Docket: 2018-2410(IT)G

BETWEEN:

THE ESTATE OF THE LATE EDMOND G. ODETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard virtually on April 6, 2021, at Ottawa, Ontario

Before: The Honourable Eugene P. Rossiter, Chief Justice

Appearances:

Counsel for the Appellant:	Rebecca Potter
Counsel for the Respondent:	Dominik Longchamps Andrew Miller

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2012 taxation year is dismissed, with costs in favour of the Respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 28th day of September 2021.

"E.P. Rossiter"

Rossiter C.J.

Citation: 2021 TCC 65
Date: 20210928
Docket: 2018-2410(IT)G

BETWEEN:

THE ESTATE OF THE LATE EDMOND G. ODETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rossiter C.J.

Executive Summary

[1] The Appellant, the Estate of the Late Edmond G. Odette ("Mr. Odette") appeals a reassessment raised on September 23, 2016 by the Minister of National Revenue (the "Minister") of his 2012 taxation year to deny a charitable donation tax credit. The late Mr. Odette was a well-known philanthropist having passed away on November 17, 2012. The Appellant is the estate that was established on the death of Mr. Odette.

[2] Beginning December 20, 2013, the Appellant implemented a tax plan involving two other non-arm's length parties. The plan was conceived in order to distribute the assets of Mr. Odette in the most tax efficient manner upon his death. Under the plan, shares of Mr. Odette's company were first transferred to a non-arm's length private foundation. The private foundation then disposed of the shares to Mr. Odette's company in exchange for a promissory note of that company. The company made corresponding cash payments within approximately eight months of the disposition.

[3] Both the shares and the promissory note were non-qualified securities under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the "*Act*"). As a result, paragraph 118.1(13)(c) of the *Act* was triggered. At issue is the interpretation of the phrase "any consideration" in paragraph 118.1(13)(c) and whether it is broad enough to include

a promissory note made at the time of the disposition as well as the corresponding cash payments. A contextual and purposeful analysis of paragraph 118.1(13)(c) was necessary in the determination of whether the Appellant is entitled to the charitable donation and tax credit.

[4] I find that a textual, contextual purposeful analysis of paragraph 118.1(13)(c) of the *Act* indicates that the term "any consideration" is limited. The consideration must be received at the time of the disposition and it must not be a non-qualifying security. I find that the only consideration received for the disposition of the shares was the promissory note. Since the promissory notes was between non-arm's length parties, it is a non-qualifying security. Thus, paragraph 118.1(13)(c) deems the fair market value of the shares to be nil and the Appellant is not entitled to the charitable donation tax credit.

Facts

[5] The facts in this particular matter are not in dispute and were provided to the Court by way of an Agreed Statement of Facts. The relevant facts are as follows:

a) At all relevant times, the Trustees of the Appellant were Anne Gloria Odette Kaye ("Anne"), Andrea Margaret Federer ("Andrea"), and Suzanne Irene Ruth Hanson ("Suzanne").

b) Anne and Andrea, along with Edmond George Odette Jr. ("Odette Jr.") and Curtis Michael Odette ("Curtis") are the children of Mr. Odette.

c) Suzanne was the solicitor of Mr. Odette prior to his death.

d) Edmette Holdings Ltd. ("Edmette") is a corporation incorporated under the *Business Corporations Act (Ontario)*. Until his death, Mr. Odette was the sole director, sole shareholder, and President of Edmette. As a result of Mr. Odette's death, the Appellant became the sole shareholder of Edmette, and Anne, Suzanne, and Andrea became the directors of Edmette. Suzanne resigned as a director effective June 30, 2016.

e) The E. & G. Odette Foundation (the "Foundation") is a private foundation with registered charitable status established in the province of Ontario. The directors and members of the Foundation were Anne, Suzanne, Andrea, and Curtis. Suzanne has since resigned as a director.

[6] At all relevant times, the Appellant, Edmette, Mr. Odette, Anne, Andrea, Curtis, and the Foundation were not dealing at arm's length.

[7] At the time of his death, Mr. Odette left a Primary Will and a Secondary Will (the "Wills"), each dated November 9, 2012.

[8] Immediately before the death of Mr. Odette, the fair market value of the total equity of Edmette was $45,921,271.

[9] On July 2, 2013, pursuant to subsection 51(1) of the *Act*, Edmette converted all of its Class B and Class C shares into 299,900 common shares resulting in the Appellant owning the following shares of Edmette:

a) 726,863 Class A shares redeemable at $7,777,434 with a paid-up capital of $6,550,456; and

b) 300,000 common shares with a paid-up capital of $103.

[10] By the Wills, Mr. Odette left the residue of his estate to the Foundation, including all of the issued and outstanding shares of Edmette.

[11] The Appellant sought and obtained advice with respect to the efficient transfer of 139,000 common shares of Edmette (the "Shares") to the Foundation. Based on that advice, the following transactions were undertaken:

a) On December 20, 2013, the Appellant transferred the Shares to the Foundation (the "gift").

b) On December 23, 2013, the Shares were disposed of by the Foundation by way of purchase for cancellation by Edmette.

c) Payment of the Shares was satisfied by the delivery of a non-interest bearing demand promissory note issued by Edmette to the Foundation in the principal amount of $17,710,000 (the "Promissory Note").

d) Cash payments in satisfaction of the Promissory Note were made by Edmette to the Foundation in three installments as follows:

i. the first on April 10, 2014 in the amount of $5,000,000;

ii. the second on June 6, 2014 in the amount of $6,000,000; and

iii. the third on August 6, 2014 in the amount of $6,710,000.

[12] The Shares were not listed on a designated stock exchange.

[13] On December 23, 2013, Edmette had cash and near cash equivalents (such as treasury bills, bankers' acceptances, marketable securities, etc.) in excess of $17,710,000.

[14] The Foundation issued a receipt to Edmette dated December 23, 2013, acknowledging receipt of the Promissory Note.

[15] The Foundation issued a charitable donation receipt for income tax purposes to the Appellant dated December 23, 2013, in the amount of $17,710,000.

[16] On May 17, 2013, the Appellant filed a T1 Terminal Return for the 2012 taxation year in which it declared total charitable donations and government gifts of $17,314,770, which included $17,213,104 in respect of the Shares transferred to the Foundation.

[17] By notice of reassessment dated September 23, 2016, the Minister reassessed the Appellant's 2012 taxation year by disallowing, among other things, the tax credits claimed in respect of the transfer of the Shares to the Foundation.

Issue

[18] The only issue before the Court is whether the Appellant was entitled to the charitable donation tax credit claimed in the late Mr. Odette's 2012 taxation year in respect of the gift and in particular, the deemed value of the gift based on the proper interpretation of paragraph 118.1(13)(c) of the *Act*.

Appellant's Position

[19] The Appellant takes the position that a textual, contextual and purposeful interpretation of the phrase "any consideration" in paragraph 118.1(13)(c) includes both Promissory Note and corresponding cash payments. The Promissory Note and corresponding cash payments were part and parcel of the consideration received and deemed value of the gift was $17,710,000. The Appellant takes the position that a broad interpretation respects Parliament's intention to encourage charitable giving and is harmonious with the *Act* as a whole.

Respondent's Position

[20] The Respondent is of the view that the textual, contextual and purposeful interpretation of paragraph 118.1(13)(c) dictates that the deemed value of the gift was nil. Consideration in paragraph 118.1(13)(c) is limited to consideration received at the time of the disposition and cannot be a non-qualifying security.

[21] Since the only consideration received for the disposition of the shares is the Promissory Note, paragraph 118.1(13)(c) deems the fair market value of the gifted Shares to be nil and therefore the Minister correctly assessed the Appellant's 2012 taxation year by disallowing the donation tax credit claimed in respect of the gifted Shares. The Respondent further argues that Parliament did not intend to grant a donation tax credit at the time as only the non-qualifying security in hand because the donor is not yet impoverished and the charity is not yet enriched. In addition, Parliament had legislated to exclude non-qualifying securities because where there is a gift of security between non-arm's length it is not possible to assess the value of the gift made.

The Law

[22] Where an individual makes a gift of a non-qualifying security, that is not an excepted gift, paragraph 118.1(13)(a) of the *Act* deems the gift not to have been made. However, if the security ceases to be a non-qualifying security within 60 months of the making of the gift or the donee disposes of the gift within that 60 month period, the individual is deemed by paragraph 118.1(13)(b) or (c) to have made the gift and may then be able to claim a charitable donation tax credit.

[23] Paragraph 118.1(13)(b) of the *Act* provides that the gift of a security is deemed to be made if it ceased to be a non-qualifying security within 60 months of the transfer of the security to the donee.

[24] Paragraph 118.1(13)(c) states as follows:

> (c) if the security is disposed of by the donee within 60 months after the particular time and paragraph (b) does not apply to the security, the individual is deemed to have made a gift to the donee of property at the time of the disposition and the fair market value of that property is deemed to be the lesser of the fair market value of any consideration (other than a non-qualifying security of any person) received by the donee for the disposition and the fair market value of the security at the particular time that would, if this Act were read without reference to this subsection,

> have been included in calculating the individual's total charitable gifts for a taxation year; […]

Non-qualifying Security Defined

[25] Pursuant to subsection 118.1(18), a non-qualifying security of an individual at any time means:

> (a) an obligation (other than an obligation of a financial institution to repay an amount deposited with the institution or an obligation listed on a designated stock exchange) of the individual or the individual's estate or of any person or partnership with which the individual or the estate does not deal at arm's length immediately after that time;
>
> (b) a share (other than a share listed on a designated stock exchange) of the capital stock of a corporation with which the individual or the estate or, where the individual is a trust, a person affiliated with the trust, does not deal at arm's length immediately after that time; […]

Excepted Gift

[26] Subsection 118.1(19) provides that a gift made by a taxpayer will constitute an "excepted gift" if the security is a share, the donee is not a private foundation, the taxpayer deals at arm's length with the donee, and if the donee is a charitable organization or a public foundation, the taxpayer deals at arm's length with each of its directors, trustees, officers and like officials.

Analysis

[27] The parties agree that the Shares transferred by the Appellant to the Foundation were, at all relevant times, non-qualifying security as defined by subsection 118.1(18) of the *Act*. The parties also agree that the transfer of the Shares from the Appellant to the Foundation, was not an excepted gift as defined by subsection 118.1(19) of the *Act* since the Foundation is a private foundation.

[28] Based on the above agreements, paragraph 118.1(13)(a) deems the transfer of the Shares from the Appellant to the Foundation not to be a gift that was made. Paragraph 118.1(13)(b) and (c) are redemptive provisions, which if complied with could deem the Gift to be made.

[29] In this case, paragraph 118.1(13)(b) does not apply. The parties agree that the Shares did not cease being a non-qualified security at any time.

[30] The Foundation disposed of the Shares on December 23, 2013. As a result, paragraph 118.1(13)(c) applies to deem the gift to have been made. The value of the gift is the lesser of:

i. the fair market value of any consideration (other than a non-qualifying security of any person) received by the donee for the disposition; and

ii. the amount of the gift made at the particular time that would, but for this subsection, have been included in the individual's total charitable gift […] for a taxation year.

[31] The main issue in this case revolves around the interpretation and application of paragraph 118.1(13)(c). The parties agree that the Promissory Note is a non-qualifying security of any person.

[32] I will first engage in a textual, contextual, and purposive analysis to interpret paragraph 118.1(13)(c). I will then review the legal form of the transaction against the intention of the Appellant.

Textual, Contextual and Purposive Analysis of Paragraph 118.1(13)(c)

(1) Textual Analysis

[33] When interpreting provisions of the *Act*, the modern approach to statutory interpretation applies. That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (*65302 British Columbia Ltd. v Canada*, [1999] 3 SCR 804 (SCC) at para 50). However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where tax statutes are concerned. (*Canada Trustco Mortgage Co. v Canada*, [2005] 2 SCR 601, 2005 SCC 54 (SCC) at para 11). Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process. (*Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715, at para 21).

[34] The *Act* does not define the term "consideration". Black's Law Dictionary describes it as "something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee" (Black's Law

Dictionary, 11th ed, sv "consideration"). The Appellant contends that the two words "any consideration" are broad enough to encompass the Promissory Note and corresponding cash payments received by the Foundation.

[35] However, as mentioned above, a word must be read in its immediate context, also referred to as its co-text. The textual aspect consists of as much of the surrounding text as is needed to make sense of the words being read. In a statute the co-text is usually the section or subsection in which the words in question appear. (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. [Markham: LexisNexis Canada, 2014] at para 3.11).

[36] The ordinary meaning of a word is not necessarily the dictionary meaning. Ruth Sullivan criticizes the use of dictionary definitions in statutory interpretation. She states:

> Dictionaries present words as the basic unit of meaning. Relying on dictionaries thus encourages interpreters to treat statutory interpretation disputes as disputes about the meaning of individual words. The interpreter is invited to identify a single word as the source of the problem, rather than a phrase or clause or the provision as a whole. In cases where the dispute obviously turns on a combination of words, the interpreter is reduced to looking up the definition of each word individually and then stringing the definition together – an operation that bears little if any relation to the cognitive operations actually relied on to construct meaning from a text. (Ruth Sullivan, *ibid* at para 3.33).

[37] In paragraph 118.1(13)(c), the term "consideration" appears in the following set of words: "at the time of disposition and …is deemed to be the lesser of the fair market value of any consideration (other than a non-qualifying security of any person) received by the donee for the disposition". For a complete textual analysis, it is important to read this provision with regard to the immediate context in which it is found. For this reason, the analysis cannot end at "any consideration", we must also look at "received", "at the time of disposition", and the parenthetical exclusion, "(other than a non-qualifying security of any person)".

i. Interpretation of "received" and "at the time of disposition"

[38] Paragraph 118.1(13)(c) includes terms "received" and "at the time of disposition" in relation to the consideration. These terms signify a timing limitation. In conjunction, these terms indicate that the consideration must be received at the time of the disposition.

[39] The term "received" is not defined in the *Act*. But the term "receive" is defined by Black's Law Dictionary as "to take (something offered, given, sent, etc.); to come into possession of or get from some outside source" (Black's Law Dictionary, 11th ed, sv "receive").

[40] The term "disposition" is defined in the *Act* as including the following:

> 248. (1) In this Act,
>
> **disposition** of any property, except as expressly otherwise provided, includes […]
>
> **(b)** any transaction or event by which,
>
> > **(i)** where the property is a share […], the property is in whole or in part redeemed, acquired or cancelled,
> >
> > **(ii)** where the property is a debt or any other right to receive an amount, the debt or other right is settled or cancelled, […]

[41] In this case, the Foundation disposed of the Shares to Edmette on December 23, 2013. On the same day, the Foundation received the Promissory Note in return from Edmette. The Foundation received the corresponding cash payments approximately eight months after the disposition.

[42] The Appellant's assertion that the cash payments received approximately eight months after the disposition are included in the consideration Parliament was targeting in paragraph 118.1(13)(c) has no support. If Parliament intended to include consideration received beyond the timeframe of the deemed gift, in this case December 23, 2013, it would have used clear language to express this intent.

[43] Parliament uses the expression "received or receivable" approximately 68 times in the *Act* and the expression "paid or payable" approximately 180 times. (These numbers are based on searches of the *Income Tax Act* on the federal law website as of July 12, 2021). The presumption of consistent expression therefore favours an interpretation according to which, if Parliament intended for "consideration received or receivable" to be considered for deeming the fair market value of the property gifted, Parliament would have chosen the appropriate words, as it has in so many other instances.

[44] The evidence also shows that on December 23, 2013, the only thing "received" by the Foundation was the Promissory Note. The payment of the Shares

was satisfied by the delivery of the Promissory Note and nothing else. The transactional documents between the parties reflect this intention, specifically, the receipt given by the Foundation to Edmette states that the Promissory Note satisfies the purchase price of the Shares. Additionally, the resolution of the directors of Edmette authorizes the delivery of the Promissory Note as payment for the Shares (not a cash payment). Finally, the Promissory Note itself states that it is given "FOR VALUE RECEIVED", which can only be interpreted as referring to the Shares.

[45] The Appellant relies on *Groupmark Canada Ltd. v Canada, [1993] 93 DTC 5179,* for the proposition that courts have rejected unwarranted restrictions on the term "consideration". *Groupmark* can be distinguished from the case at bar. *Groupmark* involved the interpretation of the word "consideration" in subsection 194(4) of the *Act*. In subsection 194(4), the word "consideration" is used in the phrase: "the amount of the consideration for which it was issued or granted". There is no qualification of the word. Unlike *Groupmark,* in the case at bar, the word "consideration" is surrounded by limitations, it is found in this phrase: "at the time of disposition and …is deemed to be the lesser of the fair market value of any consideration (other than a non-qualifying security of any person) received by the donee for the disposition". On a plain reading of the two provisions, it is clear that the term "consideration" in paragraph 118.1(13)(c) is surrounded by limitations and qualifications.

[46] The consideration could not be both the Promissory Note and the corresponding cash payments. The cash payments were made approximately eight months after the disposition occurred, not at the time of the disposition. The only consideration received at the time of the disposition was the Promissory Note. The Promissory Note and the corresponding cash payments represent the same value. They are not two separate promises. A promissory note is the promise to pay. The subsequent cash payments satisfy that obligation to pay. In this case, at the time of the disposition the consideration was simply the Promissory Note. It was not a promissory note plus a cash payment.

ii. Parenthetical Exclusion: "(other than a non-qualifying security of any person)"

[47] The parenthetical exclusion further limits the scope of consideration that Parliament was targeting. It provides that in order to fall under this redemptive provision, the consideration cannot be a non-qualifying security. In this case, the Promissory Note is a promissory note between non-arm's length parties, and thus, it is a non-qualifying security. In *Remai Estate v The Queen, [2010] 2 CTC 120 (FCA),*

(*Remai Estate*) the Federal Court of Appeal allowed a charitable donation tax credit under paragraph 118.1(13)(c). Here, the consideration was also a promissory note, but since it was made by a third party with whom the donor dealt at arm's length, it was not a non-qualifying security. On the contrary, in the case at bar, the Promissory Note did not cease to be a non-qualifying security as it was made by a party with whom the donor deals at non-arm's length.

[48] A cash payment would not be a non-qualifying security. However, as determined earlier, the cash payments do not constitute consideration as they were not received at the time of disposition and they satisfy the obligation to pay under the Promissory Note.

[49] Therefore, a complete textual interpretation of paragraph 118.1(13)(c) shows that consideration in this provision is not as broad as the Appellant contends. The provision contemplates in express terms that the consideration must be received at the time of disposition and it cannot be a non-qualifying security. It follows that at the time of the disposition, on December 23, 2013, the only consideration received for the Shares was the Promissory Note. But the Promissory Note was a non-qualifying security and thus, the deemed value of the Shares is nil.

(2) Contextual and Purposive Analysis

[50] The context and purpose of subsection 118.1(13) supports the limit on non-arm's length transactions and ensures that the charitable donation tax credit is only available where the charity is in fact enriched.

i. Imposing Limitations on Non-arm's Length Transactions

[51] Throughout the *Act*, Parliament has imposed limitations on transfers of property between persons who do not deal with each other at arm's length. The purpose of these rules is to discourage taxpayers who have close social, family or economic relationships with each other from artificially avoiding tax through the manipulation of transaction values. (Vern Krishna, Income Tax Law, 2nd ed. (Toronto: Irwin Law, 2012) at 663). Subsection 118.1(13) is no different.

[52] Subsection 118.1(13) deems a gift of a non-qualifying security not to have been made. Subsection 118.1(18) defines a non-qualifying security as follows:

> (a) an obligation of the individual or his/her estate or of any person or partnership with which the individual or estate did not deal at arm's length immediately after the relevant time. [Emphasis Added]
>
> (b) a share of a corporation with which the individual or the estate did not deal at arm's length immediately after that time. […] [Emphasis Added]

[53] Parliament directed its mind to the types of gifts that are eligible for a tax credit and determined gifts of security between non-arm's length parties are not eligible. The purpose of disqualifying these gifts is the practical difficulty of assessing their fair market value. (*Remai Estate, supra*, note 9 at para 56).

[54] For such cases, Parliament included the redemptive provisions, paragraph 118.1(13)(b) and (c). These provisions allow a tax credit where within 60 months the original non-qualifying security either seizes to be a non-qualifying security or it is disposed of. Thus, paragraph 118.1(13)(c) permits taxpayers to claim the credit if, within the prescribed time, the charity disposes of the "non-qualifying security" to a third party in an arm's length transaction. The price paid by the third party for the security can be taken to be its fair market value.

[55] Thus, the restriction imposed under subsection 118.1(13) on non-arm's length transactions is consistent with Parliament's approach to non-arm's length transactions throughout the *Act*. The limitations exist due to the difficulty in assessing the value of the security being gifted. For this reason, it would be contrary to Parliament's intention to allow a donation tax credit where a non-qualifying security (the Shares) is disposed of for another non-qualifying security (the Promissory Note).

ii. Charity must be enriched at the time of disposition

[56] Another key aspect of paragraph 118.1(13)(c) is timing. As mentioned above, words such as "received" and "at the time of disposition" dictate that consideration must be received when the disposition is made. This interpretation is further supported by looking at the context and purpose of paragraph 118.1(13)(c).

[57] Firstly, in practical terms, the Foundation issued the donation tax receipt on December 23, 2013. As per the Income Tax Regulations, the receipt must include the amount that is the fair market value of the property at the time that the gift was made. Thus, this amount had to be determined and given on the day of the disposition.

[58] Secondly, the general intent of Parliament is to restrict the credit where the donor is not yet impoverished and the charity is not yet enriched. This intent is evidenced by the modifications made to paragraph 118.1(13)(c) by Parliament in 2011. The Technical Notes relating to this amendment state that:

> Subsection 118.1(13) therefore addresses, in general, situations in respect of which a donee receives from an individual a right to a particular property, rather than the property itself, such that the individual may not at that time be impoverished by the transfer of the particular property to the donee. […] The rules in subsections 118.1(13) and (18) and new subsections 118.1(13.1) to (13.3) reflect this general intent. It is not intended that an inference be drawn that the results of arrangements that may not be subject to these rules and yet under which charities are not immediately enriched are in compliance with this general intent. (Technical Notes, 118.1(13), p 2). [Emphasis Added]

[59] Put simply, Parliament does not want to grant a tax credit where the donor is not impoverished and the charity is not enriched. A non-arm's length promissory note creates no real obligation to pay. Non-arm's length parties can artificially enter into similar transactions, claim a donation tax credit and never actually make payments. For this reason, it is important to show that the charity is actually enriched and the donor is in fact impoverished. A promissory note between non-arm's length parties is not convincing enough.

[60] The Appellant refers to *Dale v Canada,* [1997] 3 C.F. 236, where the court determined that "consideration that includes shares" does not necessarily require shares to be issued simultaneously or even within the same taxation year. *Dale* involved a section 85 rollover where the issuance of shares in consideration for the transfer did not take place simultaneously with the transfer. The agreement was thus that supplementary letters patent increasing the authorized share capital would first be obtained before the shares were issued. It was not until a later taxation year that the shares were ultimately issued. The courts stated that consideration is of two kinds – executed and executory – and it would be unwarranted restriction on that term to limit it to only one of the two types.

[61] However, this interpretation and call for avoiding unwarranted restrictions is relevant in the context of section 85, not paragraph 118.1(13)(c). Paragraph 118.1(13)(c) is a redemptive provision, it gives a second opportunity to taxpayers to be entitled to the credit. It has limited application and you have to be under that in order to get the credit. As mentioned above, Parliament wants to ensure that someone is impoverished and someone else is enriched at the time the credit is claimed.

[62] Therefore, a broad, inclusive interpretation of the words, as the Appellant suggests, without considering the immediate co-text of paragraph 118.1(13)(c) would defeat or undermine the legislative purpose. Paragraph 118.1(13)(c) is intended to be a redemptive provision for taxpayers who ultimately meet a strict set of conditions. The provision is not meant to encompass any disposition made at any time.

Legal Form Prevails

[63] The parties intended to undertake the transactions that transpired, they only have unintended tax consequences. On December 17, 2013, the accountant of the Appellant suggested the "transfer of 139,000 shares at $17,710,966 for a promissory note payable when you are comfortable".

[64] The Appellant's argument that the corresponding cash payments made in satisfaction of the Promissory Note are part of the consideration given for the Shares cannot succeed. As stated by the Federal Court of Appeal in *Friedberg v The Queen*, [1992] 1 C.T.C. 1 at para 5:

> In tax law, form matters. A mere subjective intention, here as elsewhere in the tax field, is not by itself sufficient to alter the characterization of a transaction for tax purposes. If a taxpayer arranges his affairs in certain formal ways, enormous tax advantages can be obtained, even though the main reason for these arrangements may be to save tax (see *Canada v. Irving Oil Ltd.*, [1991] 1 C.T.C. 350, 91 D.T.C. 5106, per Mahoney, J.A.). If a taxpayer fails to take the correct formal steps, however, tax may have to be paid. [Emphasis Added]

[65] The tax consequences of a transaction follows the legal form of the transaction. Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect. An undesirable outcome does not supersede the clear legal effects of the transactions.

[66] The transfer of the Shares and of the Promissory Note was part of a plan to maximize charitable donations and claim a credit for the donation. The plan was to claim the tax credit for the Appellant's T1 Terminal Return for the 2012 taxation year, but make the actual cash payment once the funds were available to do so. However, the Appellant's plan failed insofar as the donation tax credits are concerned because it failed to respect the conditions under the redeeming provision at paragraph 118.1(13)(c) of the *Act*. The Appellant cannot remedy that failure by way of appeal to this Court.

Conclusion

[67] The term “consideration” in paragraph 118.1(13)(c) has limitations. Parliament intended that consideration in this redemptive provision be limited to consideration that is received at the time of the disposition and that is not a non-qualifying security. In this case, the Promissory Note was the only consideration received at the time of the disposition. Since the Promissory Note is a promissory note between non-arm’s length parties, it is a non-qualifying security. Thus, the fair market value of the gift is nil. The appeal is therefore dismissed with costs in favour of the Respondent.

Signed at Ottawa, Canada, this 28th day of September 2021.

“E.P. Rossiter”

Rossiter C.J.

CITATION:	2021 TCC 65
COURT FILE NO.:	2018-2410(IT)G
STYLE OF CAUSE:	THE ESTATE OF THE LATE EDMOND G. ODETTE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 6, 2021
REASONS FOR JUDGMENT BY:	The Honourable Eugene P. Rossiter, Chief Justice
DATE OF JUDGMENT:	September 28, 2021

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