses. He also kept his Austrian driver's licence which is issued for life. Though he retained his Austrian citizenship, Mr. Sommerer took out Canadian citizenship in 1993.

[4] Mr. Sommerer did find work in Kanata working for Mr. Terry Matthews at Mitel. He eventually became project manager of a switching system that skyrocketed Mitel's fortunes. He was asked to go to Germany to set up a Mitel subsidiary which he did for the period 1981 to 1984. He kept his home in Ottawa, simply renting it out. During this period of working for Mitel both in Canada and in Germany, Mr. Sommerer would occasionally visit Austria.

[5] On his return to Ottawa in 1984, Mr. Sommerer described the bloom being off the rose for Mitel, and he happily joined Mr. Matthews in a new venture, Newbridge. Again, being in charge of product management, revenues for Newbridge soared. Mr. Sommerer suggested that Newbridge get into internet products in the late 1980s. Upon Newbridge going public it faced some technical issues, and Mr. Sommerer was put in charge of solving them. He became chief operating officer in 1990. Over the next few years, revenues reached the billion dollar mark.

[6] In the late 1990s, a number of Newbridge affiliated companies were established, one of them being Vienna Systems Corporation ("Vienna"), positioned to operate voice over networks on the internet. It was incorporated in August 1995. Mr. Sommerer acquired 25% of the common shares of Vienna (1,770,000). Mr. Sommerer divided his time between Newbridge and Vienna. He hired a CEO for Vienna. Mr. Sommerer left Newbridge in 1998 and looked for something new, which he found in another internet type venture, Coventus.

[7] From 2004 to 2007, Mr. Sommerer studied and obtained a Phd from a University in Vienna. He acquired an apartment in Vienna where he would spend time while studying. He also acquired a house in the mountains in Austria in 1995. He owned his Ottawa residence as well as a cottage in Pakenham, Ontario and a MURB in Kingston. He expressed no interest to return to live in Austria.

The Sommerer Private Foundation ("SPF")

[8] In 1996, Mr. Sommerer and his father discussed the establishment of a Private Foundation in Austria. Such foundations had only recently been introduced by the *Austrian Private Foundation Act* of 1993 (*APFA*). On October 3, 1996, a Foundation Declaration was signed by Mr. Sommerer's father, Mr. Herbert Sommerer, who paid 1,000,000 Austrian shillings of his own money into a foundation account. The Foundation Declaration is not lengthy and is worth reproducing in its entirety:

§ 1 Name and Registered Headquarters

(1) The foundation is a private foundation under Austrian law with the name ----

Sommerer Privatstiftung

(2) The foundation's registered headquarters is located in Mitterbach ----

(3) Founder of the foundation is Mr. Herbert SOMMERER ----

§
2 Purpose, Beneficiaries

The purpose of the foundation is to promote the interests of those individuals indicated in the supplementary deed from the income generated by the foundation funds.

Engaging in investment activities, in particular the purchase of shares on credit, is also in line with this purpose.

Beneficiairies and those who may become beneficiaries based on the purpose of the foundation have no legal claim to grants from the foundation.

§ 3 Assets

(1) Foundation assets at the time the foundation was set up consist of a cash amount of ATS 1,000,000 (one million Austrian shillings). This is recorded as capital in the opening balance of the foundation. The rules of the Companies Act on capital stock apply to these foundation assets. ----

(2) The foundation is authorized to acquire and hold movable and immovable assets and rights of any kind (including securities), both domestically and abroad, to engage in legal transactions of any kind, and to accept any contributions and incur any debt that may be necessary of useful in maintaining or administering the foundation assets. ----

§ 4 Corporate Bodies

Corporate bodies of the foundation include the: ----

a) Executive Board----------
b) Foundation Auditor----------
c) Advisory Board----------

§ 5 Executive Board

(1) The Executive Board shall consist of three members.----

(2) Members of the Executive Board are appointed and dismissed by the founder of the foundation as long as he is alive and capable of conducting business. Otherwise, in the event that a member leaves, the Executive Board decides on his/her successor. Re-appointment is permitted.----

(3) The Executive Board shall conduct the business of the foundation with the due care of a proper and conscientious business manager in accordance with the foundation declaration, any supplementary deeds, and rules of procedure that it decides upon. It represents the foundation externally in all matters; two representatives are authorized to act jointly for representational purposes.----

(4) Members of the Executive Board will leave the Board:----

- once the term of office, to be determined, has expired;----

- due to resignation, which shall be submitted in writing to the Chair of the Board or his/her deputy without requiring any reasons to be stated;
- due to death, incapacitation, or bankruptcy;
- due to dismissal by the founder or the Executive Board itself; the Executive Board shall decide by secret vote on dismissal for significant cause; the member to be dismissed has not right to vote in this case;----
- due to a decision of the court in accordance with § 27 (paragraph twenty-seven) of the PSG (Private Foundation Act).

§ 6 Principles of Asset Administration

(1) The corporate bodies of the foundation shall always strive to maintain the value of the foundation assets. The Executive Board, with the consent of the Advisory Board, decides upon the level and allocation of the grants and upon the beneficiaries, with the consent of the Advisory Board.----

(2) Members of the foundation bodies are entitled to compensation commensurate with their activities and in line with foundation income. Moreover, they have a claim to reimbursement of any necessary cash outlays. The foundation auditor is required to provide an opinion on the appropriateness of the compensation annually in his/her report.----

§ 7 Accounting, Reporting, and Audit

(1) The Executive Board shall determine the foundation's fiscal year.----

(2) The Executive Board shall prepare the annual financial statements and the management report and submit them to the foundation auditor within five months of the end of the fiscal year. The Executive Board shall report on the foundation's performance and beneficiaries, as well as the activities and grants planned for the following year, in the management report.

(4) The foundation auditor is appointed by the court upon recommendation of the Executive Board for a period of three years. Re-appointment is permissible.

§ 8 Amendments to the Foundation Declaration

(1) The founder is entitled to revoke the foundation during his lifetime and to amend any points in the foundation declaration with the consent of the Advisory Board.----

(2) Upon the death or incapacitation of the foundation founder, the Executive Board is authorized to decide on an amendment of the statutes contingent

upon a two-thirds majority and to submit such amendment to the court. An opinion of the Advisory Board shall be obtained in advance. A change in the original purpose of the foundation is permissible only if, due to a change in circumstances (changed economic or social circumstances or a shift in general moral concepts or a change in the legal situation, particularly related to tax law), the pursuit of the purpose of the foundation without change would no longer reflect the presumed intention of the founder. An adjustment for the purpose of more advantageous taxation is permissible in the interest of the maintaining the value of the foundation assets.----

§ 9 Supplementary Deed

The foundation founder may set up a supplementary deed.----

§ 10 Term, Liquidation

(1) The foundation is set up for an indefinite period.----

(2) The Executive Board may decide to liquidate the foundation based on a unanimous resolution and an endorsement by the Advisory Board in the event that it can no longer fulfill the foundation's purpose as intended by the founder, and it does not appear that this purpose can be achieved by means of a change in the foundation declaration.----

[9] On October 4, 1996, Mr. Herbert Sommerer signed a supplementary deed, also worth producing in its entirety:

§ 1 Allocation of Assets

Mr. Herbert SOMMERER established the Sommerer Privatstiftung today by notarial deed.----

§ 2 Beneficiaries

The beneficiaries are Mr. Peter SOMMERER, his wife, Mrs. Dawn Elizabeth SOMMERER, as well as the children from their marriage, but only as of their eighteenth birthdays and, in the event of their death, their offspring, provided they are resident in Austria.----

§ 3 Ultimate Beneficiaries

(1) In case of liquidation under § 34 (paragraph thirty-four) of the Privatstiftungsgesetz (Private Foundation Act), Mr. Peter SOMMERER and Mrs. Dawn Elizabeth SOMMERER are the ultimate beneficiaries as interpreted under § 36 (paragraph thirty-six), Section 4, (four) of the Private Foundation Act. ----

(2) In all other cases of liquidation, the offspring of Mr. Peter SOMMERER and Mrs. Dawn Elizabeth SOMMERER are the ultimate beneficiaries. In the event of multiple offspring, distribution should occur per head; offspring of still living offspring, however, will not participate. In the event that no children or grandchildren of the founder exist or can be identifies, the remaining assets are to be transferred in equal parts to the communities of St. Sebastian, Styria, and Wootton Basset, Wiltshire, England, on condition that the transferred assets are utilized to finance infrastructure accessible to the general public.----

§ 4 Revocation, Modification of the Supplementary Deed

The supplementary deed may be revoked by the Executive Board with unanimous approval by the Advisory Board, and all items may be modified or supplemented.--

§ Advisory Board

An Advisory Board consisting of three members shall advise the Executive Board in determining grants to beneficiaries and has the right to supervise the activities of the Executive Board.----

Members consist of the oldest two beneficiaries and the founder.----

[10] In accordance with the terms of the SPF Declaration Mr. Hebert Sommerer appointed Mr. Ketzer, a colleague of Mr. Peter Sommerer's from college, Mr. Krammer, who Mr. Peter Sommerer did not know, though expressed confidence in his credentials and Mr. Grossbacher, a banker known well by Mr. Peter Sommerer, as the members of the Executive Board of the SPF.

[11] Mr. Sommerer explained that the reasons the SPF was established were:

a) he agreed fully with the concept of the Private Foundation in that it was to stem the flow of capital out of Austria to other European countries and to attract foreign capital, thus shifting capital stocks (shares of Vienna for example) into Austria;

b) from Mr. Herbert Sommerer's perspective to establish family ties through the SPF in Austria with the hope that the family might return;

c) to make it easier to leverage financing from Austria;

d) to provide a safe haven for investments;

e) from his perspective, to, in some way, compensate Austria for the education he received, to make capital available for new start-ups, to create something for his children and use the income for charitable purposes.

[12] Coincidentally with the establishment of the SPF, Mr. Sommerer, as Seller, entered into a Sales Agreement with the SPF, as Buyer, dated October 4, 1996. It stipulated in part:

> 1. Object of the Agreement
>
> 1. The Seller owns registered shares in Vienna Systems Corporation, Kanata, Ontario, Canada (hereinafter termed the "Company").
>
> 2. The Seller hereby sells 1,770,000 of the shares detailed above to the Buyer. It is noted that voting, dividend and any subscription rights will remain to the Seller.
>
> 2. Purchase Price
>
> 1. The purchase price for the shares covered by this agreement is $1,177,050 CDN. …
>
> 3. Transfer and Guarantee
>
> 1. The Buyer acquires the shares covered by this agreement without voting, dividend and subscription rights. …
>
> 4. General Terms and Conditions
>
> …
>
> 2. In the event that individual provisions of this contract are or become unenforceable, this does not affect the enforceability of the remaining provisions. In this event, the parties to the agreement will replace such provision with a new one that reflects the business purpose of the original provision.

[13] The SPF paid Mr. Sommerer cash of $117,705, with the balance of the purchase price of $1,059,345 remaining an amount owing on which interest accrued. Excerpts of the Vienna Board of Director's meeting of September 20, 1996, indicate:

> Upon motion duly made, seconded and carried, the following resolution was passed: Resolved that the transfer of 1,770,001 common shares of the Corporation from Peter Sommerer to Sommerer Privatstiftung be and the same is hereby approved.

Further, share certificates were ultimately issued in the name of the SPF, albeit some considerable time after October 1996.

[14] Mr. Sommerer indicated that he wanted to keep the vote to influence the future of Vienna. He believed the shares, without the voting, dividend, and subscription rights should be valued at half their value of $1.33 per share (the Appellant and Respondent agree that fair market value at that time was $1.33 per share), thus the price worked out to .665 cents per share. Mr. Sommerer had suggested in his examination for discovery that another possible reason to keep the vote was to avoid the possibility of Vienna losing its Canadian control private corporation (CCPC) status, as, if the non-resident SPF and the public company Newbridge held greater than 50% of the shares there was a risk. Mr. Sommerer's testimony in this regard is worth reproducing:

> …
>
> Q. You also acknowledged that the reasons why you sold the shares to the Foundation back in 1996 without the voting rights as to maintain the status of Vienna Systems as a CCPS?
>
> A. I didn't. Where did I say that? I think I indicated that I wanted to maintain the voting rights in order to continue to have a way when it came down to set the direction of the company.
>
> Q. I'll re-read the passage in the discovery. It's volume 1 of the transcript. Page 152, you said in answer to question on page 152, line 2:
>
> "Q: Private Corporation?
>
> A: Private Corporation. Yes, Vienna Systems was a private corporation.
>
> Q: But you acknowledge certain tax advantages flow from that?
>
> A: Clearly, I am aware of the tax advantages of CCPC status.

Q: Which you did not want to lose?

A: Definitely, the company would not want to lose them, given the R&D.

Q: Yes. Is this the reason why you wanted to retain the voting rights to the shares?

A: That could very well have been one of the reasons."

This is the answer you gave us?

A. It says it could have been one of the reasons.

Q. But it wasn't now?

A. Pardon?

Q. It wasn't?

A. In 1996, no.

…

[15] On Canadian professional advice that it was not possible to split the rights in shares, Mr. Sommerer and the SPF entered an Addendum, dated March 3, 1997 that stated:

Addendum to the Purchase Agreement
dated October 4, 1996

Based on a purchase agreement dated October 4, 1996, Sommerer Privatstiftung, Waldrandsiedlung 5, 3224 Mitterbach, has acquired 1,770,000 shares of Vienna Systems Corporation from Mr. Peter Sommerer, 8 Murphy Court, Kanata, Ontario, Canada, without voting, dividend, or subscription rights.

Both contracting parties hereby agree that the aforementioned rights have in principle been transferred.

The Sommerer Privatstiftung explicitly transfers all of these rights (voting, dividend, and subscription rights) to Mr. Peter Sommerer.

> Mr. Peter Sommerer grants the Sommerer Privatstiftung the right to transfer the voting, dividend, and subscription rights against payment of a consideration of CAD 0.66 per share.
>
> Vienna, March 3, 1997

[16] It is unclear why this document is dated the 3rd of March 1997 as Minutes of the Executive Board of the SPF suggest that it was sometime after June 1998 and, perhaps, even as late as November 1998 that this Addendum was finally put in place. Indeed, the Minutes of the meeting of November 27, 1998 indicated a couple of things:

> 5. Voting, Dividend, and Subscription Rights of the Vienna Shares
>
> Mr. Krammer explained that an amendment of the agreement regarding the purchase of shares in Vienna Systems Corporation has not yet been implemented and noted that he will soon send a respective suggestion for an agreement amendment to Mr. Peter Sommerer for signing.
>
> …
>
> 10. Vienna Systems Takeover Offer
>
> Mr. Sommerer informed the attendees that the company Nokia has approached the company Vienna in order to purchase all of the outstanding shares of the company Vienna. He gave the Executive Board a copy of a decision from the Advisory Board to recommend to the Executive Board that it comply with a possible offer from Nokia and offer for sale all of the shares in Vienna Systems that are in the possession of the Foundation, provided the price per share is approximately CAD 9 (Attachment G).
>
> The Executive Board unanimously agreed to comply with this recommendation.
>
> Mr. Peter Sommerer further explained that it is anticipated that Nokia will request a signed sales offer from the Executive Board of the Private Foundation before December 18 in order to complete the purchase before year-end 1998.
>
> The Executive Board further unanimously agreed to buy back the voting, dividend, and subscription rights of the Vienna Systems shares still remaining with Mr. Peter Sommerer if Nokia accepts the sales offer.
>
> …

[17] The parties are agreed that the fair market value of the Vienna shares in October 1996 was $1.33 per share.

[18] In April 1997, Mr. Sommerer, as a member of the Advisory Board of the SPF recommended to the Executive Board to sell 150,000 Vienna shares, but the Executive Board determined not to do so at that point, as Mr. Krammer believed, according to the Executive Board minutes that the shares "still have price increase potential". In December 1997, the Executive Board, again on recommendation of Mr. Sommerer as a member of the Advisory Board, resolved to sell 150,000 Vienna shares to Mr. Mikutta, 33,333 to Mr. Jenkins and 33,333 to Mr. Madsen at a price of $4.50 Cdn per share. It is interesting to note Mr. Sommerer's correspondence of November 30, 1997 to Mr. Jenkins in connection with this sale of Vienna shares:

> I will transfer to you upon issuance of the share certificate in your name any dividend and share allocation rights. Only the voting rights for these shares shall remain with me. These voting rights shall extend to any shares obtained by you through any share dividends, share splits and to any shares acquired subject to any *pro rata* allocation rights for newly issued shares. Immediately prior to an initial public offering, I will transfer to you the voting rights for any shares owned by you for which I hold the voting rights.

[19] On November 23, 1998, the directors of Vienna considered a proposal from Nokia to purchase Vienna for $134,000,000. Four days later, the Advisory Board of the SPF recommended to the Executive Board that the Nokia proposal be accepted at $9.00 Cdn per share. (see excerpt of Minutes in paragraph 16 of these Reasons) The Share Sale Agreement with Nokia was signed by Mr. Grossbacher on behalf of the SPF on December 18, 1998.

[20] Mr. Sommerer had, on December 21, 1998, responded to the SPF's request for the transfer-back of the voting, dividend, and subscription rights to the 1,770,000 Vienna shares, by assigning such rights back to the SPF effective immediately at .665 cents per share. This appears to be in accord with the last paragraph in the Addendum of October 4, 1996.

Cambrian Shares

[21] With respect to the Cambrian Systems shares, on September 30, 1997, Mr. Sommerer entered into a written Subscription Agreement with Cambrian Systems Corporation for the purchase of 57,143 common shares of that company for $100,000.

[22] In a letter dated March 26, 1998, from Mr. Grossbacher, the chairman of the Executive Board of the SPF, to Mr. Sommerer, Mr. Grossbacher stated:

> I am sending you a decision that indicates we have followed the request of the Advisory Board to acquire 57,143 pieces of the company Cambrian Systems Corp. at a price of Cdn $100,000. I request that you initiate the following:
>
> - Establishment of the Acquisition Contract;
>
> - Definition of the account number into which the money shall be transferred.

Mr. Sommerer delivered the stock certificate for the 57,143 shares of Cambrian Systems Corp. on April 5, 1998, to Mr. Grossbacher.

[23] Notwithstanding an earlier position of the Appellant, the Appellant conceded at trial that there was a transfer of the Cambrian shares from Mr. Sommerer to the SPF in 1998.

[24] On December 4, 1998, Nortel made an offer to the shareholders of Cambrian to acquire their shares at $14.97 US per share at closing with an additional $4.12 per share if certain milestones were met in 1999. The SPF received two cheques in the amounts of $316,584 and $539,007 in connection with this sale.

Changes to the SPF

[25] There were a number of changes to the SPF after 1998. Although these are not applicable to the relevant time period in the case before me, it does show a subsequent history that gives some insight into the individuals' intentions and purpose of the SPF. I am, therefore, going to go over some of these changes briefly.

[26] At the June 17, 1998, meeting of the Executive Board of the SPF, attended by all three members of the Advisory Board, being Mr. Sommerer, Mr. Herbert Sommerer and Mrs. Sommerer, changes to the Supplementary Deed were discussed. The minutes indicate:

> 8. Amendment of the Supplementary Foundation Deed
>
> …
>
> Mr. Krammer expressed his willingness to work out a suggestion for an amended Supplementary Foundation Deed, present it to the Advisory Board and Executive

> Board as soon as possible for approval, and implement the necessary notary revision. It was agreed that a new Supplementary Foundation Deed (STD) should include the following changes:
>
> - Adding of nonprofit organizations as beneficiaries in § 2 of the STD as unanimously suggested by the Advisory Board
> - Changing the condition of an Austrian place of residence in § 2 of the STD to a condition of a place of residence in a country to be designated by the Advisory Board, with the designation of Canada as such a country being irrevocably excluded
> - Adding the same domicile condition in Para. 1 and Para. 2 of § 3 of the STD in order to apply them analogously for the determination of the final beneficiaries
> - Eliminating the explicit right of the Advisory Board expressed in the first paragraph of § 5 of the STD to monitor the activities of the Executive Board.

[27] On January 22, 1999, the Supplemental Deed was in fact amended to accomplish this. There was no longer any mention of the supervisory role of the Advisory Board.

[28] On December 6, 1999, after having received some professional advice, and having been contacted by the Canada Revenue Agency (CRA) with respect to his 1998 returns, Mr. Sommerer wrote to Mr. Krammer as follows:

> …
>
> The changes are targeted to avoid any specific names of beneficiaries. The new addendum certificate should only consist of three paragraphs:
>
> § 1. Benefited persons must be not-for-profit organizations determined by the Advisory Board.
>
> § 2. This addendum certificate can be revoked by the Executive Board and unanimous approval by the Advisory Board, and can be changed and amended on all points.
>
> § 3. An Advisory Board herewith assigned consists of three members and must advise the Executive Board for the determination of donations to the beneficiaries. At any given time, the membership consists of the oldest of the following persons: the founder, Mrs. Dawn E. Sommerer, Mr. Peter Sommerer, and the children and grandchildren of Peter Sommerer and Dawn E. Sommerer.

[29] This resulted in a further Amended Supplemental Deed dated January 7, 2000. In particular, I note:

> Second:
>
> The beneficiaries are specific charitable organizations;
>
> Third:
>
> 1. In case of liquidation under § 34 of the Privatstiftungsgesetz (Private Foundation Act), Mrs. Dawn Elizabeth SOMMERER is the ultimate beneficiary as interpreted under § 36, Section 4, of the Private Foundation Act, provided she resides in one of the countries named by the Advisory Board, with the exclusion of Canada. The residence clause is irrevocable.

[30] Later in 2000, Mr. Sommerer felt that given the issues arising surrounding the Foundation Declaration and Supplemental Deed, and how the SPF conducted its business, he drafted some rules of procedure for both the Executive Board and the Advisory Board. This also led to some changes to the Foundation Declaration, which were effective July 24, 2000, primarily to add a provision that the SPF "shall promote the establishment or expansion of companies of individuals who may be considered for the function of members of the Advisory Board…".

[31] The Supplemental Deed was also amended at the same time to make a number of changes:

> a) beneficiaries to be appointed by the Executive Board now included charitable organizations as well as groups of persons considered for the Advisory Board, provided there will be no such appointment if it would "give rise to a fiscal (taxable) position for the Private Foundation or such persons without contributions having been made".
>
> b) With respect to the ultimate beneficiaries, this too was changed to persons being considered as members of the Advisory Board…in equal shares, again subject to a residency requirement.

[32] The provision dealing with the Advisory Board underwent a substantial overhaul providing more of a complete code for the Advisory Board. The Advisory Board's purpose remained "to advise the Executive Board in certain matters and/or approve of certain decisions of the Executive Board or deny such approvals".

[33] There were further amendments in 2007, when Dr. Torggler became involved. This is long past the relevant time period and is of no consequence.

Executive Board – Advisory Board interactions

[34] Both parties spent considerable time reviewing the minutes of the Executive Board to give me a flavour of where control of the SPF rested. I do not intend to go through this in extensive detail but simply make a number of observations:

a) Apart from the minutes of February 22, 2000, where it was indicated Mr. Sommerer was contacted by phone, he attended all 25 Executive Board meetings, for which minutes were presented at trial; in many cases all members of the Advisory Board attended.

b) Mr. Sommerer acted as secretary of the Executive Board at the meetings and prepared the minutes.

c) Mr. Sommerer frequently presented investment strategies and recommendations. A good example are the minutes of the meeting of November 27, 1998, of the Executive Board where Mr. Sommerer recommended the acquisition of the Bridgewater stock options, as well as the sale to Nokia of the Vienna shares. The Board agreed unanimously with both recommendations.

d) Especially after the SPF came into funds from the sale of the Vienna shares, the Executive Board needed guidance on investments. For example, the Advisory Board communicated the following decision to the Executive Board in the fall of 1999:

> Decision by the Advisory Board of the Sommerer Private Foundation relative to the Management of the Foundation Assets
>
> The Advisory Board herewith communicates its concept relative to the management of the assets of the Sommerer Private Foundation as follows:
>
> 1. All proceeds earned from the sale of Foundation assets in the course of the year, including possible profits from speculation, must be reinvested as soon as possible while respecting the planned structure of the Foundation assets.
>
> 2. All interest or cash dividend earnings received in the course of the year must be kept as short-term cash assets. The total amount received from interest and dividends must be determined within three months after the end of a fiscal year.

3. The Executive Board shall, in coordination with the Advisory Board, put aside from this total amount a corresponding amount as cash reserve for payment of obligations of any type (taxes, other costs).

4. The remaining amount is to be paid to the beneficiaries in coordination with the Advisory Board.

5. A possible remaining amount must be reinvested in a way that it corresponds as closely as possible to the target structure of the Foundation assets.

6. The Advisory Board shall inform the Executive Board before the beginning of each fiscal year of the target structure of the Foundation assets and, if necessary or desired, propose any restructuring of specific investments.

e) It was the Advisory Board that proposed the distributions. Mr. Sommerer indicated he would value the Foundation's capital each year to bring to the Executive Board's attention the amounts available for distributions. This was in fact a two-prong test looking at both income and the inflationary value of the SPFs assets.

f) The Executive Board minutes indicate that the Executive Board, in conjunction with the Erste Bank, was involved in managing the portfolio investment.

Experts

[35] Before reviewing the testimony of the two experts, Dr. Torggler and Dr. Plesser, it is important to keep in mind the relevant provisions of the *APFA*, as published in October 1993. This legislation can be found in Appendix A to these Reasons.

[36] There are a number of elements of *APFA* that I wish to specifically note:

a) The Private Foundation is a legal entity;

b) The Foundation Declaration in the form of Deed must be recorded in the Register of Corporations;

c) A supplementary document need not be registered though the dates of the Deed and amendments must be;

d) Beneficiaries may be named in the Foundation Declaration or by a person or institution (Stelle) named for this purpose by the founder, or, if no Stelle, by the board of directors (Executive Board);

e) Ultimate beneficiaries are entitled to all assets remaining on dissolution;

f) There is provision for a supervisory board in specific circumstances (these circumstances are not met in the case before me);

g) The Foundation Declaration can provide for other Foundation organs;

h) The Executive Board ensures the purpose of the Foundation is achieved and must perform its duties frugally and prudently;

i) The founder may reserve the right to change the Foundation Declaration or revoke it; the founder in this case did reserve the right to revoke;

j) The beneficiaries have rights to information and inspection.

[37] Both Dr. Torggler and Dr. Plesser were well qualified to assist me in understanding the Austrian laws regarding the Austrian Private Foundation.

[38] Dr. Torggler not only acted as an expert witness, but he had also been retained by the SPF in 2007 to revise the Foundation Declaration. Before commenting specifically on the SPF, he opined as follows:

a) The Private Foundation is a "person";

b) The Executive Board owes a duty only to the Private Foundation and no fiduciary duty to the beneficiaries, unless provided in the Foundation Declaration;

c) An Advisory Board which is an additional organ cannot, according to the Austrian Superior Court, be dominated by beneficiaries if the rights and duties of such organ are similar to a supervisory board;

d) The legislation distinguishes between beneficiaries and ultimate beneficiaries. Austrian Courts have also distinguished actual from potential beneficiaries. Beneficiaries are considered actual beneficiaries only from the time of entitlement to endowments. Ultimate beneficiaries are considered actual beneficiaries only from the time of adoption of a resolution by the Executive Board to dissolve the Private Foundation;

e) An Austrian Private Foundation is subject to Austrian corporate income tax as a separate legal person, including a speculation tax on the disposition of shares held for less than a year.

[39] Dr. Plesser agreed with the above comments.

[40] With respect to the SPF, Dr. Torggler opined:

a) Peter Sommerer (and his wife and children) were potential beneficiaries only as they were not residents of Austria and there was no resolution to dissolve the Foundation. Dr. Plesser agrees.

b) Mr. Sommerer had no rights of a beneficiary under sections 29, 30 or 31 of the *APFA*, given he was only a potential beneficiary, but would have rights under subsection 35(3) and (4) regarding the dissolution of the Foundation. Dr. Plesser agrees.

c) Mr. Sommerer had no ownership rights in the SPF property. Dr. Plesser agrees.

d) Mr. Sommerer cannot transfer his position as a beneficiary to another person. Dr. Plesser agrees.

e) The SPF had no supervisory board as an organ.

f) The Advisory Board was not validly established in 1998 and had therefore no powers, as it was not provided for in the Foundation Declaration, only mentioned; only after a later amendment was it validly established and constituted.

g) Distributions from the SPF related to income from the property only and not the capital of the property. Although there was some considerable

discussion in this regard, I conclude that distributions were income distributions.

[41] Dr. Plesser's major disagreement with Dr. Torggler surrounded the powers of the Advisory Board. While he agreed it was not established as an organ as such of the SPF, he opined that it could either be a Stelle (authority named for the purpose of naming beneficiaries found in section 5 of the *APFA*), though only in conjunction with the Executive Board, or it could be a person to be given special responsibilities, in accordance with subsection 9(2) and (4) of the *APFA*.

[42] Dr. Plesser opined that the powers of the Advisory Board were as follows:

- its consent was required for determining the amount of grants and the beneficiaries (section 6 of the Foundation Declaration).

- its consent was required for a Founder to revoke or amend (section 8(1) of the Foundation Declaration).

- its opinion was required for amendments in event of the death of the founder (section 8(2) of the Foundation Declaration).

- its endorsement was required for liquidation (section 10 of the Foundation Declaration).

[43] Dr. Plesser also suggested, based on a 2002 Austrian Superior Court decision, there can exist an Advisory Board, though not an organ, that could have influence. In that case, the Superior Court stated:[1]

> … As such, the grantors established a "secret" board that is not subject to any organizational status with respect to § 14 Section 2 PSG. A board established by the grantors (such as the Advisory Board), at any rate, is not a body of the foundation with respect to § 14 Section 2 PSG if the foundation deed, as in this case, merely contains the reserve for the establishment of further bodies and due to the total lack of information regarding the organizational structure and tasks of the board there are no points of reference that a body should be established for the protection of the purpose of the foundation. As such, the grantors have created a board in the present case that can influence the board of the foundation within the scope of the approval authorization; however, this board is not granted a status as a body …

---

[1] OGH 31.01 2002 6 06 305/01y Austrian Supreme Court, January 31, 2002.

[44] Dr. Torggler, while denying the Advisory Board was an organ, or part of a Stelle, or an authority with special tasks, did agree there could be a non-organ Advisory Board with approval or consent functions, which he differentiated from rights of determination. I accept Dr. Torggler's position that the SPF Advisory Board is neither the Stelle or part of a Stelle, nor is it an authority appointed with special tasks. I conclude it is simply an Advisory Board that does not have the status of an organ, though has influence.

Reassessments

[45] Without going into detail for each of the five years under assessment, it is clear that the Appellant's taxable position hinges on the treatment of the disposition of the Vienna and Cambrian shares in 1998. The Respondent reassessed Mr. Sommerer on the basis that subsection 75(2) of the *Act* applied, on the assumption there was a trust in Austria. In the Reply to the Notice of Appeal, the Minister raised a new primary argument that Mr. Sommerer did not sell his shares in Vienna to the SPF until shortly before the sale on to Nokia in 1998, consequently realizing a gain on the basis of a non-arm's length disposition at fair market value (being the value Nokia was prepared to pay). The Respondent acknowledged this approach would lead to a greater tax burden on Mr. Sommerer, but that the Respondent was limited to the result of the assessment based on subsection 75(2) of the *Act*.

[46] Issues

1. When were the Vienna shares sold by Mr. Sommerer to the SPF – 1996 or 1998?

2. Can the arrangement whereby Mr. Herbert Sommerer endowed the SPF with funds for the purpose set forth in the SPF Deeds be viewed as a trust for purposes of the application of the *Income Tax Act*? I note both parties framed this issue as whether the SPF was a corporation or a trust. I suggest this is an inappropriate way of framing it. The SPF is a separate legal entity: a trust under Canadian law is not; it is a relationship describing how property is held. The SPF could be a trustee. The question is simply whether a trust existed, not whether the SPF is a trust or a corporation. Further, notwithstanding argument as to the characterization of the SPF as a corporation, this is not an issue. If I find there is a trust, it is immaterial to determine whether the SPF is a corporation. If I find there is no trust, the parties are agreed the SPF can

be viewed as a corporation, although they disagree on the application of the Foreign Accrual Property Income (*FAPI*) regime.

3. If a trust existed, does subsection 75(2) of the *Act* apply to attribute the gains on the disposition shares of Vienna and Cambrian by the SPF to Mr. Sommerer?

4. If there is a trust and subsection 75(2) of the *Act* applies, do the provisions of the *Convention* prevent the Respondent from taxing capital gains realized by the SPF on the disposition of the Vienna and Cambrian shares?

5. Was the SPF Mr. Sommerer's agent for disposing of the Vienna and Cambrian shares?

1. When were the Vienna shares sold by Mr. Sommerer to SPF?

[47] The Respondent argues that because it is not legally possible to split the rights attached to the common shares, that the October 1996 agreement between Mr. Sommerer and the SPF was made under a common mistake, which went to the very essence of the agreement and the agreement is, therefore, void. The shares were not, according to the Respondent, transferred by Mr. Sommerer to the SPF until December 1998, at the time of the sale by the SPF to Nokia, as only then did Mr. Sommerer transfer all his inseparable rights constituting shares to the SPF. As this was a non-arm's length transfer, it took place at fair market value which was established by the price offered and paid by Nokia.

[48] The Appellant, also relying on the Supreme Court of Canada's comments in the case of *Sparling v. Québec (Caisse de depot et placement du Québec)*,[2] agrees about the inseparability of the rights constituting shares, in that it is not legally possible to transfer shares excluding certain rights that attach to those shares, but argues that the contract can be interpreted in a way that does not offend the inseparability concept. Also, relying on the concept of severance, and the intention of the parties as set out in the severance clause in the October 1996 agreement itself, the Appellant suggests I should sever the offside elements of the agreement (the exclusion of the dividend, voting, and subscription rights) and leave in the place the agreement for the sale of shares.

---

[2] [1988] 2 S.C.R. 1015.

[49] In the original Sale Agreement of October 1996, the severance clause invites the parties to amend, in writing, unenforceable parts of the agreement. I find this is exactly what they attempted to do in the Addendum dated March 21, 1997. Notwithstanding it was actually signed sometime after that date, the fact is, a written Addendum was signed making it clear that the October 1996 agreement was an agreement for the sale of shares. It then clumsily attempts to still get the voting, dividend, and subscription rights back to Mr. Sommerer, but now it is in the context of the shares having passed to the SPF, rather than trying to pass shares with less than all their rights to the SPF. The problem is now SPF's attempt to pass the voting, dividend, and subscription rights back to Mr. Sommerer, without transferring shares. This is more easily interpreted. Nothing precludes a shareholder, while retaining ownership in shares, to have someone else vote its shares or to assign the dividend income it receives from the shares. I agree with the Federal Court of Appeal's view in this regard expressed as follows in *Sedona Networks Corporation v The Queen*:[3]

> … I see no reason why the same principle should not apply where the owner of voting shares enters into a contract with another person that grants that person a contractual right to vote the shares but not the other incidents of share ownership.

This is the only sensible and legally comprehensible way to interpret the Addendum dated March 21, 1997. This approach is also in accord with the concept expressed by the Ontario Court of Appeal in *Maschinenfabrik Seydelmann K-G v. Presswood Brothers Ltd.*:[4]

> … With much deference to the opinion of the learned trial Judge who decided against the plaintiff with some reluctance, he had failed to take into account the well-settled presumption of law in favour of the legality of a contract; that if a contract can be reasonably susceptible of two meanings or modes of performance, one legal and the other not, that interpretation is to be put upon it which will support it and give it operation.

When interpreting the October 1996 Sale Agreement and Addendum dated March 21, 1999 together, there is a clear and legal interpretation that fully accords with the intention of the parties to the agreement to transfer the shares.

---

3 2007 FCA 169.

4 1965 CarswellOnt 220.

[50] The Respondent argues that the facts do not support this interpretation, given Mr. Sommerer's evidence regarding voting the shares. In the examination for discovery, there was the following exchange, which Mr. Sommerer confirmed at trial:

> Q. The meeting was advised that the company was required (that is Vienna Systems Corporation) under the *Canada Business Corporations Act* to hold an annual meeting of its shareholders before February 14, 1997. Did such a meeting in fact take place before February 14, 1997?
>
> A. I do not know but I assume that such meetings took place.
>
> Q. Yes. And at that meeting, I presume that you voted the shares of the Foundation that were acquired from you in your own right?
>
> A. I would assume so.

[51] Two things to note about this exchange. First, Mr. Sommerer only assumes he voted the shares in his own right. He is not a lawyer and cannot be expected to unravel the legal niceties of ownership of shares. Second, what else was he to assume in February 1997, given how the Sale Agreement was written: Mr. Sommerer's assumption that he voted the shares in his own right is of little weight in my determination of who owned the shares. Further, I view this evidence in light of many other statements made by Mr. Sommerer at trial; for example:

> … What I, in essence, did in my part of the deal in terms of selling the shares to the foundation was to give away the prospect of personal benefit if those shares would become of some value.

[52] The Respondent also points to a list of shareholders of Vienna dated December 31, 1996, which shows the shares still in the name of Mr. Sommerer. Yet, this should be weighed against the following:

a) the SPF's financial statements indicating the shares were acquired by the SPF in 1996;

b) share certificates issued in the name of the SPF;

c) Director's Resolution of the directors of Vienna of September 20, 1996 approving the transfer of 1,770,000 shares from Mr. Sommerer to the SPF;

d) an undated Vienna shareholders' register indicating SPF acquired the shares on October 4, 1996.

[53] Based on these facts and the terms of the October 4, 1996 agreement, along with the March 1997 Addendum, I find as a fact that the Vienna shares were transferred from Mr. Sommerer to the SPF on October 4, 1996, at $1.33 per share. I reach this conclusion without the need to rely on the concept of severance argued by the Appellant. Mr. Sommerer and the SPF, in accordance with the terms of the October 4, 1996 agreement, amended that agreement in writing to clarify there was a transfer of the ownership of shares. The directors of Vienna had already approved the transfer and share certificates were issued. That is sufficient.

[54] Although having reached this conclusion on the interpretation of the Sale Agreement, I still wish to address the Respondent's approach that the Sale Agreement is void because there is such a fundamental mutual mistake by the parties as to the nature of the asset being transferred. This ignores the contractual right to amend embedded in the October 4, 1996 agreement, and Mr. Sommerer's and the SPF's reliance on that to amend the agreement by the Addendum of March 21, 1997. The Respondent invites me to simply brush that aside and concentrate only on the October 4, 1996 agreement and, specifically, that shares without voting, dividend, or subscription rights are non-existent – there simply cannot be such a thing, and, therefore, either on the basis of common mistake, or on the basis of failure to meet a condition precedent (the existence of the assets), the contract is void. What is interesting in this case is that neither party to the contract seeks to void the contract, in fact quite the opposite. It is the Government who has asked that the Court void the contract. The Government argues the asset about which the parties are contracting does not exist. Yet, there are the Vienna common shares. This is quite different from cases cited by the Respondent of goods not actually existing (see for example *Courturier v Hastie*[5]) or an endorsement of an insurance policy that had already been cancelled (see *Re Judgment Recovery (N.S.) Ltd. and Dominion Insurance Corp*[6]), or sale of land from a vendor to a purchaser where the same land had already been sold to another purchaser (see *Centurion Investments Ltd. v N.M. Skalbania Ltd.*[7]). These are not analogous, as in none of those cases could either party retrieve the subject matter so that it could effectively be transferred to the transferee. With respect to the

---

5 [1856] UKHL J3.

6 (1978), 79 D.L.R. (3d), 648.

7 (1981), 12 Sask. R. 79 (Sask. C.A.).

Vienna shares, there was no mistake that Mr. Sommerer owned the Vienna shares, and that he could transfer them; he simply could not carve out certain rights. But the parties could easily rectify the situation, which they did. The shares existed and ownership in the shares could be transferred. It was then open to the new owner of the shares, the SPF, to privately assign certain of its rights, without relinquishing its ownership of the shares. This was a misunderstanding of the law, perhaps, but that is not the same as non-existent subject matter, or a failure to meet a condition precedent. In *McLeod et al v. The Queen*,[8] Justice Bowie of this Court adopted the approach of Justice Steyn in *Associated Japanese Bank v. Crédit du Nord*,[9] who was commenting on the originator of the doctrine of mistake, *Bell v. Lever Brothers Ltd*:[10]

> The first imperative must be that the law ought to uphold rather than destroy apparent contracts. Second, the common law rules as to a mistake regarding the quality of the subject matter, like the common law rules regarding commercial frustration, are designed to cope with the impact of unexpected and wholly exceptional circumstances on apparent contracts. Third, such a mistake in order to attract legal consequences must substantially be shared by both parties, and must relate to facts as they existed at the time the contract was made. Fourth, and this is the point established by *Bell v. Lever Bros Ltd*, the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist. …

Applying this criteria confirms my view that the doctrine of mistake is not applicable, as:

1. The contract is capable of being upheld;

2. There are no exceptional or unexpected circumstances; and

3. The subject matter is shares, which did exist and were owned by Mr. Sommerer.

The Respondent's argument has not dissuaded me from a practical, legally acceptable view of what transpired.

---

8 97 DTC 777.

9 [1988] 3 All E.R., 902.

10 [1931] All ER 1.

[55] I also wish to address the Respondent's argument that Mr. Sommerer did not simply want to vote the Vienna shares in place of the SPF, but he wanted to be seen as controlling or owning the shares to ensure that Vienna did not lose its status as a CCPC, and, therefore, an interpretation of the contracts concluding that he transferred ownership of the shares in October 1996 is incorrect. I disagree with the Respondent's view of the facts. The Respondent based this argument on the passage from Mr. Sommerer's testimony reproduced at paragraph 14 of these Reasons. My understanding of Mr. Sommerer's testimony is that in October 1996, in transferring the shares to the SPF, and attempting to hang on to the vote, he was not motivated by the CCPC issue.

[56] Even if I concluded otherwise, that he wanted to somehow "own" the shares for maintaining CCPC status, that does not impact my finding that the legal effect of the October 4, 1996, plus the March 1997 Addendum, was to transfer the shares on October 1996 to the SPF. He explicitly, in the Addendum, agreed that the voting, dividend, and subscription rights had been transferred from him to the SPF: the intent is clear. He will simply have to accept the consequence of that as far as Vienna's CCPC status is concerned. If his object was to maintain CCPC status, he may have failed in that regard.

[57] Finally, the Respondent argued that finding there was a sale of the Vienna shares by Mr. Sommerer to the SPF in 1996 is such a fundamental departure from the parties' intention, that it is not open to me to reach that conclusion. I disagree. Indeed, it would be far more drastic and contrary to the parties' intention to adopt the Respondent's position that the contract was void, that the SPF agreed to pay over $1,000,000 for nothing. No, a finding that shares were sold, with an awkward assignment back of some rights, is far closer to maintaining the integrity of the deal struck than to suggest there was no deal at all.

2. Can the arrangement whereby Mr. Herbert Sommerer endowed the SPF with funds for the purpose set forth in the SPF Deeds be viewed as a trust for purposes of the application of the *Income Tax Act*?

[58] As already indicated, I reframed the issue in a manner that is more readily open to analysis. This should not be an issue of whether an Austrian Private Foundation under the *APFA* is a trust, let alone whether the SPF is a trust. That is the wrong question. The Appellant says it is a company: the Respondent says it is a trust. I have concluded that, depending on the terms of the Foundation Declaration and Supplemental Declaration, an Austrian Private Foundation could be considered a trust company, acting as a trustee, and with respect to the SPF, I find that that is as

good a label as can be attached, when looking at it through the eyes of Canadian laws.

[59] What needs to be analyzed, however, is not what the SPF is, but what relationship exists amongst the SPF (a separate legal person), Mr. Herbert Sommerer, and Mr. Peter Sommerer and the Sommerer family. Is there a trust relationship? Can Mr. Herbert Sommerer be seen as a settlor? Can the SPF be seen as a trustee, perhaps a corporate trustee? Can Mr. Sommerer be seen as a beneficiary? Do the three certainties, certainty of intention, certainty of subject matter, and certainty of objects exist? Are there any other characteristics of the Canadian trust that are missing in the Sommerer arrangement?

[60] I agree with the Appellant's suggestion that, in characterizing a foreign arrangement, I rely on the Supreme Court of Canada's comments in ***Backman v. The Queen***[11] to look at the private law in Canada to determine the essential elements of a trust, and then compare the elements of the foreign arrangement to determine if it can be treated as its correlate under Canadian law. So, what are the essential elements of a trust under Canada law? I note, with some concern, Professor Waters' opening comments in this regard in his article "*The Concept Called "the Trust"*:[12]

> It is agreed among text writers of the common law tradition – an opinion adopted by the Courts – that "the trust" cannot be defined. It can only be described. That means you can point to its characteristics or elements, but you cannot put into a sentence what it is.

[61] The Appellant's counsel referred me to a number of comments from authorities such as *Oosterhoff on Trusts*[13] and *Waters Law of Trusts in Canada*.[14] Notwithstanding Professor Waters' heads-up, I have found the following excerpts helpful:

> From *Oosterhoff*:

---

11 [2001] 1 S.C.R. 367.

12 (1999) LIII Bulletin for International Bureau of Fiscal Documentation 118.

13 7th ed. (Toronto: Carswell, 2009), pages 18-23, 36-42, 99-100, 328-335, and 1159-1209.

14 3rd ed. (Toronto: Carswell, 2005), pages 9-14, 353-356, 929-935, 1351-1352.

> An equitable obligation, binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own property, for the benefit of persons (called beneficiaries or, in all cases, *cestuis que trust*) of whom he may himself be one, and anyone of whom may enforce the obligation.
>
> From *Waters*:
>
> The hallmarks, the essential characteristics of the common law trust, are heavily reflective of a peculiar legal history. The foremost of these is the fiduciary relationship which exists between trustee and beneficiary. The following elements are surely essential. From the moment of the creation of the trust, there must be an ability of the beneficiary to secure an accounting or, to put it another way, a power in the beneficiary to enforce the discharge of its duties by the trustee.

[62] The Respondent, in his argument, puts the essential features more generally:

> In broad terms, a trust is a means of managing wealth for the benefit of one or more persons. The essential features of a trust are specified property, a person or persons as the objects of the trust with the exclusive right to its enjoyment or dedication, and person holding title to the property and administering it on behalf of the objects. In simplified terms, a trust is an arrangement whereby a person who holds title to property is under an obligation to administer it for the benefit of another person or persons.

[63] There is no disagreement as to the need for the three certainties to create a trust, though in a somewhat circuitous, though logical, fashion, the Appellant argues that if an essential element is missing for the arrangement to be considered a trust, then there cannot have been the requisite intention to create a trust. The missing element in the SPF arrangement, according to the Appellant, is the lack of the right of the beneficiaries to enforce an obligation owed to them by the trustee. Professor Waters' attempts to address this when he states:

> As necessary conditions, if any of the three certainties are not present, the courts will not recognize the existence of a trust. The presence of the three certainties are not, however, sufficient conditions to the creation of a trust; they are evidentiary in nature and represent the factual threshold at which the law will recognize as enforceable the obligations of a trustee towards the beneficiary with respect to the designated trust property.

[64] This is something of a chicken and egg statement: do the beneficiaries' rights of enforcement arise in law because there is a trust, or must the beneficiaries' rights of enforcement exist by the Trust Deed, for example, for there to be considered a trust. The Appellant suggests the latter.

[65] It is this element of accountability owed by the trustee to the beneficiaries, enforceable by the beneficiaries, that is at the crux of the dispute between the parties on this issue; in essence, the nature and extent of the required fiduciary obligation.

[66] In summary, the essential ingredients of a trust under Canadian law that I wish to address are:

a) segregated property;

b) owned by a person (trustee) having control of the property;

c) for the benefit of persons (beneficiaries);

d) to whom the trustee has a fiduciary duty enforceable by the beneficiaries.

If I find these essential features in the arrangement by which the SPF held the Vienna shares, then I will have no difficulty finding the three certainties were met to create the trust. It is absolutely clear to me that there is certainty of subject matter and objects, and if the essential features of a trust are evident, then the intention of Mr. Herbert Sommerer to create a trust can be gleaned from the Foundation Declaration, the Supplementary Deed and the application of *APFA*. All to say, the analysis does not hinge on the three certainties.

[67] Turning then to the SPF and its holding of the Vienna shares, I readily find that the first two essential features are apparent in this arrangement. The property, the Vienna shares, substituted for the initial endowment to the SPF from Mr. Herbert Sommerer, was subject to the provisions of the *APFA*, which at the very outset in section 1, refer to "an endowment for achieving a permissible purpose determined by the founder". No purpose was for the SPF to use the endowment to its own account. Secondly, the property was owned by the SPF, which, as a legal person, held title to the Vienna shares, and held control over the property.

[68] Third, was the property held for the benefit of persons? In this regard, the experts testified that Austrian law distinguishes between actual and potential beneficiaries. There is also the distinction under the *APFA* between beneficiaries and ultimate beneficiaries. The Foundation Declaration and Supplementary Declaration are not expansive in their descriptions of the beneficiaries, but I take from the experts' views that the beneficiaries (Mr. Peter Sommerer, Mrs. Dawn Sommerer and

children and their offspring, provided they are resident of Austria) are income beneficiaries only, and even then only potential beneficiaries, as none were resident in Austria and none were named to receive any grant. Similarly, Mr. & Mrs. Sommerer, in the event of the founders' revocation, are ultimate capital beneficiaries, though, again only potential beneficiaries until there is a revocation. This classification of actual versus potential beneficiary is of no consequence in answering the question of whether the property was held for the benefit of persons. Of course it was; that was the raison d'être of the SPF. The difference between actual and potential beneficiaries becomes a factor only when considering the fiduciary duty of the SPF.

[69] With respect to the income beneficiaries, the class of beneficiary was clear; it was also clear from the Foundation documents how it was to be determined who within the class might receive a grant from the SPF. The potential beneficiaries are clearly ascertainable.

[70] With respect to the ultimate beneficiaries, it is even clearer. If Mr. Herbert Sommerer decides to revoke the SPF, Mr. Peter Sommerer and Mrs. Dawn Sommerer receive the capital. They are persons who will benefit. The third essential ingredient exists.

[71] So, the penultimate question is whether the SPF had any fiduciary obligations to any of these beneficiaries, enforceable by the beneficiaries.

[72] The Appellant points to several factors in support of his position that the beneficiaries had no enforceable right to call the SPF to account. I will deal with those items, but first want to make an overriding observation regarding this essential feature. The right of the beneficiary is the flip side of the fiduciary duty of the trustee; in this case, the duty of the SPF, if any, is at issue. If there is no duty enforceable by the beneficiaries, is the SPF simply under some moral obligation and the Sommerers simply hopeful they might get something from the SPF? This would more resemble a power of appointment. My impression is that the SPF was not founded on the shifting sands of moral obligation: there were no beneficiaries other than the Sommerers; there were no ultimate beneficiaries in the case of revocation other than Mr. & Mrs. Sommerer; there are no ultimate beneficiaries in any other case other than those set out in 3.2 of the Supplementary Deed. This is not designed for the SPF to exercise any moral obligation. So, in the context of attempting to determine whether an arrangement in Austria, whose laws do not contemplate the concept of a North American trust, is akin to a trust under Canadian law, it is my overriding view that there is something well beyond moral obligation going on here. And certainly

close enough to the Canadian fiduciary duty to find this final essential element for a trust exists in the SPF arrangement.

[73] I will now address those factors raised by the Appellant to suggest my impression is misplaced.

[74] First, the Appellant relies on Dr. Torggler's evidence that there is no fiduciary duty owed by the Executive Board to the beneficiaries or by the SPF itself. This, though, must be viewed in the context of Dr. Torggler's opinion that, in Austrian law, there is no literal translation of the fiduciary duty. He testified, in answer to the question whether there are any duties owed to beneficiaries as follows:[15]

> Not from the outset, but at the moment a beneficiary has been appointed an endowment, usually the beneficiaries have been resolved upon and from that point in time, there was obligation on the part of the Board to fulfil this commitment.

He also stated:[16]

> There is a provision that the Board of Directors' owes fulfillment of the purpose of the Foundation, and as the purpose of the Foundation, generally, is in favour of the beneficiaries, in that respect indirectly there is a duty, but there is no direct duty prescribed in the law.

[75] These opinions do not go as far as the Appellant suggests. The Foundation itself is implicitly obliged to fulfill the purpose for which it is established. Further, one of its primary organs, the Executive Board, "must perform his/her responsibilities frugally and with the prudence of a conscientious manager" (section 17(2) *APFA*). Also, the Executive Board must keep the books (section 18 *APFA*). If there is any disagreement between the auditor and the Executive Board, regarding the application of the Foundation Declaration, the Court shall decide (section 21(4) *APFA*). Every member of the Executive Board is liable for damages as a result of negligent neglect of duties (section 29(1) *APFA*). For a jurisdiction that does not recognize a fiduciary duty concept, what is to be made of the above? What I make of it is that Austria has legislated obligations, and when combined with a requirement to fulfill the purposes of the Foundation, which with respect to the SPF is to benefit the Sommerer family, I conclude Dr. Torggler's opinion of no fiduciary duty is overstated. There are

---

[15] p. 415 Transcript.

[16] p. 416 Transcript.

sufficient parallels between the Canadian concept of fiduciary duty and the combination of the provisions of the *APFA* and the wording of the Foundation Declaration to find that some requisite duty exists.

[76] Second, the Appellant argues the rights of a beneficiary under the *APFA* are limited to section 30 rights, and in very limited circumstances, section 35(3) rights (application by a beneficiary or ultimate beneficiary for dissolution). With respect to the section 30 right of the beneficiary to information, the Appellant also argues that because Mr. Sommerer was only a potential beneficiary (as he was not an Austrian resident nor had been chosen for a grant) and potential ultimate beneficiary (as there had been no call by the founder to revoke the Foundation), he is not entitled to the section 30 rights for information. Dr. Torggler testified that there has been a court decision in Austria that section 30 is only available to actual beneficiaries. This raises the interesting situation where the SPF is established to benefit the Sommerer family, and no one else, yet they cannot be considered actual beneficiaries until certain conditions are met: in effect there are no beneficiaries. When the condition is met, certain rights kick in. Mr. Taylor acknowledged that only at that point might there be a trust. Presumably, following that reasoning, if Mr. Sommerer became an Austrian resident and the Executive Board determined to make a grant to him, at that point there would be a trust, yet after the grant is paid, Mr. Sommerer goes back to being a potential beneficiary only and there is again no trust. This cements my view, apparently shared by eminent authors on this subject, that the definition of a trust is illusory. But it also suggests to me that this essential feature of enforcing a fiduciary duty should not be viewed in isolation, nor rigidly adopted. Clearly, these rights could arise, and will arise, in the very situation that the founder contemplated of benefiting the Sommerer family. How different is this from the Canadian trust where property is held for a minor until the age of majority when he/she is entitled to a distribution of capital. What right does the minor have to enforce the trustee to pay out before attaining the age of majority?

[77] Also, it is noteworthy that the founder, Mr. Herbert Sommerer, provided that the Advisory Board was to be made up of Mr. & Mrs. Sommerer, the ultimate beneficiaries. Further, he provides the Advisory Board was to play an important role in the SPF including supervisory tasks. This confirms to me an explicit right to information given by the founder to beneficiaries, notwithstanding the provisions of the *APFA*.

[78] With respect to what the Appellant calls the limited rights found in section 35(3) of the *APFA*, of the ultimate beneficiary to apply to the court if the Executive Board does not pass a resolution to dissolve, once the founder has sought

revocation, I view this as a significant right. This goes to the distribution of all of the capital of the SPF to the Sommerers. This is no limited right. Mr. Herbert Sommerer decides to revoke and Mr. & Mrs Sommerer take all: if the Executive Board does not pass the requisite resolution to put this distribution into effect, the Sommerers can apply to court. I find this right alone is sufficient to meet the requirement for an enforceable right of beneficiaries to have the trustee, the SPF, act in their best interests.

[79] The Appellant goes on to argue that the potential beneficiaries have no right in the property of the SPF, as would all the beneficiaries of a common law discretionary trust, who could call for the property by invoking the rule in *Saunders v. Vautier*.[17] Again, Dr. Torggler opined that even an actual beneficiary does not have a property right in the Private Foundation property. I am concerned that because common law treatment is not afforded the Austrian Private Foundation that it fails to match the essential features of the common law trust. It is important to keep in mind what process is being engaged here. The essential features of a common law trust have been identified, and now the establishment of the SPF and transfer of property into it for the benefit of the Sommerer family is being examined to determine if it can be viewed as a common law trust, notwithstanding its jurisdiction does not have such a concept. It should be no surprise that the concept of beneficial ownership of property is not apparent. I do not find that the lack of such right of beneficial ownership is fatal.

[80] Finally, the Appellant relies on the wording of the Foundation document itself to suggest the income beneficiaries have no legal claim. The Foundation Declaration states: "Beneficiaries and those who may become beneficiaries based on the purpose of the Foundation have no legal claim to grants from the Foundation". Firstly, I interpret this provision to be dealing with income beneficiaries only, not the ultimate beneficiaries. This simply makes clear the discretionary nature of income grants. They can only be to the Sommerer family, but no individual family member can come knocking on the SPF's door asking to be paid a grant. This evidence is no more than that, and is not sufficient to strip away the character of a discretionary trust.

[81] On balance, I have not been convinced that there is no fiduciary duty enforceable by the Sommerer family. Certainly, the rights may not be as extensive as one might find in many common law trusts, but for purposes of trying to determine if

---

[17] 49 E.R. 282 (Rolls Ct).

an arrangement involving an Austrian Private Foundation has the elements of a common law trust, it is unnecessary to find every possible right of a beneficiary against a trustee, but more appropriately the question should be, are there sufficient rights that reasonably resemble those found in the Canadian trust? I conclude there are.

[82] It should be clear that in reaching this conclusion, I am not finding the SPF is a trust: I am finding the relationship between Mr. Herbert Sommerer, the SPF and the beneficiaries constitutes a trust, with the SPF as the trustee. Further, I do not make this finding in any way as a generalization that all relationships involving an Austrian Private Foundation are trust relationships. There may well be a Foundation Declaration that is found to be more akin to a power of appointment, for example, by stripping away any rights of enforceability a beneficiary might have. Here, on balance, there are sufficient indices of the essential features of a trust to find the arrangement can be considered a trust. Given that conclusion, it is unnecessary for me to review the Quebec Civil Code concepts, as well explained to me by Me Tassé, to determine if the Austrian arrangement falls within any of the Quebec concepts of trust.

3. If a trust existed, does subsection 75(2) of the *Act* apply to attribute to Mr. Sommerer the gains on the disposition of the Vienna and Cambrian shares by the SPF?

[83] Subsection 75(2) of the *Act* provides:

> Where, by a trust created in any manner whatever since 1934, property is held on condition
>
> (a) that it or property substituted therefor may
>
> (i) revert to the person from whom the property or property for which it was substituted was directly or indirectly received (in this subsection referred to as "the person"), or
>
> (ii) pass to persons to be determined by the person at a time subsequent to the creation of the trust, or
>
> (b) that, during the existence of the person, the property shall not be disposed of except with the person's consent or in accordance with the person's direction,

> any income or loss from the property or from property substituted for the property, and any taxable capital gain or allowable capital loss from the disposition of the property or of property substituted for the property, shall, during the existence of the person while the person is resident in Canada, be deemed to be income or a loss, as the case may be, or a taxable capital gain or allowable capital loss, as the case may be, of the person.

[84] A number of issues flow from the application of this provision to the facts before me:

(i) can the defined "person" in 75(2)(*a*)(i) apply to a beneficiary vendor who sells property to the trust at fair market value (i.e. Mr. P. Sommerer);

(ii) if so, can such property revert to Mr. Sommerer?

(iii) if not, can such property pass to such persons determined by Mr. Sommerer? (see subparagraph 75(2)(*a*)(ii) of the *Act*)

(iv) if not, can such property only be disposed of with Mr. Sommerer's consent or in accordance with his direction? (see paragraph 75(2)(*b*) of the *Act*)

(i) Who is the "person" as defined in subparagraph 75(2)(*a*)(i) of the *Act*?

[85] The Respondent argues there is no requirement that the "person" be the settlor, but that it could be any person, including a beneficiary vendor of property sold to the trust at fair market value. The Respondent relies on IT369 which indicates that it is the department's view that a person, other than the settlor, may transfer property to a trust and become subject to the attribution rules. With respect, I disagree with the Respondent's view of the definition of person.

[86] It is well established that income tax legislation is to be interpreted in a textual, contextual and purposive manner. It is meant as no unkindness to the drafters of income tax legislation, but they have at times made this task exceedingly difficult: subsection 75(2) of the *Act* is an example of (trying to put this fairly) awkward language.

Textual interpretation

[87] The opening words are significant - "by a trust created…property is held on condition". In this case, one could insert the date and have the opening words: "where, by a trust created on October 3, 1996, property is held on condition". The provision does not say "where property is held in trust or in a trust on condition". It

specifically refers to a trust created and a time at which the trust is created. I suggest it invites an interpretation to look at the conditions on the creation of the trust, the creation in this case by Mr. Herbert Sommerer, the settlor. The nature of the trust, and whether it is of a type contemplated by subsection 75(2) of the *Act*, is to be discerned at the time of creation. On the creation of the trust by a settlor, there can only be one person from whom property is received – the settlor. There is no other person. This does not however preclude the possibility of another person settling property in trust with the same trustee and on the same terms, but in such a case, I would suggest there is another trust created. In effect, by the opening words of subsection 75(2) of the *Act* only a settlor, or a contributor akin to a settlor is contemplated as being the defined person.

[88] This interpretation is confirmed by examining the two situations contemplated by subsection 75(2) of the *Act*: first, what is the effect if the trust holds the original property, and second, what is the effect if the trust holds "property substituted therefor". In that regard, it is clear with respect to the SPF that it could, as trustee, substitute property for the original endowment. And indeed it did.

[89] So let us look at the wording of subsection 75(2) of the *Act* in the first situation, where the trust simply holds the original property endowed by Mr. Hebert Sommerer. The text of subsection 75(2) of the *Act* would read:

> Where, by a trust created in October 1996, property is held on condition that it may revert to the person from whom the property was directly or indirectly received.

That seems straightforward and requires no acrobatic semantics to discern what the provision means. The property would be the Austrian shillings and the person could only be the settlor, Mr. Herbert Sommerer.

[90] Let us now look at the wording of subsection 75(2) of the *Act* in the second situation where the trust holds substituted property. The text of subsection 75(2) of the *Act* would then read:

> Where a trust created in October 1996, property (shillings) is held in on condition that the property (shillings) or property substituted therefor (shares) may revert to the person from whom the property for which the shares were substituted (i.e. shillings) was directly or indirectly received.

Again, this can only be the settlor of the trust. This is a logical, textual, grammatical reading of subsection 75(2) of the *Act*, when one notes the difference between

"property substituted therefor" in subsection (*a*) and "property for which it was substituted" in subsection (*a*)(i).

[91] While I would not go so far as to suggest it is perfectly clear, it is, I would suggest, a correct textual reading. Any other reading gives an artificial interpretation to the term "property for which it was substituted". The "it" in that phrase can only mean the "property substituted therefor". The Respondent would have me read "property for which it was substituted" as "property substituted therefor". It cannot and should not be read that way. In "property for which it was substituted" the "it" can only mean the shares, and therefore the "property for which it was substituted" can only mean the shillings – only the settlor, Mr. Herbert Sommerer endowed the shillings. If one attempted to read the "it" in that phrase as referring to the shillings, the phrase becomes meaningless as the shillings were not substituted for anything; it was the shares that were substituted for the shillings. I recognize that this may take the reader several readings of what at first might seem simple language. It is not. But once properly unravelled and viewed grammatically and logically, the only interpretation is that only a settlor, or a subsequent contributor who could be seen as a settlor, can be the "the person" for purposes of subsection 75(2) of the *Act*.

[92] The other possibility from the Respondent is that the reference to "property" in the first line of subsection 75(2) of the *Act* could refer to the substituted property, in this case, the shares. In effect the section would have to be read as follows:

> Where, by a trust created on October 3, 1996, the Vienna shares are held on condition that the Vienna shares may revert to the person from whom the Vienna shares or property for which the Vienna shares were substituted, i.e. the original shillings, were directly or indirectly received.

[93] There are three flaws in this approach. First, as previously discussed, by the trust created on October 3, 1996 the only property held on condition was the original endowment of the shillings. Second, this approach could result in more than one "person" to whom the attribution rules might apply, in this case both Mr. Sommerer and his father (were he Canadian) There is no mechanism for an allocation in that case, obviously, I would suggest, because it is incorrect to read the provision as resulting in more than one attributee. Third, because subsection 248(5) of the *Act* deems subsequent substituted properties to be substituted for the original property, there are only two types of property to which subsection 75(2) of the *Act* can refer: the original property and substituted property. This is in line with the later attribution wording in subsection 75(2) of the *Act* which refers to income or loss from "the property or from property substituted for the property". The income or loss can derive

from either, but can only be attributable to one person: the donor of the original property. The opening words of subsection 75(2) of the *Act* do not refer to substituted property being held on condition, just property, the original property.

[94] Does this mean that Mr. Peter Sommerer could never be "the person" for purposes of this section? No. If he settled the shares in the same trust, by contributing them to the trust (that they be held on the same conditions), he could be seen as creating a new trust and could, therefore, be a settlor and subject to the application of subsection 75(2) of the *Act*. He would, however, had to have been a contributor. But he did not do that. He did not transfer shares into the SPF as a settlor or contributor creating a trust. He sold the shares unconditionally to the SPF, who, as trustee of the property, held the property on conditions created by Mr. Herbert Sommerer, substituting those shares for the shillings endowed by Mr. Herbert Sommerer. In these circumstances, Mr. Peter Sommerer could not be "the person" as defined.

[95] Having reached this conclusion on the textual interpretation of subsection 75(2) of the *Act*, I was concerned that the wording of the French version differed with respect to the expression "property for which it was substituted". The French version uses the same expression "biens qui leur sont substitutés" in paragraph 75(2)(*a*) and subparagraph 75(2)(*a*)(i), unlike the English version which uses "property substituted therefor" in paragraph 75(2)(*a*) and "property for which it was substituted" in subparagraph 75(2)(*a*)(i). I asked the parties to provide further submissions, given this significant difference in wording between the English and French versions.

[96] The Appellant argues that the French text does not derogate from their argument on the English interpretation, which I have accepted. The Appellant makes two arguments: first, the French phrase in subparagraph 75(2)(*a*)(i) was intended to convey the same meaning as "property for which it was substituted"; second, the two phrases are simply irreconcilable and the English version better accords with the intention of Parliament. Indeed, the Respondent agrees with the Appellant in this regard.

[97] From a literal reading of the French version, the Appellant concludes that it would enable the Government to find more than one "person" for the purpose of applying subsection 75(2). The Appellant provided an example of how this could arise:

> … Suppose A settles $100 on a trust and reserves the right to revoke the trust. The trust then uses the $100 to buy shares from B (at their fair market value at the time

> of purchase). During the period that the trust owns the shares, it receives dividends. The trust subsequently sells the shares to C for $200 (their fair market value at the time of sale). Immediately thereafter, the trust uses the $200 proceeds to buy real estate from D which generates rental income during the period it is owned by the trust. B and D are capital beneficiaries of the trust.
>
> There is no dispute that all three subsequent properties – the shares, the $200 and the real estate – are, by virtue of s. 248(5), property substituted for the original $100. As the appellant has previously submitted, the intent of s. 75(2) is to attribute to A the income (or loss) from, or capital gain (or capital loss) from the disposition of the $100 and from the shares and from the $200 and from the real estate. The rationale for s. 75(2) is that, in such cases, A is not considered to have fully disposed of the $100 (because of the right to revoke the trust) and therefore the income from that property or property substituted for it, or the gain from the disposition of the property or the property substituted for it, should be attributed to A. However, to give effect to the literal French meaning of "ou les biens qui leur sont substitués" in preference to the English meaning of "or property for which it is substituted" would attribute the income or gain from the shares and real estate to B and D as well as to A. As stated in our earlier submission, such an interpretation should be avoided because it is contrary to public policy to permit the Minister to choose to impute the income (or gain) from the shares and the real estate amongst any or all of A, B and D unless the language of the provision clearly made them jointly, or jointly and severally, liable for a single charge to tax. Indeed, this interpretation would permit the Minister to attribute the income from shares and the gain from the disposition of the shares to D (because the real estate is substituted for the shares) even though D did not transfer any property to the trust during the period that the trust owned the shares. In other words, if the literal French meaning of the phrase "ou les biens qui leur sont substitués" were to determine the scope of s. 75(2)(a)(i), it would remove any temporal connection between the transfer of property by a person to the trust and the attribution of income from the trust property (including previously-owned trust property) to that person.
>
> …

[98] This reasoning makes eminent sense to me. Subsection 75(2) of the *Act* is neither in the French nor English versions drafted by any reference to persons (plural), only to a person. It contemplates just the one person.

[99] The Appellant brought to my attention seven provisions of the *Act* where the English language version refers to "the property…or…property for which it was substituted"[18] and six provisions that use the phrase with identical meaning "the

---

[18] Sections 70(9.1)(a), 70(9.3)(a), 95(2)(F.1), 107(4.1)(c)(i), 110.6(1.2)(a), 110.6(1.3)(a) and 110.6(1.3)(c).

property…or…property for which the property was substituted".[19] The Appellant argues that all of these provisions concern a tax consequence or tax attribute at a particular point in time and include conditions applicable during a specified period before that time. Almost all of the provisions deal with the tax consequences of disposition of a property, and the conditions that must be met at the time of disposition and prior to the time of disposition. According to the Appellant, it is clear from the text and purpose of all of these provisions that the phrase in issue must refer to a previously held property and not to a subsequently substituted property. Consequently, the use of the phrase "un bien qui lui est substitué" is intelligible in these contexts only if it is understood as referring back to previously owned property. The Appellant suggests that the most obvious examples are paragraphs 110.6(1.2)(a), 110.6(1.3)(a) and 110.6(1.3)(c). In effect, the French phrase should be taken as referring to the property for which the substituted property was substituted, and not the substituted property itself.

[100] Again, this makes sense: it accords with my earlier view of how to properly parse subsection 75(2) of the *Act* into the two situations, one, where the original property is held, and two, where the substituted property is held. If I look to the French version in applying the second situation where the trust holds substituted property, subsection 75(2) of the *Act* would effectively read:

> Soit que des biens qui leur sont substitutes puissant revenir à la personne dont les biens leur sont substitutes…

[101] It is apparent that "leur" referred to in the latter phrase must reference the substituted property, and therefore, the latter phrase can only mean, in English, the property for which the substituted property was substituted.

[102] All to say, that despite this considerable head-spinning, a review of the French version has not altered my view that subsection 75(2) of the *Act* is not meant to apply to more than one person, that person being the settlor.

Contextual

[103] Support for this textual interpretation of "the person" can be found in the context of the balance of subsection 75(2) of the *Act*. Specifically, subparagraph 75(2)(*a*)(ii) refers to property passing to persons to be determined by

---

[19] Sections 83(2.2)(d), 83(2.4)(d), 83(2.4)(e), 89(1) capital dividend account, 107(6)(a) and 129(4).

"the person" at a time subsequent to the creation of the trust. The only person to whom the time of the creation of the trust holds any relevance is the settlor, not a beneficiary vendor for value. It is implicit that if the settlor retains any such authority, it is he or she who may be caught by subsection 75(2) of the *Act*.

[104] This view has garnered some favour amongst the academics. *Maurice Cullity in Taxation and Estate Planning* indicates the usual object of subsection 75(2) attribution is the settlor, though could apply to a subsequent transferor in the sense of a contributor. In that regard, I concur with Justice Bowie's comments in *Greenberg Estate v. The Queen*[20] that "contributed" signifies a voluntary payment made to increase the capital of the estate: a sale to the trust at fair market value does no such thing. As I indicated earlier, if Mr. Peter Sommerer was to contribute to the trust, he might be viewed as a settlor creating a new trust. A fair market sale of property to a trust is not a contribution and the vendor is not a contributor, nor therefore a settlor. The property sold to the trust cannot, as argued by the Respondent, be viewed as "original property"; it can only be substituted property, as consideration was given for it by the trust.

Purposive

[105] On its face, subsection 75(2) of the *Act* is an avoidance provision that denies the taxpayer the use of a trust to defer and perhaps avoid tax. Counsel was unable to provide any commentary from the Department of Finance or anywhere in the Government for that matter, at the time of the introduction of this provision, to shed light on the Government's view of its purpose. Neither party was able to rely on this tool of interpretation to assist me. Unlike other attribution provisions or anti-avoidance provisions, subsection 75(2) of the *Act* does not appear to require any element of intent. It has been suggested that this provision could be a trap for the unwary, who establish trusts for non-tax purposes. I remain guided, therefore, by the textual and contextual view of subsection 75(2) of the *Act*.

(ii) If the Respondent is correct that Mr. Sommerer can be the "person" as defined in subsection 75(2) of the *Act*, can the property revert to him?

[106] There is no question that Mr. Sommerer is an ultimate beneficiary entitled to the property in the event Mr. Herbert Sommerer revokes the SPF. The Appellant

---

[20] 97 DTC 1380.

relies on the case of *Fraser v. The Queen*[21] to argue that a reversionary interest must be an absolute reversionary interest for subsection 75(2) of the *Act* to apply and that that is not the case for Mr. Sommerer. I do not accept the *Fraser* decision as a strong authority for that proposition. In *Fraser*, the parties agreed that if the Court found a trust existed rather than an agency, then the trust was taxable. Only on the last day of trial was it even suggested that subsection 75(2) of the *Act* might apply to attribute losses to the investors. Justice Reed gives this relatively short shrift:

> In addition, it is argued that subsection 75(2) only applies when the beneficiary has a reversionary right and that no such right exists in this case. It is argued that while the GMS Agreement states that the plaintiff may request a sale or redemption of her units, and the agreement goes on to state that the syndicate will not continue making investments until redemption has taken place, there is in fact no absolute right to redemption. It is argued that the documentation does not give an absolute right of reversion. I accept this as a correct interpretation of subsection 75(2) and the facts of the present case. In my view, subsection 75(2) anticipates a situation in which the whole corpus of the trust is capable of reverting to the settlor (75(2)(a)) or where the corpus during the life of the trust remains under the control of the settlor (75(2)(b)).
> …

[107] If the investors in the mortgage syndicate wanted out, they could seek to sell their interest or seek redemption from the syndicate itself, if the syndicate was not in a loss position. This is what Justice Reed likely meant when she referred to the documentation not giving an absolute right of reversion. This is not at all similar to the situation before me. If Mr. Herbert Sommerer revokes the Foundation, Mr. Peter Sommerer gets half the corpus of the trust. Unlike the case before Justice Reed, the Vienna and Cambrian shares were held subject to an absolute condition as to how they, or substituted property, were to be distributed in the event of a revocation. No, I do not see how the *Fraser* case is of any assistance to Mr. Sommerer, if Mr. Sommerer is found to be the "person" as defined in subsection 75(2) of the *Act*.

[108] This does confirm for me, however, that Mr. Sommerer, as a vendor beneficiary for fair market value, should not be the "person", as a reversionary right implies the right of the transferor, yet here the right vests in the settlor via his right of revocation, not in Mr. Peter Sommerer. By applying subsection 75(2) of the *Act* to Mr. Peter Sommerer as the "person", words such as "revert" need to be stretched to accommodate an interpretation that, I respectfully suggest, was never contemplated. In a trust, property can revert to a settlor: a reversionary trust. Mr. Peter Sommerer

---

[21] 91 DTC 5123 (F.C.T.D.).

did not settle a reversionary trust but the property he sold to the trust, by operation of the trust, can be distributed to him; again, Mr. Sommerer should not be considered the "person".

[109] Having said that I still conclude that, if Mr. Peter Sommerer is the "person" from whom property was received by the trust, and I am forced to look to how "revert" applies to him, then I find the property "may revert" to him, as it is enough that by the terms of the trust upon which the property is held, the property shall be distributed to him in the event of revocation. No technical meaning need be ascribed to "revert" in the context of property distributed to a beneficiary that was previously owned by the beneficiary. He owned it once: he could own it again without having to pay for it.

(iii) and (iv) Subparagraphs 75(2)(*a*)(ii) or 75(2)(*b*) of the *Act*

[110] It is unnecessary to consider subparagraph 75(2)(*a*)(ii) or 75(2)(*b*) of the *Act* given this conclusion, but if I had to make those determinations, I would conclude that it was not Mr. Sommerer who could determine to whom trust property would pass, though the Advisory Board effectively had a veto power with respect to income distributions (Foundation Declaration section 6(1)), nor was his consent or direction required for a disposition of the trust property as the Foundation Declaration was silent in this regard. That authority ultimately vested with the Executive Board, notwithstanding Mr. Sommerer, as the dominant member of the Advisory Board, had some considerable influence. I will have more to say on this with respect to agency.

4. If there is a trust, which I have found there is, and if Mr. Peter Sommerer is the "person" for purposes of subsection 75(2) of the *Act*, which I have concluded he is not, to whom property may revert, then is Mr.Peter Sommerer saved by the provisions of the *Convention*? Given my conclusion thus far it is unnecessary to deal with this issue, but for the sake of completeness or, if my interpretation of "person" is incorrect, this issue should be addressed.

[111] Article XIII(5) of the *Convention* reads as follows:

> Gains from the alienation of any property, other than those mentioned in paragraphs (1), (2) and (3) shall be taxable only in the contracting state of which the alienator is a resident.

[112] The *Convention* was incorporated into domestic law of Canada pursuant to the *Canada-Austria Income Tax Convention Act*, 1980, subsection 5(2) of which states:

> In the event of any inconsistency between the provisions of this Part, or the Convention, and the provisions of any other law, the provisions of this Part and the Convention prevail to the extent of the inconsistency.

[113] The Appellant argues that subsection 75(2) of the *Act* is inconsistent with Article XIII(5) and therefore Article XIII(5) prevails, precluding the taxability in Canada of the gains from the SPF's sale of the Vienna and Cambrian shares. The Respondent's position is that Article XIII(5) applies only to prevent juridical double taxation, that is the same taxpayer being taxed on the same gain in two different jurisdictions, but not applicable to economic double taxation where the same transaction is taxed in two different persons' hands in two jurisdictions. This could lead to a discussion worthy of an extensive paper, but it is not a path I feel I need to go down. What is before me is the interpretation of a Treaty provision, which is unambiguous: gains from the alienation of property, in this case the Vienna and Cambrian shares, shall be taxable only in the state of which the alienator, the SPF, is a resident – Austria. *Prima facie* this removes the very same gains on the sale of shares from the Canadian taxing authorities.

[114] Does subsection 75(2) of the *Act*, however, deem Mr. Peter Sommerer to be the alienator? No, it recognizes the trust is the alienator but that the gain could be Mr. Sommerer's. A fine distinction perhaps, but a distinction nonetheless, the effect of which there is only one alienator – the SPF.

[115] Had the drafters of the *Convention* intended to make an exception that the general and clear provision of Article XIII(5) was not to apply to the attribution rules contained in subsection 75(2) of the *Act*, they could have done so. In this regard, it is interesting to note Article XXVIII(2) of the *Convention* which provides:

> Nothing in this Convention shall be construed as preventing Canada from imposing its tax on amounts included in the income of a resident of Canada according to section 91 of the *Canadian Income Tax Act*. However, that section shall not apply to income from an active business carried on in Austria by a foreign affiliate of a person resident in Canada or to income that pertains to or is instant to an act of business carried in Austria.

[116] It is clear that the drafters wanted to ensure the terms of the *Convention* would not override Canada's *FAPI* legislation, which could tax income in Canada, that had also been subjected to tax in Austria in a different entity's hands. No such provision is to be found in the *Convention* referencing subsection 75(2) of the *Act*, notwithstanding that 56 of the 88 *Income Tax Conventions* in force in Canada have

provisions such as found in the *Canada-Germany Income Tax Convention*, Article 29(2)(*a*):

> It is understood that nothing in the Agreement shall be construed as preventing:
>
> (a) Canada from imposing a tax on amounts included in the income of a resident of Canada with respect to a partnership, trust or controlled foreign affiliate, in which that resident has an interest;

[117] The absence of a similar saving provision in the *Convention* supports the position that Canada has not preserved the jurisdiction to tax residents such as Mr. Sommerer, with respect to his interest in an Austrian trust.

[118] The Respondent argues that it is unnecessary to have these types of saving provisions in *Convention*s, citing both a recent (2009) Japanese Superior Court[22] decision in the *FAPI* context, as well as recent (2003) OECD Commentary on Article 1 of the OECD Model Tax Treaty. The Appellant takes exception with the Respondent's reliance on the 2003 OECD Commentary, which states in paragraphs 22 and 22.1 that domestic anti-avoidance rules like "substance over form", "economic substance" and "General Anti-Avoidance Rules (GAAR)" are "part of the basic domestic rules set by domestic tax laws for determining which facts give rise to a tax liability; these rules are not addressed in tax treaties and are, therefore, not affected by them." The Appellant contends this Commentary is contrary to the 1977 OECD Commentary coincident with the entering of the *Convention*, and it is only the earlier OECD Commentary that is relevant. In 1977, the OECD Commentary suggests that if a State intended that a domestic anti-avoidance provision remain applicable in the treaty context, it would have to incorporate it into the treaty, similar to the *FAPI* rules. The Respondent's view is that since the 1977 Commentary did not go into great detail, the 2003 Commentary was simply an elaboration and, consequently, the two OECD Commentaries are not in conflict, and it is therefore appropriate to rely on the latter. I disagree. The Federal Court of Appeal in *Her Majesty the Queen v. Prévost Car Inc.*[23] stated:

> 10. The worldwide recognition of the provisions of Model Convention and their incorporation into a majority of bilateral Conventions have made the Commentaries on the provisions of the OECD Model a widely-accepted

---

[22] Petition for Rescission of Corporation Tax Correction Disposition 2008 (GYO.HI) 91, 29 October 2009.

[23] 2009 DTC 5053 (FCA).

> guide to the interpretation and application of the provisions of existing bilateral Conventions …
>
> 11. The same may be said with respect to later commentaries, when they represent a fair interpretation of the words of the Model Convention and do not conflict with Commentaries in existence at the time a specific treaty was entered and when, of course, neither treaty partner has registered an objection to the new Commentaries. …

[119] A later OECD Commentary should only be of assistance if not in conflict with the Commentary in existence at the time of the *Convention*. I find the two Commentaries are very much in conflict, and I restrict myself to looking to the 1977 Commentaries for help. It supports the Appellant's view that specific mention should have been made in the *Convention* to permit the application of domestic anti-avoidance rules such as subsection 75(2) of the *Act* to override the effect of Article XIII(5) of the *Convention*. Failing that, Article XIII(5) can only be interpreted in its ordinary sense, which would preclude the application of subsection 75(2) of the *Act* to tax the gain in Mr. Sommerer's hands in Canada.

[120] This is certainly a view which found favour with Justice Woods in *Garron et al v. The Queen*[24] where she concluded that a similar provision of the *Canada-Barbados Income Tax Convention* took precedence over the application of subsection 75(2) of the *Act*.

[121] The Respondent relied on *obiter* comments I made in the case of *Antle v. The Queen*[25] where I discussed the application of GAAR to the interplay between the *Act* and the *Canada-Barbados Income Tax Convention*. That was an entirely different situation decided on different grounds. It appears no significance was attached to the differing OECD Commentaries, and that I may have been applying the more recent OECD Commentary in suggesting GAAR applies to find a Canadian resident taxable on gains of a Barbados trust, but it is implicit in the reasoning in *Antle* that I looked on Mr. Antle as the alienator of property – not a finding I have made with respect to Mr. Sommerer. Also, in this case I am not dealing with the GAAR but a specifically worded anti-avoidance provision, precluding the application of section 4.1 of the *Income Tax Convention Interpretation Act*.

---

[24] 2009 TCC 450.

[25] 2009 TCC 465.

[122] Based on the clear wording of Article XIII(5), section 5(2) of the *Canada-Austria Income Tax Convention Act* 1980, the 1977 OECD Commentary, the lack of a provision in the *Convention* similar to Article 29(2)(a) of the *Canada-Germany Income Tax Convention*, and the decision in *Garron*, I conclude Article XIII(5) applies to preclude Canada from taxing Mr. Sommerer on the gain on the disposition of the Vienna and Cambrian shares by the SPF.

5. Was the SPF an agent of Mr. Sommerer's for the purpose of disposing of the Vienna and Cambrian shares?

[123] The Respondent relies on the following Commentary of the American author, A.W. Scott in *The Law of Trusts*[26] for the proposition that sufficient control by a beneficiary over a trustee could render the trustee the beneficiary's agent.

> An agent acts for, and on behalf of, his principal and subject to his control; a trustee as such is not subject to the control of his beneficiary, although he is under a duty to deal with the trust property for the latter's benefit in accordance with the terms of the trust, and can be compelled by the beneficiary to perform his duty. The agent owes a duty of obedience to his principal; a trustee is under a duty to conform to the terms of the trust.
>
> A person may be both agent of an trustee for another. If he undertakes to act on behalf of the other and subject to this control he is an agent; but if he is vested with the title to the property that he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation that predominates, and the principles of agency, rather than the principles of trust, are applicable.

[124] This approach must be viewed with some caution, however, given Professor Waters' statement:[27]

> Even where there is a very clearly expressed intention to form a trust relationship there may be situations where the relationship could also be characterized as one of agency. It has been argued that the greater degree of control the beneficiaries of a trust have over the management of the trust assets, the greater the likelihood that the relationship cold also be characterized as agency. The consequence of this that the trustees will be treated as agents and the beneficiaries will be treated principals. The beneficiaries are then personally liable for the acts of the trustees in their management of the trust property.

---

26 4 ed. Boston: Little Brown, 1987, Vol. 1, pp. 88 and 95.

27 3rd ed. (Toronto: Carswell, 2005), *supra*, p. 58.

…

Professor Waters mentions *Trident Holdings Ltd. V. Danand Investments Ltd.*[28] as well as *Advanced Glazing Systems Ltd. v. Frydenlund*,[29] concluding:[30]

> With the possible exception of *Advanced Glazing Systems Ltd. v. Frydenlund*, courts in Canada have not clearly applied a control test to find trustees to be agents for beneficiaries thereby making beneficiaries liable for the acts of the trustees. However, the citation, with apparent approval, of a passage from the American treaties on trusts by Scott dealing with the control test in *Trident Holdings Ltd.*, and the apparent acceptance of the control test in *Advanced Glazing Systems Ltd.*, suggest an increasing willingness to adopt the control test in Canada.
>
> If the control test were adopted it is unclear to what extent beneficiary control would lead to the trustees being considered agents of the beneficiaries. …

In a footnote Professor Waters goes on to comment on Scott's statement concluding that the possibility is perhaps greater in the United States.

[125] The cases referred to by Professor Waters are not tax cases but deal with the personal liability of the principals. Are agency principles to predominate over trust principles for purposes of determining liability under the *Act*, especially in light of the extensive treatment afforded trusts under the *Act*'s legislation? It is not as though applying agency principles, to follow Scott's approach, means there is no trust: there is still a trust. The question is whether the Government of Canada, not being a party to the trust or agency relationship, can choose that for tax purposes agency principles or trust principles apply. The Government argues that even if I find a trust, that there is, in law, an agency relationship, and it is on that basis Mr. Sommerer should be taxed. This ignores the circumstances of the holding of the property for others' benefit. Even if the SPF is agent and sells the property on the instructions of the principal, the principal is not to receive the proceeds unless certain conditions are met and even then not all the proceeds. What kind of agency is that? It is tantamount to saying that you are my agent to sell my property but it is up to you when and to whom you distribute the proceeds; surely the trust conditions cannot be ignored for determining the correct tax liability. In effect, it is not a full answer to conclude the

---

28 (1988), 64 O.R. (2d) 65.

29 [2000] C.L.R. 3d, 241.

30 3rd ed. (Toronto: Carswell, 2005), *supra*, p. 60.

SPF is Mr. Sommerer's agent: one must ask, agent with authority to do what? Does the authority include the right to deliver all the proceeds from the sale of shares to Mr. Sommerer? This is simply a different situation than those cases giving rise to the notion of agency principles trumping trust principles. The finding in *Trident* was based on the trustee being a bare nominee and trustee whose purpose was to hold the legal title to the land and do the bidding of the beneficiaries. *Advanced Glazing Systems Ltd.* dealt with a business trust whose investors were held to be principals of the trust. In that case there were numerous documents which explicitly indicated the existence of an agency relationship as well as a finding that the investors had sufficient power. These are not similar to the situation before me.

[126] It should be noted that this alternate position of the Respondent's was not the basis for the assessment. It was a subsequent position raised by the Attorney General in the Amended Reply to the Notice of Appeal. The onus is on the Respondent to prove the facts in support of the agency relationship. There is no agency contract as such linking the alleged principal (Mr. Sommerer) and the SPF as agent, that might put the principal in direct contractual relations with a third party. It is clear the SPF held title to the Vienna and Cambrian shares in its own right, and that the Foundation Declaration set the parameters within which the Executive Board could deal with the property. Therefore, even if I accept the proposition that some significant control by a beneficiary over the actions of a trustee can effectively overlay an agency relationship onto the trust relationship for tax purposes, the Respondent has to prove such an implicit agency relationship "predominates and the principles of agency, rather than principles trust are applicable". Proof of control must be clear and unequivocal; influence of a principal or consultation with a principal is not sufficient. The principal must control the property, and I would suggest that, for tax purposes, also the disposition of the proceeds. The agent must be found to be unable to act without the authority of the principal. Indeed, the control should be in line with the level of control where a trustee is merely a bare nominee or trustee, whose purpose was to hold legal title to the property and do the bidding of the beneficiary.

[127] While I find Mr. Sommerer had considerable influence as a member of the Advisory Board, I do not find the degree of control that causes me to displace trust principles with agency principles for tax purposes. I will expand.

[128] First, Mr. Sommerer's authority as a principal, if any, can only stem from his role as a member of the Advisory Board. As I have already concluded, the Advisory Board was not an organ of the SPF, neither was it a Stella or authority with special tasks: it was simply an Advisory Board consisting of Mr. & Mrs Sommerer and Mr. Herbert Sommerer. I find Mr. Sommerer was the moving force on the Advisory

Board, but that goes to his influence more than his actual authority. What was Mr. Sommerer's authority that gave him control over the disposition of the corpus of the trust and the disposition of the proceeds? The Foundation Declaration and Supplemental Deed are silent on the Advisory Board's role with respect to the disposition of the trust property and its ultimate distribution. The Advisory Board's consent was sought in determining grants, but I have concluded the grants were not capital distributions. No consent of the Advisory Board was required in disposing of the trust fund itself, though in fact the Advisory Board did recommend acquisitions and dispositions. In one case though, the Advisory Board's recommendation was not followed: at the Executive Board meeting of April 17, 1997, it was decided to defer the sale of some Vienna shares to Mr. Mikutta, notwithstanding the Advisory Board's recommendation. Yes, the Foundation Declaration referred to a supervisory role of the Advisory Board, but a review of the many minutes presented at trial left me with the impression that the Advisory Board, and undoubtedly Mr. Sommerer as the representative of that Board, did just that; it advised, not unlike management providing guidance to a Board of Directors, but with the ultimate decision resting with the Executive Board.

[129] It is also helpful to step back and look at the Foundation with a longer term view. There was the obvious purpose of benefiting the Sommerer family but this should be put in context of the other objectives cited by Mr. Sommerer to increase family ties to Austria, return a pool of capital to Austria, provide that capital would be available for family in emergencies, act as a capital investor for beneficiaries' business endeavours, and fulfill some charitable purposes. This appears to have been a two-phase arrangement with the Foundation acquiring the shares and realizing a significant gain on them to put itself in a position to meet the above objectives. Once having achieved this level of capital, the Foundation proceeded to make charitable donations. When examining the Foundation from this perspective, it is apparent that it very much has existence separate from Mr. Sommerer. He certainly had influence, but in these circumstances the SPF was far from being his conduit to do his bidding.

[130] In summary,

i) there was no evidence suggesting Mr. Sommerer would be liable for any of the SPF's actions;

ii) he had an advisory role, albeit influential, but decisions with respect to the trust fund were within the Executive Board's discretion;

iii) the SPF, having a separate existence with its own ongoing responsibilities, specifically retaining income to fulfill its purposes, was not Mr. Sommerer's conduit;

The SPF was not Mr. Sommerer's agent.

Conclusion

[131] It is not surprising the Government would be interested in Mr. Sommerer's activities, for, as acknowledged by the Appellant, had Mr. Herbert Sommerer revoked the Foundation shortly after the sale of the Vienna shares and distributed the funds to Mr. Sommerer and his wife, there would have been no tax payable by the Sommerers in Canada, if the distribution was considered to be from a non-resident trust. And indeed, I have found that the SPF was a trustee of a non-resident trust, but not a trust captured by the wording of subsection 75(2) of the *Act*. It is regrettable neither side could provide more background and insight into the purpose of subsection 75(2) of the *Act* notwithstanding their excellent and extensive research in all aspects of this many-faceted case. I have concluded subsection 75(2) of the *Act* does not apply to a beneficiary vendor of property at fair market value to a trust, but only to a settlor or subsequent contributor, who could be seen as a settlor. If this is an incorrect reading of subsection 75(2) of the *Act*, and it is meant to apply to beneficiaries such as Mr. Sommerer, then I find the *Convention* overrides that application in Mr. Sommerer's case.

[132] The appeals are allowed and the reassessments **are referred back to the Minister of National Revenue for reconsideration and reassessment** on the basis that:

i) Mr. Sommerer sold 1,770,000 Vienna Systems Corporation shares to the Sommerer Private Foundation in October 1996;

ii) the Sommerer Private Foundation was a trustee of a trust settled by Mr. Herbert Sommerer in October 1996, but subsection 75(2) of the *Act* is not applicable to attribute to Mr. Sommerer the gain on the sale of the Vienna shares or the gain on the sale of the Cambrian shares, as Mr. Sommerer cannot be considered "the person" as defined in subsection 75(2) of the *Act*; and even if subsection 75(2) of the *Act* applied, Article XIII(5) of the *Convention* precludes Canada from taxing Mr. Sommerer on the gains;

iii) the Sommerer Private Foundation was not Mr. Sommerer's agent in respect of the sale by it of the Vienna and Cambrian shares.

Costs to the Appellant.

Signed at Ottawa, Canada, this 13th day of May 2011.

"Campbell J. Miller"

C. Miller J.

APPENDIX A

OFFICIAL GAZETTE

of the Austrian Revenue Administration
Published by the Federal Minister of Revenue
[Bundesminister fьr Finanzen]

Article I

Private Foundations Act

Definition

Section 1. (1) In this Federal Act, a private foundation is a legal entity to which the founder has dedicated an endowment for achieving a permissible purpose determined by the founder through the use, administration and utilization of the endowment; it has a legal personality and must have its head office in Austria.

(2) A private foundation must not
1. perform any commercial activities other than a mere secondary activity;
2. assume the management of a commercial corporation;
3. be registered as the personally liable shareholder of a partnership company or an incorporated commercial company.

Name

Section 2 The name of a private foundation must be distinctly different from the name of any private foundations recorded in the registry of corporations; it must not be misleading, and it must contain the word "Private Foundation" without abbreviation.

Founders

Section 3 (1) The founder of a private foundation can be one or more individuals or corporate bodies. A *mortis causa* private foundation can have only one founder.

(2) If a private foundation has several founders, the right to which the founders are entitled or which are reserved for them can be exercised only by all founders jointly, unless the charter of foundation provides otherwise.

(3) The rights of founders to develop the foundation are not transferred to their legal successors.

(4) Persons who dedicate assets to a private foundation after its formation (subsequent donors) do not automatically acquire the status of founder.

Endowment

Section 4 A private foundation must receive an endowment in the value of at least one million shillings.

Beneficiary

Section 5 The beneficiary is the person named as such in the Declaration of Foundation. If the beneficiary is not named in the Declaration of Foundation, the beneficiary is the person determined as such by the authority named for this purpose by the founder (section 9, subsection 1, number 3), or otherwise determined as such by the directors of the foundation.

Ultimate beneficiary

Section 6 The ultimate beneficiary is the person who is to receive any assets remaining after the private foundation is dissolved.

Establishment and formation of a private foundation

Section 7 (1) A private foundation is established by means of a declaration of foundation; it is formed by being recorded in the register of corporations.

(2) Persons acting on behalf of the foundation prior to its recording in the register of incorporations are liable undividedly.

Declaration of foundation

Section 9 (1) The declaration of foundation must definitely contain the following:

1. a dedication of the assets;
2. the purpose of the foundation;
3. the name of the beneficiary or an authority that must designate the beneficiary; this does not apply if the purpose of the foundation is for the benefit of the public at large;

4. the name and head office of the foundation;
5. the founder's name and address (for serving documents), in the case of individuals also the date of birth, in the case of registered corporations, the registration number;
6. an indication whether the private foundation is established for a definite or indefinite period.

(2) In addition, the declaration of foundation may include the following:

1. provisions about the appointment, dismissal, term of office and authorized representation of the directors of the foundation;
2. provisions about the appointment, dismissal and term of office of the auditor for the foundation;
3. provisions about the election of the auditor for the foundation;
4. the establishment of a supervisory board or other organs to ensure that the purpose of the foundation is achieved (section 14, subsection 2), and the appointment of persons who are to be given special responsibilities;
5. in the case of a necessary or otherwise intended appointment of a supervisory board, provisions about its appointment, dismissal and term of office;
6. provisions about the amendment of the declaration of foundation;
7. an indication that a supplementary foundation document has been or can be set up;
8. making the private foundation subject to countermand (section 34);
9. provisions regarding remuneration for the foundation's organs;
10. more detailed definition of the beneficiary or additional beneficiaries;
11. stipulation of a minimum of assets to be maintained before funds can be paid to beneficiaries;
12. determination of an ultimate beneficiary;
13. provisions about the internal order of collegial foundation bodies;
14. dedication and description of other foundation assets which exceed the minimum assets (section 4).

Foundation charter, supplementary foundation charter

Section 10 (1) The foundation declaration must be recorded in the form of an official document (foundation charter, supplementary foundation charter).

(2) If the foundation charter contains the statement that a supplementary foundation charter has been or can be established (section 9, subsection 2, number 6), provisions can be recorded in a supplementary charter which exceed those of section 9, subsection 1, except for a provision according to section 9, subsection 1, numbers 1 to 8. The supplementary foundation charter does not have to be presented to the court which maintains the Register of Corporations.

Auditing a foundation

(3) The audit report must be presented to the founder and to the foundation directors. Disagreements between the auditor of the foundation and the foundation directors are settled by the Court at the request of the foundation directors or the auditor of the foundation.

Application for entry in the Register of Corporations

Section 12 (1) The first board of directors of the private foundation must apply for entry in the Register of Corporations.

Entry in the Register of Corporations

Section 13 (1) Private foundations must be entered in the Register of Corporations.

(2) Local jurisdiction is with the court (section 120, subsection 1, number 1, Jurisdiction Standards) in whose district the private foundation has its head office.

(3) Section 3, Register of Corporations Act, must be applied *mutadis mutandis*. In addition, the following must be entered:

1. brief description of the foundation's purpose;
2. date of the foundation charter, and each amendment of this charter;
3. if applicable, the date of the supplementary foundation charter and the date any amendments;
4. if applicable, names and dates of birth of the chairman, vice chairman and the other members of the supervisory board.

Bodies of the private foundation

Section 14 (1) Organs of the private foundation are the foundation's board of the directors, the foundation's auditor and, if applicable, the supervisory board.

(2) The founders may provide for further organs to achieve the purpose of the foundation.

The foundation's board of directors

Section 15 (1) The foundation's board of directors must consist of at least three members; two members must have permanent residence in Austria.

(2) A beneficiary or a beneficiary's spouse as well as persons who are related to the beneficiary in direct line or up to the third degree in indirect line, as well as corporate bodies cannot be members of the foundation's board of directors.

(3) If the beneficiary is a corporate body in which an individual as defined in section 244, subsection 2, Commercial Code, has an interest, such individuals, their spouses or persons who are related to the individual in direct line or up to the third degree in indirect line, cannot be members of the foundation's board of directors.

(4) The foundation's first board of directors must be appointed by the founder or the foundation curator (section 8, subsection 2, number 1).

(5) The names of the members of the foundation's board of directors and their authority to represent the foundation as well as the termination of or change in their authority to represent the foundation must be reported without delay for entry in the register of corporations. Such a report must be accompanied by proof of appointment or change in a publicly certified form. At the same time, the members of the foundation's board of directors must present their publicly certified signature.

Signatures

Section 16. The members of the board of directors must sign their name in such a way that they add their signature to the name of the private foundation.

Responsibilities of the foundation's board of directors,
representing the private foundation

Section 17 (1) The foundation's board of directors administers and represents the foundation and ensures that the purpose of the foundation is achieved. It is obligated to comply with the terms of the foundation declaration.

(2) Every member of the foundation's board of directors must perform his/her responsibilities frugally and with the prudence of a conscientious manager. The board of directors may provide services to beneficiaries in compliance with the purpose of the foundation only when and if this does not reduce the claims of creditors of the private foundation.

(3) Unless provided otherwise by the foundation declaration, all members of the foundation's board of directors are only authorized jointly to make declarations of intention and to sign on behalf of the private foundation. The foundation's board of directors may empower individual members of the foundation's board of directors to perform certain business transactions or certain types of business transactions. If a declaration of intention must be served on the private foundation, service to one member of the board of directors is sufficient.

(4) Meetings of the foundation's board of directors can be called within an appropriate period by the chair, the deputy chair or a two-thirds majority of the directors.

(5) If the private foundation does not have a supervisory board, legal transactions between the private foundation and a member of the foundation's board of directors require the approval of all other members of the board and of the court.

Accounting

Section 18 The foundation's board of directors must keep the books of the private foundation, applying the following provisions *mutatis mutandis*: sections 189 to 216, 222 to 226, subsection 1, section 226, subsection 3 to 234 and 236 to 239, Commercial Code, section 243, Commercial Code, concerning the annual report, and sections 244 to 267, Commercial Code, regarding the group annual statement and the group annual report. The annual report must also indicate how the purpose of the foundation has been achieved.

Auditors for the foundation

Section 20 (1) The auditor for the foundation must be appointed by the court or, if applicable, by the board of directors.

Audit

Section 21 (1) The auditor for the foundation must audit the annual statement including the bookkeeping and the annual report within three months of presentation. Section 269, subsection 1, Commercial Code, shall apply *mutatis mutandis* to the object and the extent of the audit, and section 272, Commercial Code shall apply *mutatis mutandis* to the right to information according to section 272.

(2) The auditor is not obligated to maintain confidentiality toward other organs of the foundation and toward the persons authorized in the foundation declaration to perform auditing tasks. Section 275, Commercial Code shall apply *mutadis mutandis* to the responsibility.

(3) Sections 273 and 274, Commercial Code, regarding the audit report and the auditor's certification shall be applied *mutatis mutandis*. The audit report must be presented to the other bodies of the private foundation.

(4) In case of disagreements between the foundation's auditor and the other foundation organs regarding the interpretation and application of statutory provisions and of the foundation declaration, the court shall decide upon request.

Supervisory board

Section 22 (1) A supervisory board must be appointed if

1. the number of employees of the private foundation exceeds three hundred, or
2. the private foundation uniformly manages domestic capital corporations or domestic cooperatives (section 15, subsection 1, Corporations Act of 1965) or controls such corporations or cooperatives by means of a direct interest of more than 50 percent, and if in both cases the number of employees of these corporations or cooperatives exceeds an average of three hundred, and if the activity of the private foundation is not limited only to the administration of company shares of the controlled corporations.

(2) The average number of employees is determined by the number of employees on the last day of each month during the preceding calendar year.

(3) In case of subsection 1 and according to the following provisions, the foundation's board of directors must determine by January 1st the average number of employees working in the previous year. If the average exceeds three hundred, this must be reported to the court; the next determination of the number of employees must be made three years after the January 1st deadline named in the first sentence. If the number of employees changes within a three-year period, this does not affect the necessity of a supervisory board. If it is determined that the average number exceeds three hundred, the next determination must be repeated as of each January 1st of the following years until the number three hundred is exceeded. The bodies responsible to represent the corporations or cooperatives named in subsection 1, number 2, must upon request provide the information required for this determination to the foundation's board of directors in due course.

(4) Section 110, Workers' Insurance Act [*ArbVG*] applies *mutadis mutandis* to private foundations as it does to limited liability companies.

Appointment and dismissal of foundation bodies and their members by the court

Section 27 (1) If there are not enough members of foundation bodies as required by law or on the basis of the foundation declaration, the court must appoint them upon request or *ex officio*.

(2) The court must dismiss a member of a foundation organ upon request or ex officio if this is provided by the foundation declaration or for other important reasons. The following in particular are considered important reasons:

1. gross neglect of duties;
2. inability to meet responsibilities properly;
3. opening of insolvency proceedings against the member's assets, dismissal of such proceedings for lack of cost-covering assets and repeated execution with regard to the member's assets.

Internal order of foundation bodies

Section 28 (1) A foundation body consisting of at least three members,

1. elects a chairperson and at least one deputy chair from among themselves;
2. unless provided otherwise in the foundation declaration, and section 35, subsection 2 notwithstanding, a foundation passes resolutions with a simple majority, whereby the chairperson's vote breaks a tie;
3. can pass resolutions in writing if no member objects.

Liability of members of foundation bodies

Section 29 (1) Section 21, subsection 2, last sentence regarding the liability of the foundation's auditor notwithstanding, every member of a private foundation's body is liable for damage as the result of negligent neglect of duties.

Beneficiary's entitlement to information

Section 30 (1) A beneficiary may request that the private foundation provide information on whether the purpose of the foundation is being achieved, and may request inspection of the annual statement, the annual report, the auditor's report, the books, the foundation declaration and the supplementary foundation declaration.

(2) If the private foundation does not comply with this request within a reasonable time, the court may upon application by the beneficiary order such inspection, if need be by a person skilled in accounting. Sections 385 to 389, Code of Civil Procedure, applies to this process *mutatis mutandis*.

Special audit

Section 31 (1) Every foundation body and each of its members may ask the court to order a special audit to ensure that the purpose of the foundation is achieved.

(2) The court must order the special audit if it is convinced that dishonest acts or gross violations of the law or of the foundation declaration have been committed.

Amendment of the foundation declaration

Section 33 (1) Prior to the establishment of a private foundation, the foundation declaration can be cancelled or amended by the founder; if one of several founders is

eliminated, the foundation declaration cannot be cancelled and can be amended only when the purpose of the foundation is maintained. If the only or last founder is eliminated, the foundation's board of directors may make amendments while maintaining the purpose of the foundation, taking into account any obstacles to registration and changed circumstances that may have occurred in the meantime.

(2) After the establishment of a private foundation, the founder may amend the foundation declaration only if he had made it subject to amendments. If an amendment is not possible because of the elimination of a founder or a lack of agreement among several founders or because the declaration had not been made subject to amendments, the board of directors may, while achieving the purpose of the foundation, amend the foundation declaration to adapt it to changed circumstances. The amendment requires approval by the court.

(3) The foundation's board of directors must apply to have the amendment of the foundation declaration entered in the register of corporations of, accompanied by a publicly certified copy of the amendment resolution, and stating the fact that the supplementary foundation charter has been amended. The amendment becomes effective when the entry in the register of corporations is recorded.

Revocation of a private foundation

Section 34 (1) A private foundation can be revoked by the founder only if he has made the foundation declaration subject to revocation. A founder who is a corporate body cannot be subject to revocation.

Dissolution

Section 35 (1) The private foundation is dissolved as soon as

1. the period provided for in the foundation declaration has expired;
2. bankruptcy proceeding have begun against the assets of the private foundation;
3. the decision denying an application for bankruptcy protection for the lack of assets covering the expected costs of bankruptcy proceedings has come into effect;
4. the foundation's board of directors has passed a unanimous resolution to dissolve;
5. the court has decided to dissolve the foundation.

(2) The foundation's board of directors must pass a unanimous resolution to dissolve as soon as

1. it has received an admissible revocation from the founder;
2. the purpose of the foundation has been achieved or is no longer achievable;
3. a non-charitable private foundation whose major purpose is for the benefit of individual persons, has lasted for 100 years, unless all ultimate beneficiaries resolve unanimously that the private foundation should continue for another period, but no longer than for 100 years at a time;
4. there are other reasons for this as stated in the foundation declaration.

(3) If a resolution according to subsection 2 is not passed although a reason for dissolution exists, each member of a foundation body, each beneficiary or ultimate beneficiary, each founder and each person thus authorized in the foundation declaration may apply to the court for dissolution. Furthermore, the court must dissolve the private foundation if it violated section 1, subsection 2 and has failed to comply within a reasonable time with a legally binding order to cease and desist.

(4) If the foundation's board of directors has passed a unanimous resolution although there is no reason for dissolution, any person named under subsection 3 may apply to have this resolution revoked.

(5) In the cases of subsection 1, numbers 1 and 4, the foundation's board of directors must apply to have the dissolution of the private foundation entered in the register of corporations. The dissolution is effective when it is entered in the register.

(6) If the private foundation is dissolved as the result of a court order, the court must notify the court responsible for the register of corporations. The dissolution must be entered in the register *ex officio*.

Liquidation

Section 36 (1) The foundation's board of directors must advise the creditors of the private foundation about the dissolution and ask them to register their claims no later than one month after publication of the request. This request to the creditors must be published without delay in the Official Gazette in Vienna ["Amtsblatt zur Wiener Zeitung"].

(2) Section 213, Corporations Act of 1965 must be applied with regard to creditor protection. The remaining assets of the dissolved private foundation must be transferred to the ultimate beneficiary.

(3) If there is no ultimate beneficiary or if the ultimate beneficiary does not wish to receive the remaining assets, and if there is no other provision in the foundation declaration, the remaining assets shall become the property of the Republic of Austria.

(4) If the private foundation is dissolved and if there is no other provision in the foundation declaration, the founder shall be the ultimate beneficiary.

(5) Unless otherwise provided in the foundation declaration, several ultimate beneficiaries shall share the remaining assets equally.

Deregistration

Section 37 (1) If the liquidation is finished and a final accounting has been done, the foundation's board of directors must apply to have the liquidation entered in the register of corporations. Finalization of the liquidation must be entered, and the private foundation must be deregistered.

(2) The books and documents of the private foundation must be deposited and held for seven years in a safe place to be determined by the court.

(3) If it is subsequently found that other liquidation measures are necessary, the court must appoint the foundation's previous board of directors or a liquidator for that purpose.

CITATION:	2011 TCC 212
COURT FILE NO.:	2007-2583(IT)G
STYLE OF CAUSE:	PETER SOMMERER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 6, 7, 8, 9 and 10, 2010, January 25 and 26, 2011, and February 7 and 8, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF AMENDED JUDGMENT:	May 13, 2011

APPEARANCES:

Counsel for the Appellant:	Roger Taylor, Daniel Sandler and Louis Tassé
Counsel for the Respondent:	Luther P. Chambers, Q.C. and Ryan Hall

COUNSEL OF RECORD:

For the Appellant:

Name:	Roger Taylor, Daniel Sandler and Louis Tassé
Firm:	Couzin Taylor LLP

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada