Docket: 2016-2068(IT)G

BETWEEN:

VICTORIA Y LOUIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on July 9, 10 and 11, 2018, at Vancouver, B.C.

Before: The Honourable Associate Chief Justice Lucie Lamarre

Appearances:

Counsel for the Appellant: Alan Louie
Counsel for the Respondent: Ron D.F. Wilhelm

JUDGMENT

The appeal with respect to the 2009 taxation year is dismissed.

The appeals for the 2010 and 2012 taxation years are allowed and the assessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is not liable to pay the tax assessed of $70,841 for 2010 and $29,217 for 2012 under Part XI.01 of the *Income Tax Act*.

Considering their divided success, the parties shall bear their own costs.

Signed at Montréal, Canada, this 16th day of November 2018.

Lucie Lamarre

Lamarre A.C.J.

Citation: 2018 TCC 225
Date: 20181115
Docket: 2016-2068(IT)G

BETWEEN:

VICTORIA Y LOUIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Overview

[1] These are appeals from assessments for her 2009, 2010 and 2012 taxation years[1] made against the Appellant under Part XI.01 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("Act") in connection with her tax-free savings account.

[2] The events giving rise to these appeals took place following the financial crisis of 2008, more specifically, according to the evidence, during the recovery period that started in March 2009.

[3] Victoria Louie ("Appellant") is a sophisticated investor with extensive knowledge of the stock market. Testifying at trial, she proved to be highly knowledgeable about her trading activities.

[4] In 2008, the Appellant had two accounts with TD Waterhouse Discount Brokerage ("TDW"): a Canadian direct trading account ("CDN") and a self-directed registered retirement savings plan ("RRSP") (Exhibit R-2, Tabs 13-15). In January 2009, when the tax-free savings account rules ("TFSA Rules") were implemented, the Appellant opened a third account with TDW called the President's Account TFSA ("TFSA") (Exhibit R-2, Tab 12).

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[1] The taxation years at issue are the ones indicated in the Amended Notice of Appeal, dated August 25, 2016.

[5] From May 15 to October 17, 2009, the Appellant made 71 share exchange transactions ("swap transactions" or "swaps") that are relevant here. In doing so, the Appellant transferred shares listed on the Toronto Stock Exchange ("TSX") between her TFSA and her CDN and RRSP.

[6] The Appellant thereby increased significantly the total fair market value of her TFSA in the 2009 taxation year. Further, and although the Appellant did not enter into any swap transactions after October 17, 2009, her TFSA increased in value in 2010 and in 2012. However, the TFSA suffered a loss in 2011.

Issue

[7] The issue is whether, for the 2009, 2010 and 2012 taxation years, the Appellant is liable to pay tax under Part XI.01 of the Act with respect to the increase in the total fair market value of the property held in her TFSA. More precisely, the Court is asked to determine whether, for each of the years 2009, 2010 and 2012, the Appellant, as the holder of the TFSA, was extended an advantage within the meaning of the definition of this term in subsection 207.01(1) of the Act, and if so, whether she is liable to pay the Part XI.01 tax, which, pursuant to section 207.05 of the Act, amounts to the fair market value of the benefit (i.e., $200,795 for 2009, $70,841 for 2010 and $29,217 for 2012).

Statutory Provisions

[8] The relevant statutory provisions of the Act referred to in these reasons are attached hereto as Appendix I.

Facts as Presented in Evidence

[9] The Appellant was the only one who testified at the hearing. She explained that a swap transaction requires that the assets swapped be of equal value. She testified that, for the determination of the value of the assets, TDW directed her to their "Swap of Registered/Non-Registered Assets" document ("TDW document") (Exhibit A-2, Tab 2).

[10] The TDW document specifies (on page 2) the valuation method for equities in a chart providing "an overview of how each security is valued for SWAP purposes". The Chart states the valuation method as follows: "If the stock has traded, any price between the high and low of the day. If the stock has not traded, the price showing as the previous closing price. (Do not use the bid/ask)". The

Appellant recognizes that, in following these guidelines, she was at liberty to pick the price of the day that would be most advantageous to her when swapping in or swapping out shares.

[11] The TDW document, dated September 5, 2008, predates the enactment of the TFSA Rules. That document includes a disclaimer stating that it does not constitute legal, investment or tax advice. It also urges the reader to consult a tax advisor prior to implementation of a swap. No one from TDW testified at trial. The Appellant acknowledges that she acted on her own after she was provided with the TDW document.

[12] After choosing the appropriate shares to swap and making sure that their values balanced in accordance with the guidelines provided in the TDW document, the Appellant needed the approval of a TDW officer. The Appellant testified that on some occasions she was asked to review her calculations by the TDW officer. The reasons why her calculations had to be adjusted were not specified.

[13] A number of recurring features are found in each swap transaction. The Appellant testified that, for all of the swap transactions, the price selected for the shares swapped out of her TFSA was the highest price at which they had traded during the day up to the time of the swap. Conversely, for the shares swapped into her TFSA, the price chosen was the lowest at which they had traded. The Appellant testified at trial that the swap transactions always happened between noon and 1 p.m., Pacific Time, shortly before the close of trading on the TSX. Furthermore, the Appellant generally conducted swap transactions on days on which the prices of the swapped shares were highly volatile, the high degree of volatility of the shares being attributable to the sectors in which the Appellant had chosen to invest (i.e., mining, energy and technology). A number of times, the Appellant swapped the same shares in and out within a 24 hour time frame.

[14] These transactions allowed the Appellant to significantly increase the proportion of her capital stock held in her TFSA. By the end of 2009, the value of the Appellant's TFSA was $206,615.09 while at the beginning of 2009 it had been $5,000, which represents a 4,032% increase in the value of the TFSA.

[15] In comparison, at the end of 2009 the Appellant's RRSP and CDN had a value of $423,294.80 and $591,623.31 respectively. At the beginning of 2009, the

respective values were $388,301.83 and $204,742.97. This represents an increase in value of 9% for the RRSP and of 189% for the CDN[2].

[16] However, regarding the CDN, it is important to note that there were no limits on contributions. On a number of occasions, the Appellant made $10,000 deposits into her CDN; on August 24, 2009, she deposited $50,000; on September 25, 2009, she deposited $100,000; and on October 15, 2009, she deposited $97,001.15 into her CDN. As a result, outside contributions largely explain the increase in value of the CDN.

[17] When the Appellant stopped engaging in swap transactions in October 2009, she left the shares in her TFSA, where they were subject to true market forces for the other years at issue (i.e., 2010-2012). In 2010 and 2012, the value of the TFSA increased. In 2011, the Appellant suffered a loss.

Appellant's Position

[18] At trial, the Appellant explained the rationale behind the swap transactions in the following way. Speculating on the future price of the shares, she would identify shares in her TFSA that had appreciated but might depreciate in the near future. The shares with "downside risk" would be swapped for "upward price momentum" shares held in her RRSP or CDN. By doing so, the Appellant was able to crystallize gains that arose in her TFSA and to increase her contribution room while respecting the contribution limit. The Appellant explained this as follows in her memorandum of argument at paragraphs 412, 413 and 419:

> 412. By using a swap transaction to capture the gains earned by the shares in her TFSA the Appellant was able to use those gains together with the existing contribution room in her TFSA to swap in more shares which if they should increase in value in turn would increase the FMV of the TFSA and would also increase the Appellant's contribution room in her TFSA.
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> 413. This was allowable because Parliament had not set any limit as to how much a Holder can earn in her TFSA as long as her investments were qualified ones.

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2 Formula: (final value - initial value) / initial value x 100%

	TFSA	RRSP	CDN
Initial value	5000	388,301.8	204,742.9
Final value	206,615.1	423,294.8	591,623.3
Variation in % of the value of the account	4,032%	9%	189%

. . .

> 419. By using a swap transaction to capture those gains the Appellant was able to not only increase her contribution room by the amount of the captured gain but also simultaneously use that newly created contribution room by swapping in shares of stocks which had the best potential to increase in value in the future.

[19] The Appellant testified that this strategy involved risk because the future value of the swapped shares was uncertain. Accordingly, the increase in value of her TFSA resulted from her judicious investment decisions in a context of general market recovery.

[20] Arguing the legality of her investment strategy, the Appellant puts forward five distinct arguments in support of her contention that she was not extended any advantage as defined in subsection 207.01(1) of the Act and that the assessments under appeal must fail.

[21] First, the Appellant argues that the parties to the swap transactions dealt at arm's length. Relying on the Supreme Court of Canada ("SCC") decision in *Canada v. McLarty,* 2008 SCC 26 [2008] 2 S.C.R. 79, 2008 DTC 6354, the Appellant submits that the proper approach is for this Court to consider which transactions should be analyzed, which entities needed to be at arm's length and whether the entities in fact dealt at arm's length. The transactions to be analyzed are the 71 swap transactions referred to earlier. For 14 of these transactions, the Appellant suggests that the entity to consider is TDW acting as trustee for both her TFSA and her RRSP (Appellant's Memorandum of Argument, paragraph 91). For the remaining 57 transactions, the Appellant suggests that the entities to consider are TDW, acting as trustee of her TFSA, and she herself, as she is the owner of the CDN (Appellant's Memorandum of Argument, paragraph 92). The Appellant argues that in each case the entities dealt at arm's length. In reaching this conclusion, the Appellant gives significant weight to the independent status of TDW acting as trustee (Appellant's Memorandum of Argument, paragraphs 84 and 211) and the valuation method set out in the TDW document (Appellant's Memorandum of Argument, paragraph 219).

[22] Second, the Appellant argues that the swap transactions were priced at fair market value ("FMV") and would have occurred in an open market. Relying on the SCC decision in *Untermyer Estate v. Attorney General for British Columbia*, [1929] S.C.R. 84, the Appellant argues that picking a price between the high and low of the day was an appropriate valuation method (Appellant's Memorandum of Argument, paragraphs 144 and 241). Since the price of the shares swapped was

determined on the TSX, the Appellant further contends that the commercial terms of the transactions were characteristic of open-market transactions.

[23] Third, the Appellant argues that benefiting from the tax exemption in respect of the TFSA was not one of the main purposes of the swap transactions. In this regard, the Appellant suggests that, for there to be an intent to benefit from the exemption, taxable income must have been shifted from the RRSP or the CDN to the TFSA at the time of the completion of the swap transactions (Appellant's Memorandum of Argument, paragraphs 274 and 275). According to the Appellant, this interpretation is supported by the July 14, 2008 Explanatory Notes, which say that "[t]his provision [subsection 207.01(1) of the Act] is intended to guard against transactions designed to artificially shift taxable income away from the holder and into the shelter of a TFSA . . ." (Appellant's Memorandum of argument, paragraphs 275 and 276).

[24] Fourth, the Appellant argues that the swap transactions do not qualify as a series of transactions because they were not preordained (Appellant's Memorandum of Argument, paragraphs 289 and 333).

[25] Finally, in the alternative, the Appellant argues that, should this Court find that there was an advantage within the meaning of subsection 207.01(1), the tax is payable by TDW under subsection 207.05(3). In support of the claim that TDW extended the advantage, the Appellant referred to the TDW document, TDW's role as trustee and the degree of control exercised by TDW officers.

Respondent's Position

[26] The Respondent argues that the swap transactions constituted an advantage under subsection 207.01(1). The Respondent disagrees with the Appellant's assessment of the facts. According to the Respondent, the Appellant was able to shift value from her RRSP and CDN to her TFSA by selecting the price of the swapped shares a posteriori (Respondent's Written Submissions, paragraphs 31 and 77). Because these trades took place off-market and because parties dealing at arm's length would not have agreed to set prices that would constantly disadvantage the holders of the RRSP and CDN, the Respondent contends that the actions of the Appellant meet the requirements set out in clause (b)(i)(A) of the definition of "advantage" in subsection 207.01(1) (Respondent's Written Submissions, paragraphs 25, 59 and 78). Regarding clause (b)(i)(B) of the definition, the Respondent further argues that the only objective of the swap transactions was to enable the Appellant to benefit from the tax exemption

provided for shares held in a tax-free savings account. Having met both requirements, the swap transactions would constitute an advantage (Respondent's Written Submissions, paragraph 79). According to the Respondent, this conclusion is in line with a textual, contextual, and purposive analysis of section 207.01.

[27] The Respondent also argues that, for the years 2010 and 2012, the increase in value of the shares swapped in 2009 constituted an advantage (Respondent's Written Submissions, paragraphs 56, 81 and 93).

[28] Finally, the Respondent argues that the Appellant, not TDW, has to pay the tax on the advantage. As regards the facts, the Respondent stresses that the Appellant designed the strategy and conducted all trades without the services of a broker or a TDW advisor (Respondent's Written Submissions, paragraph 5). It was also the Appellant who instructed the TDW officer on the nature and value of the swap transactions (Respondent Written Submissions, paragraph 27). With regard to the law, the Respondent argues that the expression "extended by" used in subsection 207.05(3) refers to the use of debt instruments and since TDW did not provide a loan to the Appellant, subsection 207.05(3) does not apply (Respondent's Written Submissions, paragraph 95). The Respondent adds that an overly broad interpretation of the responsibilities of the trustee would render 207.05(3) meaningless (Respondent's Written Submissions, paragraph 96).

Analysis

Legislative Background

[29] The TFSA Rules were enacted in 2009. In the years that followed their introduction, Parliament made numerous amendments to address unexpected issues and to make the overall tax scheme more comprehensive. It is in this context that this Court now considers the application of the TFSA Rules, I believe for the first time.

[30] These appeals call for the interpretation of sections 207.01 and 207.05 of the Act. Those sections are part of Part XI.01 entitled "Taxes in Respect of TFSAs" (2009, 2010) or "Taxes in Respect of RRIFs, RRSPs and TFSAs" (as of March 2011).

[31] Part XI.01 must be read in conjunction with section 146.2, which is part of Division G (of Part I), entitled "Deferred and Other Special Income Arrangements". Subsection 146.2(5) sets out the rules related to the creation and

termination of a tax-free savings account. Subsection 146.2(6) sets out the general rule that a tax-free savings account allows for tax-free compounding of investment returns and tax-free distributions of accrued gains. More generally, section 146.2 provides for what has been referred to as a "tax-prepaid" investment account (Benjamin Alarie, "*Policy Forum: Assessing Tax-Free Savings Accounts – Promises and Pressures*", (2009) 57:3 Can. Tax J. 504).

[32] The general purpose of tax-free savings accounts is to encourage households to invest. In the 2008 budget introducing the tax-free savings accounts, the Department of Finance explained the tax savings that could be realized supposing a 5.5% rate of return on investments generating diversified income (40% interest, 30% dividends and 30% capital gains). The plan was that tax-free savings accounts would improve incentives for people with low and modest incomes to save (see Budget 2008, "Tax-Free Savings Account" pamphlet, Department of Finance, February 26, 2008, Exhibit A-2, Tab 14).

[33] Part XI.01 sets out anti-avoidance rules that prevent taxpayers from taking advantage of the tax exemption provided under section 146.2 in a way not intended by Parliament. One such rule is the taxation of an "advantage". The term "advantage" is defined in subsection 207.01(1). Under subsections 207.05(1) to (3), tax is payable on an advantage.

[34] Effective October 17, 2009, the definition of advantage was amended to include "swap transactions". Both parties agree that this amendment does not apply to the present appeals, because all swap transactions conducted by the Appellant happened before October 17, 2009. The Respondent also acknowledged that before the amendment swap transactions did not necessarily fall under the definition of advantage (see transcript, Volume 3, page 397, lines 7 to 16). The previous definition must therefore be considered.[3] More specifically, the parties directed this Court to subparagraph (b)(i) of the definition of "advantage" in subsection 207.01(1), as it read in 2009.

A. Was there an advantage under subparagraph (b)(i)?

[35] The relevant excerpts from subsection 207.01(1) read as follows:

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[3] See *Oxford Properties Group Inc. v. Canada*, 2018 FCA 30, [2018] F.C.J. No. 97 (QL) at paragraph 46 (application for leave to appeal filed, [2018] SCCA No. 114 (QL)), in which the Federal Court of Appeal states that subsequent amendments cannot be assumed to either alter or confirm the prior state of the law.

> **207.01(1) Definitions** – The definitions in subsection 146.2(1) and the following definitions apply in this Part.
>
> “advantage”, in relation to a TFSA means
>
> […]
>
> (b) a benefit that is an increase in the total fair market value of the property held in connection with the TFSA if it is reasonable to consider, having regard to all the circumstances, that the increase is attributable, directly or indirectly, to
>
> (i) a transaction or event or a series of transactions or events that
>
> (A) would not have occurred in an open market in which parties deal with each other at arm’s length and act prudently, knowledgeably and willingly, and
>
> (B) had as one of its main purposes to enable a person or a partnership to benefit from the exemption from tax under Part I of any amount in respect of the TFSA . . .

[36] The Appellant does not dispute that the total FMV of her TFSA increased in 2009, 2010 and 2012.[4] According to the assessments at issue, by the end of 2009, the Appellant’s TFSA was worth $205,795.[5] After subtraction of the $5,000 initial contribution, the increase in FMV for the year was assessed at $200,795. For the years 2010 and 2012, the increase in FMV was $70,841 and $29,217 respectively.[6] Because the Appellant’s TFSA decreased in value in 2011, that year was not reassessed by the Minister.

[37] For all three remaining years, this Court will have to determine whether it is reasonable to consider, having regard to all the circumstances, that the increase in the total FMV of the Appellant’s TFSA is attributable directly or indirectly to a transaction or series of transactions that would not have occurred in an open market in which parties deal with each other at arm’s length and act prudently, knowledgeably and willingly, and whether one of the main purposes of the swap transactions was to enable the Appellant to benefit from the exemption from tax under Part I.

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4 Request to Admit, Exhibit R-1, Tab 2, paragraph 115, and Response to Request to Admit, Exhibit R-1, Tab 3, paragraph 1(q).

5 The value of the TFSA at the end of 2009 appears to have been $206,615.09 according to Exhibit R-2, Tab 12.

6 These figures, according to the chart provided in Schedule A of the Amended Reply and my own calculation, represent an increase of 35% in 2010 and 15% in 2012 in the value of the TFSA.

a) Is the increase in FMV in 2009 attributable to a series of transactions?

[38] Under subparagraph (b)(i) of the definition, the increase in FMV must be attributable directly or indirectly to a transaction or a series of transactions. On this point, I conclude that the 2009 increase in FMV is attributable to the series of swap transactions. Conversely, I do not consider the increase in FMV to be attributable to each swap transaction taken individually. If the Appellant had made only one swap transaction or just a few such transactions over a long enough period of time I might have concluded, on the facts, that the increase in value is not attributable to the swap transactions. As will be explained in greater detail when I consider whether the transactions would have occurred in an open market, it was the succession of numerous swap transactions in a short time that allowed the Appellant to transfer funds from her RRSP and CDN to her TFSA.

[39] In reaching this conclusion, I adopt an interpretation of "series of transactions" that is contrary to the one suggested by the Appellant. The Appellant argued that all the transactions had to be preordained in order to qualify as a series of transactions.[7] Because, the Appellant argued, her decision to give instructions to carry out swap transactions depended on future market prices, the specific transactions could not be planned in advance and thus were not preordained: (Appellant's Memorandum of Argument, paragraphs 330-333). The Appellant's argument is based entirely on the common law meaning of "series of transactions" as stated by Justice Rothstein in *OSFC*, *supra*, at paragraph 24. However, Justice Rothstein recognized in *OSFC,* at paragraphs 29, 34 and 35 and later in *Copthorne Holdings Ltd. v. Canada,* 2011 SCC 63, [2011] 3 S.C.R. 721, that subsection 248(10) of the Act broadens that meaning. He stated that the common law definition of "series of transactions" referred to in *OSFC* was "expanded by s. 248(10) of the Act which deems any 'related transactio[n]' which is completed 'in contemplation of' a series to be part of that series": (*Copthorne*, paragraph 43). Regarding the meaning of "in contemplation", the Supreme Court, in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at paragraph 26, elaborated that the term should be "read not in the sense of actual knowledge but in the broader sense of 'because of' or 'in relation to' the series" (this interpretation was confirmed in *Copthorne*, paragraphs 55-56). It was thus not necessary for the Appellant to know in advance which shares would be swapped. All that was necessary was that the Appellant have planned on doing swap transactions with the purpose of achieving the objectives of the series.

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[7] The Appellant referred particularly to the decision of the Federal Court of Appeal in *OSFC Holdings Ltd. v. Canada,* 2001 FCA 260, [2002] 2 F.C. 288.

[40] Considering the facts of the present appeals, I conclude that the swap transactions were completed in contemplation of the series. From May to June 2009, the Appellant conducted prospective swap transactions ("trial runs" is the term used by the Appellant) to ascertain the potential of her strategy.[8] After June 2009, the Appellant carried out swap transactions on a weekly basis, and often multiple times a day.[9] The facts show clearly that at that point the Appellant was trying to complete as many swap transactions as possible. The only limit she faced was the $45 fixed cost. Hence only swap transactions that would transfer a large enough gain out of her RRSP and CDN into her TFSA were completed. In light of the Appellant's testimony, I have no doubt that, absent the October 17 amendment, she would have continued pursuing the same strategy. While the series of transactions never had a predetermined end point, all the transactions were completed in contemplation of the series.

b) **Was the main purpose of the swap transactions to benefit from the exemption from tax under Part I as contemplated by clause (b)(i)(B)?**

[41] The Appellant completed this series of transactions with the goal of transferring shares traded on the TSX held in her RRSP and her CDN into her TFSA. The Appellant argues that benefiting from the exemption from tax was not one of the main purposes of the transactions because taxable income was not shifted between her accounts (Appellant's Memorandum of Argument, paragraph 275). There were indeed almost no sales of shares. However, the Appellant's suggested approach defeats the very definition of the term "purpose", which is "the reason for which something is done".[10] The purpose of an action thus necessarily precedes its realization. Whether or not the end goal is realized does not alter the original purpose that led to the act. Identifying the purpose of a transaction is done by objectively considering the facts: (*Trustco*, paragraph 29). It is a fact that the Appellant incurred transaction costs of $3,195 (71 transactions times $45 per transaction) to complete the swap transactions. That fact combined with the Appellant's strategy of identifying the downward and upward price momentum of the shares swapped (as explained in paragraph 18 of these reasons) creates a strong inference that she entered into those transactions to benefit from the Part I tax exemption on the sale of the shares subsequently held in the TFSA. The taxpayer must have intended to benefit from a tax-free distribution from her TFSA as opposed to a taxable withdrawal from her RRSP or a taxable gain within her CDN.

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8 Transcript, Vol. 1, pages 113, 126, 127 and 130.

9 As is evidenced in her 2009 TFSA statements of account (Exhibit A-2, Tab 3).

10 *New Shorter Oxford English Dictionary* Vol. 2, 1993, *sub verbo* "purpose".

Otherwise, I cannot see any advantage to transferring the shares between those accounts. Consequently, I conclude that benefiting from the exemption from tax under Part I was one of the Appellant's main purposes in completing the series of transactions. The requirement set out in clause (b)(i)(B) of the definition of "advantage" in subsection 207.01(1) is thus met.

c) Requirements under clause (b)(i)(A)

[42] For clause (b)(i)(A) of the definition to apply, this Court must consider whether the series of transactions would have occurred in an open market, in which the parties were dealing at arm's length and acting prudently, knowledgeably and willingly.

1) Would the series of transactions have occurred in an open market?

[43] I am of the view that the swap transactions would not have occurred in an open market, contrary to the Appellant's argument. In support of her position, the Appellant stated that the shares swapped were traded on the TSX. Most importantly, the Appellant relies heavily on the TDW document that provided a valuation method for equities swapped between registered and non-registered plans. The valuation method stated that any price between the high and low of the day could be picked if the stock had traded during the day. Because shares swapped had always traded during the day of the swaps, the Appellant contends that the swaps were priced at FMV when she picked at the time of the swap a price between the high and low of the day. In this regard, the Appellant also relies on the *Untermyer Estate case, supra,* in support of the position that picking a price within a bracket is an appropriate proxy for FMV.

[44] To explain how the significant increase in value of her TFSA would have occurred on an open market, the Appellant points to the fact that the TSX recovered strongly after the financial crisis. She adds that at that time she took risks based on her insight and research into, and knowledge of, the markets. Taking risks on a large number of transactions that ended up being successful would thus explain the significant compound rate of return on her TFSA. This led her to the conclusion that the swap transactions would have occurred on an open market.

[45] I do not agree with either the Appellant's presentation of the facts nor with her interpretation of the applicable law. With regard to the facts, I note that the Appellant conceded that she conducted all the swap transactions shortly before the close of trading on the TSX (transcript, Volume 1, at pages 159-160). Waiting until

just before closing allowed for greater price volatility. Indeed, the difference between the high and low price of the day will always increase -- or at least stay constant -- as the day goes by. When the Appellant chose which shares to swap, she thus had the benefit of daily price fluctuations. It was her ability to select the price that allowed her, in the long run, to transfer more shares from her RRSP and CDN to her TFSA. This is not realistic trading at fair market value in an open market. If there is a second-by-second market price, the FMV is the price at the second the swaps occur, not a price selected within a bracket of prices.

[46] The ability to select the price on a repetitive basis allowed the Appellant to eliminate the risk factor and thus artificially transfer shares into her TFSA. This may be illustrated with the following hypothetical example. The Appellant could have decided to swap exactly the same shares from one account into the other and vice versa. In swapping shares of Company A into her TFSA, she would have picked the lowest price. When swapping shares of Company A out of her TFSA, she would have picked the highest price. The end result would have been a greater number of shares swapped in (because of the low price) compared to the number of shares swapped out (because of the high price). While quantities of shares are moving between accounts, the overall value of the two accounts is not affected. Again, selecting the transfer price as the Appellant did would not be possible in an open market because the price for the shares would be fixed at the time of the swap transactions and would necessarily be the same whether the shares were being swapped in or swapped out.

[47] Even if the Appellant did not conduct swaps involving exactly the same shares, she still managed to achieve the same result. When two different sets of shares are swapped, the future value of the accounts will depend on the future value of the shares swapped. Hence, if the shares swapped into the TFSA decrease in value while the shares swapped out increase in value, the swap transaction will not bring the desired result. The future value of shares can be said to constitute the risk factor in the swap transaction. By swapping the same shares repetitively, the Appellant manage to neutralize this risk factor.

[48] It is again useful to consider an example. On day one, the Appellant swaps shares of Company A into her TFSA at the lowest price and swaps shares of Company B out of her TFSA at the highest price. The next day, she conducts the reverse trade, swapping in shares of Company B at the lowest price and swapping out shares of Company A at the highest price. Whether the value of her TFSA will have increased at the expense of her other account will depend on the price variations on day two. For the shares of Company A, only if the high price of day

two is lower than the low price of day one will the swap fail to transfer value into the TFSA. For the shares of Company B, only if the low price of day two is higher than the high price of day one will the swap fail to transfer value into the TFSA. Both scenarios are highly improbable considering that the price of the shares swapped by the Appellant was highly volatile and that she had the benefit of waiting till the end of the day to decide which shares to swap. Moreover, if it was not advantageous to swap on day two, she could wait a couple of days, which significantly increased her probabilities of making a beneficial reverse trade.

[49] A review of the facts confirms that this was exactly the approach taken by the Appellant. The same shares were swapped in and swapped out within days at a rate that eliminated all risks related to market variables. The overall result was thus to artificially transfer shares out of her RRSP and CDN into her TFSA.

[50] With regard to *Untermyer*, I find the facts leading to that decision to be distinguishable from those of these appeals. In *Untermyer*, the owner of the shares possessed a significant stake in the company. The Court had to determine the fair market value for succession duty purposes of the shares owned by the taxpayer at the date of his death. Because there was no actual market price that took into account a significant sale of shares, the Supreme Court recognized that a range of prices may be an appropriate proxy for the FMV of those shares at that time, (*Untermyer*, *supra*, at 91-92). In the current appeals, the market price of the shares at the time of the swap transactions was known. Consequently, the prices selected reflected the highs and lows of the day, not the FMV of the shares at the moment of the swap.

[51] This reasoning applies equally to the valuation method provided in the TDW document. However, I would note that, had the Appellant made only one swap transaction or a small number of such transactions over a long period of time, this factor may not have weighed heavily in considering whether the transactions would have occurred in an open market. The reason for this distinction is that the ability to select the price would not have allowed the Appellant to artificially transfer shares into her TFSA absent the repetitive swaps. In fact, absent this repetition, the overall value of each account would have depended solely on the evolution of the value of the shares as influenced by market variables. The risk of price changes would in that case have made the strategy of the Appellant inefficient. As explained earlier, the Appellant managed to neutralize this risk factor.

2) <u>Were the parties to the swap transactions dealing at arm's length and acting prudently, knowledgeably and willingly?</u>

[52] The Appellant contends that TDW acting as the trustee of the TFSA and TDW in its capacity as trustee of the RRSP were unrelated parties in relation to the 14 transactions between her TFSA and her RRSP. Similarly, the Appellant contends that TDW acting as the trustee of the TFSA and she herself as the holder of the CDN were unrelated parties in relation to the 57 transactions between her TFSA and her CDN. The Appellant stresses that in both situations the transactions were based on the valuation method provided in the TDW document and that TDW is a sophisticated and independent actor.

[53] While indicative, the legal status of parties as unrelated persons pursuant to subsection 251(2) of the Act is not determinative in assessing whether those parties acted at arm's length. The particular facts of the case need to be examined to determine whether the parties were in fact dealing at arm's length (section 251 of the Act and *McLarty*, *supra* at paragraphs 44, 45 and 62). In this regard, the Supreme Court, in *McLarty*, referred (at paragraph 62) to three independent factors that need to be considered:

> (a) the existence of a common mind which directs the bargaining for both parties to a transaction,
>
> (b) whether the parties to a transaction were acting in concert without separate interests, and
>
> (c) whether there was de facto control.

[54] However, not all of these criteria need be satisfied in every case (*The Queen* v. *Remai Estate*, 2009 FCA 340, at paragraph 32).

[55] In these appeals, the first two factors are applicable. The evidence is clear that the Appellant was the single mind directing all the swap transactions. She determined which shares would be swapped, at what price, in what quantity and at what time. She gave instructions to TDW officers, who always complied with her requests. No evidence was provided to show that anyone other than the Appellant controlled the nature and substance of the transactions between all parties involved.

[56] In addition, the parties in control of the RRSP and CDN acted in concert without separate interests. The Respondent emphasized that swaps into the TFSA were always at the lowest price and swaps out at the highest, whereas swaps into the RRSP and CDN were always at the highest price and swaps out at the lowest. The result was that the RRSP and CDN were consistently on the bad end of the deal. I agree with the Respondent that this is indicative of parties acting in concert without separate interests. As pointed out by the Court of Queen's Bench of Alberta in *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, 1998 ABQB 279, [1998] A.J. No. 364, at paragraph 197):

> […] In assuming that the parties are acting at arm's-length, the negotiation is contemplated to be between parties with opposing interests, each having an economic stake in the outcome.

[57] It is clear to me that the parties in charge of the RRSP and CDN clearly did not act "prudently, knowledgeably and willingly", as all the swap transactions were carried out in such a way as to favour the TFSA to the detriment of the RRSP and CDN.

[58] In the current appeals, the parties in control of the RRSP and CDN never had an economic stake in the outcome of the transactions. This point was conceded by the Appellant, who recognized that she only considered what was best for the TFSA in planning the swap transactions. Given the particular facts of the case, I thus conclude that the series of swap transactions would not have occurred if the parties had been dealing at arm's length and were acting prudently, knowledgeably and willingly.

Conclusion for the 2009 Taxation Year

[59] Having reviewed all the criteria set out in subparagraph (b)(i) of the definition of "advantage" in subsection 207.01(1), I conclude that the Appellant received an advantage in relation to her TFSA in 2009.

B. Is the increase in the FMV of the TFSA in 2010 and 2012 directly or indirectly attributable to the swap transactions undertaken in 2009 so as to be caught by the definition of "advantage" in subsection 207.01(1)?

[60] The Minister contends that the 2010 and 2012 increase in the total value of the Appellant's TFSA was attributable, directly or indirectly, to the series of transactions conducted in 2009. As previously mentioned, the Appellant stopped

engaging in swap transactions in October 2009. She left her shares in the TFSA, where they were subject to true market forces for the 2010-2012 years. In 2010 and 2012, the value of the TFSA increased. In 2011, the Appellant suffered a loss.

[61] The Minister gives significant weight to the word "indirectly". Absent the swaps, the Minister argues, the Appellant would not have had the shares in her TFSA that increased its overall value.

[62] The analysis below applies a textual, contextual and purposive interpretation of the phrase "directly or indirectly" as found in paragraph (b) of the definition of "advantage" in subsection 207.01(1) of the Act.

Context

[63] Paragraph (b) must be considered in the context of the TFSA Rules in the Act as a whole. The context surrounding the enactment of those rules is set out above in the legislative background summarized at paragraphs 29 to 34 of these reasons.

Purpose

[64] Paragraph (b), in combination with subsection 207.05(1), creates an anti-avoidance rule. It taxes 100% of the increase in FMV that is attributable to transactions (or series of transactions or events) that would not occur in an open market between arm's length parties and has as one of its main purposes to prevent a non-qualifying person from benefiting from a tax exemption. This anti-avoidance purpose is clearly illustrated by the Explanatory Notes to the 2009 Budget, which state that paragraph (b) of the definition "is intended to guard against transactions designed to artificially shift taxable income away from the holder and into the shelter of a TFSA or to circumvent the TFSA contribution limits."[11]

[65] While paragraph (b) is itself an anti-avoidance provision, it pertains to a legislative scheme whose very purpose is to encourage a tax-free increase in savings. There is therefore an inherent tension between the purpose of the provision and the scheme as a whole.

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[11] Explanatory notes relating to Bill C-10, *Budget Implementation Act, 2009,* February 25, 2009, page 102.

[66] The explanatory notes describe the type of transactions considered offensive but add no additional information regarding when or how far into the future an advantage (i.e., an increase in value) will be considered as attributable to such transactions.

Text

[67] Paragraph (b) of the definition raises the question of whether it is reasonable to consider, having regard to all the circumstances, that the increase in the FMV of a tax-free savings account is attributable, directly or indirectly, to the impugned transactions, in this case the swaps.

[68] In that provision, "directly" and "indirectly" appear all-encompassing; they occupy opposite ends of the spectrum, thereby capturing the entire range of meaning. For example, the *New Shorter Oxford English Dictionary* defines "directly" to include "[i]n a straight line; without deviation . . . Without an intermediary; by a direct process."[12] By contrast, "indirectly". means "[b]y indirect action, means, or connection; through an intervening person or thing . . . Not in a straight line or with a straight course; circuitously, obliquely."[13] It follows from this that the use of the phrase "directly or indirectly" is intended to capture any and all methods through which a transaction could increase the FMV of a tax-free savings account.

[69] However, this very inclusive understanding of "directly or indirectly" is balanced by the rest of paragraph (b), which requires one to ask whether it is "reasonable to consider, having regard to all the circumstances" that the increase is directly or indirectly attributable to the impugned transactions. This reasonability factor indicates that the analysis must go beyond simply the ability to make a connection between an increase and a transaction. It acts as a constraint on the potential for "directly or indirectly" to operate over-inclusively and requires an analysis of other circumstances relevant to the transaction or series of transactions. This finds support in *Trustco*, *supra*, where the Supreme Court noted that the presence of the word "reasonably" in subsection 245(4) -- with regard to whether it may (reasonably) be considered that a transaction would result directly or

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12 *New Shorter Oxford English Dictionary*, Vol. 1, 1993, *sub verbo* "directly".

13 *Ibid*, *sub verbo* "indirectly".

indirectly in an abuse of the Act -- "tempered" the interpretation of the provision, "suggesting some ministerial and judicial leeway in determining abuse."[14]

[70] There is some judicial interpretation of the phrase "directly or indirectly" in provisions of the Act that concern the transfer of property, but I consider those cases to be distinguishable for two reasons. First, the provisions being dealt with there lack the reasonableness component present in paragraph (b) of the definition of "advantage" in subsection 207.01(1).[15] Second, there is a defined start and end to a transfer of property that allows the transaction to be delineated, even if the intervening events are complex; this is unlike attributing an increase in the value of an account back to certain acts or transactions. An increase in value does not necessarily—in fact, probably rarely does it — have one cause that can be clearly traced from start to finish. Accordingly the broad interpretation of "directly or indirectly"given in the transfer cases is less appropriate to paragraph (b) of the definition of "advantage" in subsection 207.01(1).

[71] For example, in *Medland* v.*R.*,[16] the Federal Court of Appeal found that the Appellant's husband had transferred property to her by making mortgage payments on a house of which the Appellant had become the sole owner. That court held that:

> The words "indirectly ... by ... any other means" in subsection 160(1) of the Act refer to any circuitous way in which property of any kind passes from one person to another. . . .

[72] In *Kieboom*,[17] the taxpayer diluted his ownership in his company by issuing additional, non-voting shares to his wife and children. The Federal Court of Appeal found that dividends paid to the wife following the issuance of shares to her were deemed income of the husband under then section 74, which deemed income from property directly or indirectly transferred to a spouse to be income of the transferor, not the transferee:

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[14] *Supra*, at paragraph 37.

[15] I should note here that although certain provisions of the Act (e.g. the GAAR in section 245) contain both a reasonableness criterion and the phrase "directly or indirectly", I am not aware of any judicial interpretation of the phrase "directly or indirectly" in those contexts.

[16] 1998 CarswellNat 766, [1999] 4 C.T.C. 293, [1998] F.C.J. No. 708 (QL), at paragraph 20.

[17] *Canada* v. *Kieboom*, [1992] 3 F.C. 488 at 500, 1992 CarswellNat 308, [1992] 2 C.T.C. 59 at 65.

> In this case, therefore, the taxpayer transferred property to his wife, that is, he gave a portion of his ownership of the equity in his company to his wife. . . . The fact that this transfer of property was accomplished through causing his company to issue shares makes no difference. Subsection 74(1) covers transfers that are made "directly or indirectly" and "by any other means whatever". The transfer, which in this case was indirect, in that the taxpayer arranged for his company to issue shares to his wife, is nevertheless a transfer from the husband to the wife. There is no need for shares to be transferred in order to trigger this provision of the Act, as was erroneously concluded by the Tax Court Judge. By this transfer of property to his wife, he divested himself of certain rights to receive dividends should they be declared. Hence, when the dividends were paid to the wife in 1982, that was income from the transferred property and was rightly attributable to the taxpayer.

[73] *Garron Family Trust* (also cited as *Fundy Settlement*)[18] provides an interesting counterpoint to the above cases. Similarly to the above cases, *Garron* concerned the acquisition of property. Specifically, the issue was whether two non-resident trusts were deemed to be resident in Canada under section 94 of the Act as it then read because they had “acquired property, directly or indirectly in any manner whatever” (paragraph 94(1)(b)) from a resident beneficiary or resident related person. However at trial, Justice Woods expressed concern about the scope of that phrase:

> [298] The phrase "directly or indirectly in any manner whatever" is highly ambiguous. It is not entirely clear which of these interpretations was intended by Parliament.
>
> [299] The preferred interpretation in my view is the more restrictive one.
>
> [300] I am particularly troubled by the uncertainty that is inherent in the Minister's position. Determining ownership of property through a chain of corporations is a murky exercise with unclear results. Should one look through more than a first tier subsidiary? Should one look through a corporation that is not wholly-owned? Should one look through if the shares are non-voting?
>
> [301] The question is an important one, as the phrase "directly or indirectly" is used in other provisions of the *Act*. I am loath to adopt an interpretation that is

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18 *Garron Family Trust v. The Queen*, 2009 TCC 450, [2009] T.C.J. No. 345 (QL); affirmed *Fundy Settlement. v. Canada*, 2010 FCA 309, [2012] 2 F.C.R. 374, [2010] F.C.J. No. 1457 (QL); affirmed *Fundy Settlement v. Canada*, 2012 SCC 14, [2012] 1 S.C.R. 520.

> likely to lead to considerable uncertainty. The appellants' interpretation is the preferred one in my view.

[74] The Federal Court of Appeal disagreed with Justice Woods regarding the meaning of "directly or indirectly in any manner whatever". Sharlow J.A. found that Parliament had chosen those words to capture every possible means by which wealth and income-earning potential can be moved:

> [75] There are undoubtedly many ways in which a transfer of property may occur directly or indirectly in any manner whatever, and there is very little guiding jurisprudence. However, it is now well established that if the existing common shares of a corporation worth, say, $100, are exchanged for preference shares with a value that is fixed at some lesser amount, say, $80, and new common shares are issued to a new shareholder for nominal consideration, the holders of the preference shares have indirectly transferred property worth $20 to the new subscriber (see *Canada* v. *Kieboom* [citation omitted]).
>
> . . .
>
> [78] However, the question asked by paragraph 94(1)(*b*) is whether property was transferred "directly or indirectly in any manner whatever" to the Dunin Trust and the Garron Trust, as the sole shareholders of New Dunin Co and New Garron Co respectively. Justice Woods said no, because this would require "looking through" New Dunin Co and New Garron Co to find that the Trusts were the recipients of the transferred property, which would give the phrase "directly or indirectly in any manner whatever" a meaning that would be unreasonably broad with unforeseeable and uncertain consequences in other situations.
>
> [79] I do not share Justice Woods' concerns, and I respectfully disagree with her interpretation of paragraph 94(1)(*b*). Once it is accepted that an indirect transfer of the shares of a corporation from Shareholder A to Shareholder B can be achieved by a corporate reorganization that shifts part of the value of the corporation from the class of shares owned by Shareholder A to the class of shares owned by Shareholder B, I see no principled basis for concluding that the same transaction cannot also be an indirect transfer of property "in any manner whatever" to the person that owns Shareholder B. This does not imply any change to the legal principle that the property of a corporation is not the property of its shareholders. It merely recognizes the fact that any increase in the wealth of Shareholder B will necessarily increase the wealth of whoever owns Shareholder B. In the hypothetical corporate reorganization described above, it does no violence to the language of paragraph 94(1)(*b*) to conclude that there has been an indirect transfer of property "in any manner whatever" from Shareholder A to the owner of Shareholder B.
>
> [80] In my view, Parliament chose the words "directly or indirectly in any manner whatever" in paragraph 94(1)(*b*) deliberately to capture every possible means by

> which the wealth and income-earning potential represented by the shares of a Canadian corporation can move to a non-resident trust from a Canadian resident beneficiary of the trust or a person related to that beneficiary…
>
> . . .

[75] As can be seen, the Tax Court of Canada and the Federal Court of Appeal differed on what was in that case an alternative argument, i.e., the argument as to whether the trusts had acquired property directly or indirectly. The Supreme Court of Canada declined to rule on the alternative argument, explicitly stating that the Court should not be understood as endorsing the reasons of the Federal Court of Appeal on that matter.[19]

[76] Although the sum of the above case law might be interpreted as favouring a broad reading of the phrase "directly or indirectly" in paragraph (b) of the definition of "advantage" in subsection 207.01(1), the absence of a reasonability factor and the inclusion of expressions such as "by any other means" or "in any manner whatever" in the provisions at issue in all the above cases are two powerful distinguishing factors between those cases and the Appellant's case. As will be seen below in my analysis, Justice Woods' concerns about the ambiguity of the phrase "directly or indirectly" may be more appropriately applied to a provision like paragraph (b), at issue here, that lacks a defined analytical beginning and end point.

<u>Application of the textual, contextual and purposive analysis</u>

[77] I have concluded that the value of the Appellant's TFSA in 2009 qualifies as an advantage within the meaning of the definition of that term in paragraph (b) of subsection 207.01(1) and is therefore subject to the advantage tax under subsection 207.05(1). The question is whether the 2010 and 2012 increase is also subject to the subsection 207.05(1) tax. I conclude that it is not.

[78] Although the purpose of paragraph (b) of the definition of "advantage" is an anti-avoidance one, the text and context do not support extending the definition such that it would apply to the 2010 and 2012 taxation years. The broad scope of "directly or indirectly" is limited by the reasonableness requirement also present in paragraph (b). In this case, the circumstances that it is reasonable to consider in deciding whether the 2010 and 2012 increases are attributable to the 2009 swaps include the fact that, unlike in 2009, in the 2010 and 2012 taxation years the

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[19] *Fundy Settlement, supra*, at paragraph 19.

Appellant was no longer engaging in swap transactions and the account was subject purely to market forces.

[79] Following October 17, 2009, the Appellant's investment strategy changed drastically. She was no longer able to continue the strategy she had developed whereby she controlled the market risk involved in the swaps by selecting the transfer prices. She therefore had to choose what step to take next. She had the option to "cash out" by selling her shares and theoretically realizing a tax-free capital gain, thereby ensuring that the value she had built up through her swap transactions would be preserved. Instead, she decided to risk leaving the shares in the TFSA where they were subject to market forces, and accordingly, to real market risk. That she was exposed to true and potentially significant market risk is illustrated by the fact that she suffered a loss in 2011.

[80] I consider that it is reasonable in the circumstances to attribute the 2010 and 2012 increases to the post-2008 financial recovery. Similarly, I consider that the loss in 2011 was attributable to the brief 2011 downturn. While the Appellant was engaging in the swap transactions in 2009, she was largely responsible for the increase in the value of the TFSA in that year because she controlled the transaction prices and the risk. Once she ceased to do so and the TFSA was subject to true market forces, the TFSA, like the market generally, benefited from the extraordinary uptick attributable to the post-2008 financial recovery. Much evidence was led regarding the "once in a lifetime" nature of the 2008 crash and subsequent recovery. That recovery was substantial and the value of the Appellant's TFSA throughout the years in question cannot be divorced from it. In 2009, the recovery and the swap transactions coincided and this was the year in which the TFSA saw by far its largest gains. By contrast, in 2010 and 2012, with only the recovery still coming into play, the TFSA gains were considerably less (one need only look at the increase of 4,032% in the value of the TFSA in 2009 in comparison to 35% in 2010 and 15% in 2012). With regard to those two years, there is not necessarily any reason to say that the shares in the TFSA were not "behaving" like any other prudent, legitimate investment; i.e., it is reasonable to say that their value was determined by the health of the market, which happened to be very healthy indeed. The circumstances thus appear to have changed significantly from 2009 to 2010 and in 2012, with the market recovery as the only clear constant throughout.

[81] Justice Woods' concerns in *Garron* about the ambiguity inherent in the phrase "directly or indirectly" may perhaps not be entirely appropriate in the context of the transfer of property (as suggested by the Federal Court of Appeal)

but they are appropriate here. How far into the future do the swaps continue to affect the funds? How much of the gain is attributable to the Appellant's contribution of $5,000 in 2009? What about her contributions of $5,000 in 2010, 2011 and 2012? What about the Appellant's loss in 2011? A transfer of property has a defined end point, although a circuitous route may be taken to get there. Here, there is no easily defined or delineated end point for the purpose of the analysis regarding the length of time during which an increase may still be attributed to an impugned transaction.

[82] A more restrictive interpretation of paragraph (b) of the definition avoids these difficulties while still fulfilling the anti-avoidance purpose of the provision. The 2009 swap transactions had an avoidance purpose and would not have occurred in an open market in which parties deal with each other at arm's length and act prudently, knowledgeably and willingly. Those transactions increased the value of the Appellant's TFSA in 2009 by 4,032%. The transactions can be clearly delineated and the resulting value is fully caught by the provision. The same cannot be said with respect to the increased value in 2010 and in 2012.

[83] I therefore conclude that the increase in the value of the shares in 2010 and 2012 is not attributable to the swap transactions. The increase is attributable to what happened in the market and, in my view, is neither a direct nor an indirect consequence of the swap transactions.

Who was liable to pay the tax under section 207.05?

[84] The relevant section read as follows in 2009:

> **Tax payable where advantage extended**
>
> 207.05 (1) A tax is payable under this Part for a calendar year in connection with a TFSA if, in the year, an advantage in relation to the TFSA is extended to a person who is, or who does not deal at arm's length with, the holder of the TFSA.
>
> **Amount of tax payable**
>
> (2) The amount of tax payable in respect of an advantage described in subsection (1) is
>
> (a) in the case of a benefit, the fair market value of the benefit; and
>
> (b) in the case of a loan or an indebtedness, the amount of the loan or indebtedness.

Liability for tax

> (3) The holder of a TFSA in connection with which a tax is imposed under subsection (1) is liable to pay the tax except that, if the advantage is extended by the issuer of the TFSA or by a person with whom the issuer is not dealing at arm's length, the issuer, and not the holder, is liable to pay the tax.

[85] Because an advantage was extended to the holder of the TFSA in 2009, tax is payable under subsection 207.05(1). Under subsection 207.05(2), the amount of tax payable is equal to the FMV of the benefit. The parties agreed that the FMV of the shares swapped into the TFSA equalled $200,795. Neither of those conclusions is contentious.

[86] In the Notice of Appeal and during his rebuttal, counsel for the Appellant argued that TDW was liable under subsection 207.05(3) to pay the tax. Accordingly, the Appellant would have no tax to pay on the advantage. In support of the Appellant's position, her counsel first emphasized that the Appellant relied on the TDW document in using the valuation method therein provided by TDW. Second, counsel suggested that TDW as the issuer of the TFSA was responsible for the actions of the Appellant. In this regard, he pointed to the responsibilities of the issuer under subsection 207.01(5) and to the role of TDW officers in approving swap transactions.

[87] Regarding the second point, I recognize the fact that TDW acted as trustee. However, this factor is not in itself determinative because, as pointed out by the Respondent, making the trustee liable simply by virtue of status would render subsection 207.05(3) meaningless. The text states explicitly that the holder of the TFSA is liable.

[88] Further, the other arguments raised by the Appellant do not convince me that TDW is liable. Subsection 207.01(5) read as follows in 2009:

> 207.01(5) The issuer of a TFSA shall exercise the care, diligence and skill of a reasonably prudent person to minimize the possibility that a trust governed by the TFSA holds a non-qualified investment.

[89] I note that this provision refers to non-qualified investments and is thus inapplicable here as the tax payable in the present case is related to the increase in value of qualified investments.

[90] Regarding the role of TDW officers, the evidence suggests that the degree of control they exercised was limited to checking the arithmetic of the Appellant. On this point, the Appellant merely mentioned that a few swap transactions were reviewed, but she did not explain why. Regarding the TDW document, I agree that it may be misleading. However, it was conceived prior to the enactment of the tax-free savings account provisions and, particularly, prior to the enactment of subsection 207.01(1).

[91] On these last two points, I consider problematic the fact that the Appellant did not produce as a witness someone working for TDW. Someone from TDW could have testified to explain the extent to which the Appellant was told to rely on the TDW document. Someone from TDW could also have explained the role of TDW officers in reviewing the swap transactions. From the absence of witnesses from TDW, I am left to infer that their evidence would have been unhelpful to the Appellant's position.

[92] The Appellant did not adduce evidence to satisfy me that the advantage was extended by TDW (the issuer) so as to render her exempt from the tax liability.

[93] I thus conclude that the Appellant is liable under subsection 207.05(3) to pay the tax for the 2009 taxation year.[20]

Decision

[94] The appeal with respect to the 2009 taxation year is dismissed.

[95] The appeals for the 2010 and 2012 taxation years are allowed and the assessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is not liable to pay the tax assessed of $70,841 for 2010 and $29,217 for 2012 under Part XI.01 of the Act.

[96] Considering the parties' divided success, I am of the view that the parties should bear their own costs.

Signed at Montréal, Canada, this 16th day of November 2018.

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[20] In the circumstances, I found it unnecessary to analyze the argument, raised by the Respondent, that the expression "extended by" used in subsection 207.05(3) refers to the use of debt instruments.

Lucie Lamarre

Lamarre A.C.J.

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COURT FILE NO.:	2016-2068(IT)G
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APPEARANCES:

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APPENDIX 1

STATUTORY PROVISIONS

INCOME TAX ACT

Tax-free Savings Accounts

Definitions

146.2 (1) The following definitions apply in this section and in Part XI.01.

. . .

“holder” of an arrangement means

(a) until the death of the individual who entered into the arrangement with the issuer, the individual;

. . .

“issuer” of an arrangement means the person described as the issuer in the definition “qualifying arrangement”.

“qualifying arrangement”, at a particular time, means an arrangement

(a) that is entered into after 2008 between a person (in this definition referred to as the “issuer”) and an individual (other than a trust) who is at least 18 years of age;

(b) that is

(i) an arrangement in trust with an issuer that is a corporation licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada the business of offering to the public its services as trustee,

(ii) an annuity contract with an issuer that is a licensed annuities provider, or

(iii) a deposit with an issuer that is

(A) a person who is, or is eligible to become, a member of the Canadian

Payments Association, or

(B) a credit union that is a shareholder or member of a body corporate referred to as a "central" for the purposes of the *Canadian Payments Act*;

(c) that provides for contributions to be made under the arrangement to the issuer in consideration of, or to be used, invested or otherwise applied for the purpose of, the issuer making distributions under the arrangement to the holder;

(d) under which the issuer and the individual agree, at the time the arrangement is entered into, that the issuer will file with the Minister an election to register the arrangement as a TFSA; and

(e) that, at all times throughout the period that begins at the time the arrangement is entered into and that ends at the particular time, complies with the conditions in subsection (2).

. . .

Using TFSA interest as security for a loan

(4) A holder of a TFSA may use the holder's interest or, for civil law, right in the TFSA as security for a loan or other indebtedness if

(a) the terms and conditions of the indebtedness are terms and conditions that persons dealing at arm's length with each other would have entered into; and

(b) it can reasonably be concluded that none of the main purposes for that use is to enable a person (other than the holder) or a partnership to benefit from the exemption from tax under this Part of any amount in respect of the TFSA.

TFSA

(5) If the issuer of an arrangement that is, at the time it is entered into, a qualifying arrangement files with the Minister, before March of the calendar year following the calendar year in which the arrangement was entered into, an election in prescribed form and manner to register the arrangement as a TFSA under the Social Insurance Number of the individual with whom the arrangement was entered into, the arrangement becomes a TFSA at the time the arrangement was entered into and ceases to be a TFSA at the earliest of the following times:

(a) the time at which the last holder of the arrangement dies;

(b) the time at which the arrangement ceases to be a qualifying arrangement; or

(c) the earliest time at which the arrangement is not administered in accordance with the conditions in subsection (2).

Trust not taxable

(6) No tax is payable under this Part by a trust that is governed by a TFSA on its taxable income for a taxation year, except that, if at any time in the taxation year, it carries on one or more businesses or holds one or more properties that are non-qualified investments (as defined in subsection 207.01(1)) for the trust, tax is payable under this Part by the trust on the amount that would be its taxable income for the taxation year if it had no incomes or losses from sources other than those businesses and properties, and no capital gains or capital losses other than from dispositions of those properties, and for that purpose,

(a) “income” includes dividends described in section 83;

(b) the trust’s taxable capital gain or allowable capital loss from the disposition of a property is equal to its capital gain or capital loss, as the case may be, from the disposition; and

(c) the trust’s income shall be computed without reference to subsection 104(6).

. . .

PART XI.01 - Taxes in Respect of TFSAs

Definitions

207.01 (1) The definitions in subsection 146.2(1) and the following definitions apply in this Part.

“advantage”, in relation to a TFSA, means

. . .

(b) a benefit that is an increase in the total fair market value of the property held in connection with the TFSA if it is reasonable to consider, having regard to all the circumstances, that the increase is attributable, directly or indirectly, to

(i) a transaction or event or a series of transactions or events that

(A) would not have occurred in an open market in which parties deal with each other at arm’s length and act prudently, knowledgeably and willingly, and

(B) had as one of its main purposes to enable a person or a partnership to

benefit from the exemption from tax under Part I of any amount in respect of the TFSA, or

. . .

“non-qualified investment” for a trust governed by a TFSA means property that is not a qualified investment for the trust.

. . .

“qualified investment” for a trust governed by a TFSA means

(a) an investment that would be described by any of paragraphs (a) to (d), (f) and (g) of the definition qualified investment in section 204 if the reference in that definition to “a trust governed by a deferred profit sharing plan or revoked plan” were read as a reference to “a trust governed by a TFSA” and if that definition were read without reference to the words “with the exception of excluded property in relation to the trust”;

(b) a contract for an annuity issued by a licensed annuities provider if

(i) the trust is the only person who, disregarding any subsequent transfer of the contract by the trust, is or may become entitled to any annuity payments under the contract, and

(ii) the holder of the contract has a right to surrender the contract at any time for an amount that would, if reasonable sales and administration charges were ignored, approximate the value of funds that could otherwise be applied to fund future periodic payments under the contract; and

(b) a prescribed investment.

. . .

Obligation of issuer

(5) The issuer of a TFSA shall exercise the care, diligence and skill of a reasonably prudent person to minimize the possibility that a trust governed by the TFSA holds a non-qualified investment.

. . .

Tax payable where advantage extended

207.05 (1) A tax is payable under this Part for a calendar year in connection with a TFSA if, in

the year, an advantage in relation to the TFSA is extended to a person who is, or who does not deal at arm's length with, the holder of the TFSA.

Amount of tax payable

(2) The amount of tax payable in respect of an advantage described in subsection (1) is

(a) in the case of a benefit, the fair market value of the benefit; and

(b) in the case of a loan or an indebtedness, the amount of the loan or indebtedness.

Liability for tax

(3) The holder of a TFSA in connection with which a tax is imposed under subsection (1) is liable to pay the tax except that, if the advantage is extended by the issuer of the TFSA or by a person with whom the issuer is not dealing at arm's length, the issuer, and not the holder, is liable to pay the tax.

PART XVII - Interpretation

Definitions

. . .

248(10) For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

. . .