Docket: 2016-367(IT)G

BETWEEN:

TOTAL ENERGY SERVICES INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on June 20, 2022 to June 24, 2022 and June 27, 2022 to June 29, 2022 at Calgary Alberta and continuation of Appeal heard January 15, 2024 and January 16, 2024,
at Edmonton, Alberta

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Jehad Haymour Wesley Novotny Sophie Virji Anna Lekash
Counsel for the Respondent:	Matthew Turnell Neva Beckie Alexander Wind Eric Brown

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JUDGMENT

The appeals are dismissed.

Costs are awarded to the Respondent. The parties shall have until March 4, 2024 to reach an agreement on costs, failing which the Respondent shall have a until April 4, 2024 to serve and file written submissions on costs and the

Appellant shall have 30 days following the service of the Respondent’s submissions above to file and serve a written response. Any such submission shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing limits, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 2nd day of February 2024.

“F.J. Pizzitelli”

Pizzitelli J.

Citation: 2024 TCC 12
Date: 20240202
Docket: 2016-367(IT)G

BETWEEN:

TOTAL ENERGY SERVICES INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] The Appellant appeals from the Minister's notice of reassessment dated August 27, 2015 denying the deduction of non-capital and other losses and deductions for the 2010 and 2011 taxation years on the basis of the application of the General Anti Avoidance Rules (GAAR) under s.245 of the *Income Tax Act* (the "Act"). More specifically the Appellant was denied the deduction of non-capital losses of $2,878,871 in 2010 and non-capital losses of $26,196,711, SR&ED expenditures of $23,229,238 and net capital losses of $347,424 in 2011 - all being or relating to the tax attributes acquired by the Appellant from an unrelated party.

[2] This is another loss–trading case.

Overview:

[3] While the factual details can be overwhelming and appropriate relevant facts will be analysed in more detail in the analyses portions of this decision, a more concise view of the transactions in play are useful from the beginning. I will divide them into two parts to essentially reflect the two main parties involved in these transactions. I will also give a more simplistic bird's eye view of these transactions and the result they achieved that is the subject matter of this appeal.

The Seller

[4] On the one hand, we have two individuals, a Mr. Tonken and Mr. Mathews, who through several corporate entities were in the business of identifying failed corporations through their contacts in the investment community, inserted themselves into their management and used their expertise to effect steps necessary to essentially clean them for acquisition by other viable companies looking to use their public existence to facilitate the raising of capital or to access their tax losses or other attributes.

[5] In the case at hand, these gentlemen identified Xillix Biotechnologies Corp. (“Xillix”), a widely held public company with no ascertainable controlling shareholder or group of shareholders, as a failed medical imaging company that had a large pool of unused non-capital losses and other tax attributes involved here. It had sought protection under the *Companies’ Creditors Arrangement Act* (“CCAA”) of British Columbia and given the opportunity to develop a reorganization plan by the BC Supreme Court to maximize value for its stakeholders.

[6] Through Cavalon Capital Partners Ltd (“Cavalon”) an agreement dated July 9, 2007 was made with Xillix (the “Investment Agreement”) to invest $4.4 million dollars in Xillix by way of convertible debenture, based on paying $0.055 per dollar of its usable tax losses of $84 million, of which $3.6 million was to pay off its creditors remaining after the sale of its other assets satisfied other secured creditors and $800,000 was to be retained as capital to maintain itself as a publicly traded company with its listing on a stock exchange, including paying salaries to the aforementioned gentlemen, until a sale transaction of its attributes was complete.

[7] In return, Cavalon would be able to convert 94.5% ($4,160,000) of its debenture into 45% of the voting shares and 100% of a newly created class of non-voting shares so as to give it 80% of the equity in Xillix with the balance of the debenture loan remaining turned into a $240,000 non-interest bearing unsecured demand loan. In addition, the officers and directors of Xillix would resign and be replaced by nominees of Cavalon, i.e. the aforementioned gentlemen and their friendly nominees, and the name of the corporation would be changed from Xillix to Biomerge Industries Ltd. (“Biomerge”) and be delisted from the TSX and relisted to the smaller NEX exchange, a subboard of the TSX Venture exchange that did not have a minimum listing requirement. There was no difference in the underlying rights of the voting and newly created non–voting common shares, other than the vote, so both participated equally via dividends and distribution on any wind-up. The

parties understood this was to avoid a change in control to preserve the losses of Xillix.

[8] Another of the gentlemen's corporations, which had the ability to borrow funds, and in fact did, to allow the loan to Xillix to be made, Nexia Biotechnologies Inc., bought the shares of Cavalon, which had no other assets other than its rights in the agreement with Xillix, and then amalgamated with Cavalon to form Nexia Biotechnologies Ltd. ("Nexia") and became the successor to Cavalon in the Investment Agreement.

[9] Before completion of the agreement, the CEO of Xillix died and Xillix was placed into Receivership with Mr. Vermette of PWC, who had acted as Monitor beforehand. The remaining officers and directors of Xillix resigned at such time and in order to continue its corporate existence and meet its securities and other regulatory requirements, as well as have someone sign the necessary documents to complete the agreement and restructuring plan, Messrs. Tonken and Mathews agreed to act as directors and officers before completion thus enabling them to complete the plan.

[10] The Restructuring plan that gave affect to the above agreement was completed on September 24, 2007, after an amendment dated September 7, 2007 requested by Cavalon, that changed the original Restructuring plan approved by the Court to delete the requirement for Xillix to be first placed then removed from bankruptcy and that amended the terms of the non-voting shares so as to delete their convertibility feature into voting shares. The latter was done to ensure de jure control would not be acquired by the issuance of such shares. The Court approved the Restructuring plan as amended and dispensed with the approval of the then existing shareholders of Xillix on the basis they would have received no payout from the plan. The evidence of Mr. Tonken was that the only chance the original shareholders had in obtaining any value for their investment in Xillix was on a sale of its tax attributes via the completion of the Investment Agreement and restructuring contemplated therein. They had no choice and went along.

[11] Messrs. Tonken and Mathews then proceeded to market Xillix through the investment community as a cleansed entity no longer carrying on business, having its tax attributes and public company existence as its only assets, and having no other debts or obligations other than to Nexia who now held 45% of the voting shares, 100% of the non-voting common shares and 80% of its total equity and the aforementioned demand promissory note for $240,000.00.

[12] The above transactions are generally described by the parties in their pleadings and argument as the CCAA Plan transactions and I will refer to them as the CCAA transactions or series.

The Buyer:

[13] On the other hand, we have an Income Trust by the name of Total Energy Services Trust ("Total"), an Alberta mutual fund trust whose units were listed and traded on the TSX, which conducted its businesses of contract drilling services and the manufacture and rental of equipment to the gas and oil exploration and production companies in western Canada through its direct and indirect subsidiaries; mainly Total Energy Services Limited ("TESL").

[14] Due to changes in the Act, which proposed to level the playing field between Income Trust structures and Corporations by imposing additional taxes on Income Trusts through what are generally described as the SIFT Rules in the Act, Total decided it would convert to a corporate structure to: remain competitive from a tax perspective and in its ability to raise funds on the market, retain some of its major investors who threatened to sell their interest if there was no corporate conversion, and address concerns that the new rules would restrict growth by limiting its ability to undertake significant acquisitions. This was noted by the CEO of Total, Mr. Halyk but disputed by the Respondent.

[15] Lo and behold, Total was introduced to Biomerge through the efforts of intervening investment advisors and, after exploring other possibilities, decided Biomerge was exactly the type of entity it would prefer to merge with using the trust unit for shares exchange method provided by the SIFT Rules, it being a clean corporation with no creditors or active business and with the benefit of having been cleaned through the CCAA Court ordered process, not to mention the fact it had valuable tax attributes in the nature of unused losses and deductions.

[16] Accordingly, Total entered into an Arrangement Agreement with Biomerge pursuant to which a Plan of Arrangement set out the numerous steps to occur on an effective date that would: amend the Deed of Trust of Total to allow its trust units to be transferred to Biomerge, create articles of continuance for Biomerge (from BC to Alberta) that would provide for a new class of common shares ("New Common Shares") that would be exchanged for the trust units and a portion of the existing voting common shares of Biomerge, exchange the 29,050,000 outstanding trust units of Total on a one for one basis to 29,050,000 New Common Shares of Biomerge, provide that the total of 248,941,152 existing common voting shares of Biomerge

would be exchanged for $702,293 in cash and 56,730 New Common Shares, cash out the existing 435,647,055 non-voting common shares of Biomerge for $1,695,185, deposit with its solicitors in trust, a sum of cash of $1,247,401 equal to Biomerge's liabilities in return for a demand promissory note , change the name of Biomerge to Total Energy Services Inc. ("New Total") and replace the existing officers and directors of Biomerge with the officers and directors of TESL, the earlier referred to subsidiary of Total.

[17] It should be noted that the total consideration to be paid to the shareholders of Biomerge through a combination of cash and shares of New Total was $3.9 million negotiated by the parties based on paying $0.052 per dollar on the total of non-capital losses and SR&ED expenditures in the Biomerge tax pool.

[18] The above arrangements and transactions became effective May 20, 2009 after approval of the Total Plan of Arrangement by the Court of Queen's Bench of Alberta on May 15, 2009 and New Total commenced trading on the TSX after substituting old Total's listing for New Total. At this time 99.8% of the equity in New Total belonged to the original trust unit holders of Total and only 0.2% to the then shareholders of Biomerge.

[19] After May 20, 2009, Total (and its sub-trusts) were wound up pursuant to s.88.1(2) of the Act as result of which the assets of Total Trust, mainly its shares in and debenture loan to its subsidiary, TESL, became the assets of New Total.

[20] On January 1, 2010, New Total and TESL amalgamated into the Appellant, Total Energy Services Inc. so that the tax pools of New Total and TESL became those of the Appellant, including obviously the tax pools that had belonged to Biomerge traced back to Xillix that were denied by the Minister here.

[21] Total Trust expended approximately $4.8 million inclusive of the $3.9 million consideration to Biomerge shareholders discussed above and the transaction costs to implement the transactions here.

[22] This group of transactions are referred to by the parties as the Total Arrangement or Total Conversion transactions and I will henceforth refer to them at the Total Conversion transactions or series.

Bird's Eye View:

[23] In my view, the above CCAA transactions and Total Conversion transactions reflect a vendor of inactive but existing shell corporations, with tax losses and securities exchange registrations, marketing and selling such attributes on the open market to a willing and unrelated buyer, who ended up acquiring and using such losses against its income from a business totally different from that of the original corporation, almost entirely for the benefit of new shareholders. The role of this Court will be to determine whether any of such transactions which gave rise to the aforesaid result violates the GAAR.

GAAR

[24] Section 245 of the Act is the GAAR. Although I will refer to the specific provisions in more detail during this analysis, there is no dispute that it is well established law that three conditions must be me for the GAAR to apply:

(1) Was there a tax benefit?

(2) Was there an avoidance transaction or a series of transactions that included an avoidance transaction that resulted in the tax benefit; and,

(3) Were any of the avoidance transactions abusive?

[25] In this case, there is no dispute that we are not dealing with a sole transaction but a series of transactions so my reference to the applicable GAAR provisions will reflect that.

[26] I will address each of the conditions specifically and set out the position of the parties thereon within that analysis.

(1) Was there a tax benefit?

[27] The Appellant concedes in argument that the use of the Biomerge tax attributes in 2010 and 2011 by the Appellant that resulted in the reduction of tax was a tax benefit and the subject matter of the Minister's reassessment in this appeal.

[28] While it is clear this first condition has been met, I believe it is important to note that the Respondent describes the tax benefit as "the preservation, carry-forward and use of the Biomerge Tax Attributes" in paragraph 27 of its written submissions as well as paragraph 11(uu) of the Reply. As the Appellant's counsel had pointed out in argument, only the use of these attributes can be considered the tax benefit for

the purpose of this appeal. The legislative changes made by Parliament in Budget 2022 to amend the definition of “tax benefit” to include the preservation and carry-forward of tax attributes did not form part of the definition of “tax benefit” applicable to this appeal. The applicable definition reads as follows:

> 245(1)…a reduction, avoidance or deferral of tax or other amount payable under this Act…

[29] Clearly, this definition contemplates that the tax attributes must have been used as confirmed by the Federal Court of Appeal in the decisions of *Wild v.* Canada, 2018 FCA 114 at paragraphs 30-39 and *Gladwin Realty Corporation v*. Canada 2020 FCA 142 at paragraph 47.

(2) Was there a series of transactions that included avoidance transactions that resulted in the tax benefit?

[30] Section 245(3) defines “avoidance transaction” as a transaction that results in a tax benefit, either by itself or as part of a series of transactions “unless the transaction may reasonably be considered to have been undertaken or arranged primarily for a bona fide purpose other than to obtain a tax benefit”. [See *Canada Trustco Mortgage Co.* V Canada 2005 SCC 54 (“Canada Trustco”) at par 22 and *Copthorne Holdings Ltd.* V Canada 2011 SCC 63 (“Copthorne”) at par 39]

[31] A “transaction” is widely defined to include an arrangement or an event in s.245(1) of the Act.

[32] It is also established law that the burden is on the taxpayer to refute the Minister’s assumption regarding the primary purpose of the series and of each transaction forming part of the series and that only one transaction in the series must be found to be an avoidance transaction in order to satisfy the requirements of s.245(3) [See Copthorne at par 63 and 64].

[33] It is agreed that the Court must determine: 1. what transactions make up the relevant series of transactions for the purposes of the GAAR analyses and whether the Tax benefit resulted from such series, and 2. whether every transaction within that series was undertaken or arranged primarily for bona fide purposes other than to obtain a tax benefit.

Series of transactions that resulted in a Tax Benefit

[34] As set out in Copthorne at par 43, citing *OSFC Holdings Ltd.* V Canada, 2001 FCA 260 at paragraph 24, the starting point is the common law series where each transaction is preordained to produce the final result.

[35] At the beginning of this decision, reference is made to two sets of transactions the parties generally refer to as the CCAA transactions and the Total Conversion transactions. The parties generally agree that these each constitute a series of transactions with few minor exceptions; namely that according to the Appellant, some of the transactions in the CCAA transactions should not be included in that series if it becomes part of a larger series under s.248(10) to be discussed herein. There were other Transactions the parties referred to as the "Other Transactions" which are not necessary to set out in detail here as they are not consequential to the determination of this matter.

[36] There is no dispute that each of the aforesaid series would only be separate Common Law Series and do not form part of one large Common Law Series so there is no need to reference the Appellant's argument in this respect although its essentially uses similar arguments with respect to the real dispute.

[37] The real dispute between the parties centers on the issue of whether the two Common Law Series are joined in their entirely or only partially pursuant to Section 248(10) of the Act, which serves to expand a common law series.

[38] Section 248(10) provides:

> For the purposes of this Act, where there is 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.

[39] The Respondent takes the position that both common law series are joined in their entirety pursuant to Section 248(10) while the Appellant argues only the transactions that preserved the reporting issuer status and eliminated the claims of creditors should be added and not any of the CCAA transactions that involved preserving the Biomerge Tax attributes including any of the Cavalon/Nexia's investment and ownership interest in Biomerge (originally Xillix).

[40] The Appellant's arguments are two-fold. First, the Appellant argues that since there is no material judicial consideration of the term "related" as referenced in the phrase "related transactions or events" that we must use the basic principles of interpretation to find that the term must have meaning and that the dictionary

definitions of Black's Law Dictionary and Webster's Dictionary of the English language which define "related" means that related transactions must mean that only transactions that are connected in some way, or have a relationship to the Total Conversion transactions should be considered related transactions under S.248(10).

[41] The Appellant's position seems to be predicated on their submission that the only reason they entered into the deal with Biomerge was to access a cleansed corporation with reporter issuer status. With all due respect, this position totally ignores the overwhelming evidence that the acquisition of Biomerge tax attributes was, at the very least, a significant portion of the Total Conversion series and one of the reasons for the transactions; putting aside for the moment whether it was the primary reason. The Appellant sought out companies with significant losses, based its price on $0.052 per dollar of tax attributes, required a minimum of at least $70 million dollars in such attributes as a condition of closing, undertook due diligence with respect to their availability for use and negotiated with the principals and representatives of Nexia in relation thereto. Accordingly, any transaction within the CCAA transactions that related to the preservation of the Biomerge Tax attributes was extremely relevant using the Appellant's own rationale. The preservation of Biomerge tax attributes had great relevance to Total.

[42] Moreover, the Investment Agreement pursuant to which Cavalon (later Nexia) was to inject $4.4 million dollars into Xillix of which $3.6 million was to be used to "cleanse" it by paying off creditors is the same agreement that provided for the ability to convert such debt to shares that took place pursuant to the Restructuring Plan. I fail to see how these transactions are not related.

[43] Secondly, the Appellant argues that since the Trust Conversion Rules (SIFT) rules were released 9 months after the September 24, 2007 date when the CCAA transactions were completed there was no way for Biomerge to contemplate being involved in a trust conversion or how conversions would be effected. In earlier argument pertaining to delineating the Common Law Series, the Appellant also made reference to the fact that none of Xillix, Cavalon, Nexia or their principals had any knowledge of Total at the time the CCAA transactions were undertaken or completed.

[44] In Copthorne, at paragraphs 42-54, the SCC analysed in detail the second condition for applying GAAR and clearly provided material judicial consideration of related transactions or events completed in contemplation of the series per 248(10) of the Act. At paragraph 54 the SCC states:

> [54]… nothing suggests that the related transaction must be completed in contemplation of a subsequent series. The context of the provision is to expand the definition of a series which is an indication against a narrow interpretation.

[45] In fact, at paragraph 56 the SCC stated that the language of s.248(10) allows either a prospective or retrospective connection of a related transaction to a common law series.

[46] In determining whether a related transaction was done in contemplation of another series, the SCC in Copthorne, paragraphs 46-47 stated that:

> [46]………. "The Court is only required to consider" whether the series was taken into account when the decision was made to undertake the related transaction in the sense it was done "in relation to" or "because of" the series.
>
> [47] Although the "because of" or "in relation to" test does not require a strong nexus, it does require more than a "mere possibility" or a connection with "an extreme degree of remoteness"…… Each case will be decided on its own facts…. In the end, it will be the "because of" or "in relation to" test that will determine, on the balance of probabilities, whether a related transaction was completed in contemplation of a series of transactions.

[47] In the case at hand, whether looking at it from a prospective or retrospective manner, it is clear that it is only "because of" the CCAA transactions in preserving the tax attributes of Biomerge and placing it in inventory for future sale that Total was able to acquire the tax attributes and it is only "because of" these transactions and events that Biomerge was able to sell them on the open market.

[48] Consequently, I find all the CCAA transactions are part of the Total Conversion common law series in their entirety pursuant to s.248(10). Since the Tax Benefit occurred within the Total Conversion series it also occurred within the expanded series.

(3) Primary Purpose of Avoidance Transactions

[49] As earlier indicated, s.245(3) defines an "avoidance transaction" as a transaction that results in a tax benefit, either by itself or as part of a series of transactions, "unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain a tax benefit."

[50] The Minister assumed that the transactions between Xillix and Cavalon, including the initial letter agreements, the January 3, 2007 Letter Agreement accepted by Xillix, the Investment Agreement of Cavalon dated July 9, 2007, as amended and the completion of the transactions pursuant to the Restructuring Plan described in the earlier overview of this decision, was to monetize and ultimately sell the tax attributes of Xillix. The evidence overwhelmingly supports this. Reference to the desire to do so is found in the reports of Mr. Vermette, the PWC monitor and then Receiver appointed for Xillix. The affidavits of Mr. Gannon, the CEO of Xillix during the CCAA proceedings before his death speak to Cavalon's interest in acquiring Xillix's tax losses and refer to Cavalon as the "Tax Purchaser". The evidence of Mr. Tonken was that Cavalon was in the business of acquiring failed companies and marketing and selling their attributes, including tax attributes.

[51] Moreover the Restructuring Plan approved steps that were carried to completion that had only a tax purpose, which include:

(1) Xillix's articles were amended to create an unlimited number of non-voting shares with the same economic attributes as the voting common shares, in that they both participated equally as to dividends and rights on distributions but were clearly needed to allow Nexia to convert most of its debenture in a manner to avoid obtaining de jure control. As stated earlier, after the debenture conversion, Nexia ended up with 45% of the voting shares, 100% of the non-voting common shares and 80% of the equity interest in Xillix. Mr. Tonken acknowledged the need to avoid a change in control. Clearly, as in the case of *Madison Pacific Properties Inc.* V Canada 2023 TCC 180 ("MP Properties"), the logical conclusion is that the creation and issuance of these non-voting shares was to avoid Nexia obtaining de jure control and hence preserve the losses.

(2) At the request of Cavalon, the initial Investment Agreement and Restructuring plan was amended to remove the convertibility feature in the non-voting common shares into common shares to avoid those shares being treated as voting shares under s.256(8) of the Act and thus avoid de jure control. This event had only a tax purpose.

[52] In analysing the CCAA transactions it is absolutely clear that the entire purpose of most of the transactions therein was to preserve and monetize the Biomerge tax attributes. Practically speaking, what else do you do with an entity that was an empty shell that had ceased carrying on business and no longer even had a place from which to conduct business with no assets other than its tax attributes and

reporting issuer status with registration on the NEX exchange, a small subboard of TSX Ventures? The only evidence of the latter was from Mr. Tonken who testified that a clean public company with reporting issuer status and exchange registration would be worth about $250,000. There was no mention of whether the lower status of the NEX exchange would affect this, but it is clear the primary remaining assets were the $75 million plus level of tax attributes at that time.

[53] I also agree with the Respondent's argument that the onus was on the Appellant to show the CCAA transactions had primarily a non-tax purpose and it neither pleaded any material facts in this regard nor made any argument to rebut the Minister's assumption in this regard other than to suggest in argument that the primary purpose of the transactions to complete the "cleansing" portion of the CCAA transactions was to eliminate Biomerge's liabilities and preserve it as an ongoing concern; totally ignored the remaining transactions that I have found to be avoidance transactions, instead focusing only on the Total Conversion transactions.

[54] While it is not necessary for me to consider whether any of the Total Conversion transactions would be an avoidance transaction due to the requirement that only one of the transactions in the expanded series of transactions had to be primarily for a non-tax purpose, I believe it would be appropriate to address the arguments of the parties in this regard.

[55] In essence, the Appellant argues that the Total Conversion transactions were undertaken solely to effect the conversion of the Trust to a corporation to avoid the tax consequences of the SIFT rules earlier discussed and that the tax benefit from the Biomerge attributes were just "gravy" as Mr. Halyk testified. Moreover argues the Appellant, the selection of Biomerge as the conversion candidate is a "choice" not an avoidance transaction, relying on *Spruce Credit Union* v. the Queen 2012 TCC 357, confirmed by the FCA 2014 FCA 143 [Spruce].

[56] That case involved the determination by the Tax Court whether a dividend paid by an entity known as STAB to its members, which consisted of all BC credit unions who are required by law to be members and shareholders thereof, for the purpose of putting them in funds to pay an extraordinary assessment issued by the entity known as CUDIC attracted the GAAR. The Minister took the position that the dividend should be re-characterized as a refund of premiums paid and thus be taxable treating the dividend as an abusive avoidance transaction. STAB was the central credit union under BC legislation that is designated the stabilization authority for and required to supervise credit unions in BC. STAB is itself funded by contributions from credit unions as member premiums. CUDIC was the entity that in BC is

required to maintain a deposit insurance fund to protect consumers against losses on their deposits funded by assessments against credit unions which occurred here to satisfy the higher fund thresholds resulting from legislative changes.

[57] The Court decided this single transaction was not an avoidance transaction and had a clear non-tax purpose. Stab was clearly exercising its duty to stabilize it credit union members and whether the amounts to do so were a dividend or refund the amount of its payment would have been the same.

[58] At paragraphs 91 to 93 of Spruce, Boyle J. stated:

> [91] In this case, the overall transaction of STAB paying dividend amounts to its member credit unions was clearly done for the purpose of putting the member credit unions in funds to pay the CUDIC assessments and reducing STAB's deposit protection and stabilization funds to the lesser required level following CUDIC's extraordinary assessment. This is clearly a bona fide non-tax purpose. An "overall non-tax objective of transferring funds from STAB to CUDIC "is admitted by the Respondent.
>
> [92] Unlike in Copthorne, in this case no step was inserted or undertaken primarily for the purpose of being able to obtain a desired or preferred tax result.
>
> [93] The act of choosing or deciding between or among alternative available transactions or structures to accomplish a non-tax purpose, based in whole or in part upon differing tax results of each, is not a transaction. Making a decision cannot be an avoidance transaction.

[59] This was not a series of transaction case as the Respondent has pointed out in argument and in Spruce only the dividend transaction was in issue and no extra steps were involved. Indeed at paragraph 101 of Spruce, the Court stated:

> [101] overall, I am unable to identify any step or transaction undertaken other than for a primary non-tax purpose. This is in contrast with, for example, Copthorne, where the Appellant had to convert its pre-existing parent subsidiary structure to a sister company structure as a preliminary or intervening separate step in order to position itself to obtain the tax benefit sought. In this case there was no such step or transaction done primarily for that purpose.

[60] The Appellant did not elaborate further on this issue in argument other than to conclude a choice is not a transaction and so the selection of Biomerge itself cannot be an avoidance transaction. Implied in the Appellant's position is of course, the Duke of Westminster principle and the ability of taxpayers to make business decisions that result in most favourable tax consequences to them and a caution

against interfering with commercial decisions. The Appellant however has staged this argument in the context of arguing there was no primarily tax reasons for any of the Total Trust Conversion transactions.

[61] Here I believe there is ample evidence to justify the Respondent’s position that the primary purpose of the Conversion Transactions, including the choice of Biomerge, were primarily for a tax purpose and that there are steps or transactions undertaken for a primary a tax purpose.

[62] Indeed at paragraph 60 of the FCA decision in Spruce, the Court specifically stated that the existence of an alternative transaction is a factor that can be considered even though a comparison between transactions accomplishing equivalent results other than tax is not itself sufficient to establish an avoidance transaction, otherwise the existence of alternative transactions with greater tax consequences would render the Duke of Westminster principle meaningless.

[63] In paragraph 61, the Federal Court of Appeal went on to acknowledge that the “need to determine the ‘primary’ purpose implies that multiple purposes can coexist and that both tax and non-tax purposes can be intertwined.” And in paragraph 62, the Court, relying on the Supreme Court decision in Canada Trustco, stated that “where there is an avoidance transaction a Tax Court judge must consider and weigh all the evidence to determine whether it is reasonable to conclude that the transaction was not undertaken or arranged primarily for a non-tax purpose.”

[64] Accordingly, it is clear that simply saying that a choice is not a transaction and thus not an avoidance transaction is simply not always true and will depend on all the evidence to be weighed.

[65] In the case at hand, I find that there is overwhelming evidence to support the Respondent’s position that the Total Conversion series as a whole and individual transactions within that series were undertaken primarily for tax purposes – to access the Biomerge tax attributes in a manner that avoided the application of s.111(5) of the Act. Such evidence includes the following:

(1) Notwithstanding Mr. Halyk’s testimony that all options were considered and analysed before deciding on selecting Biomerge as the conversion candidate, it is clear from the testimony of Mark Kearl, the CFO, that he was instructed only to consider targets with tax loss attributes and only interviewed this type of candidate.

(2) The notes of Mr. Kearl put in evidence demonstrate the willingness of the Appellant to “walk” from the deal if there was not a sufficient level of tax attributes that would make it “worth our while” and in fact the Arrangement Agreement was conditional upon there being a minimum of $70 million in such usable tax attributes.

(3) The $3.9 million price or total consideration to be given to the Biomerge shareholders was calculated on a price of $0.052 per dollar of the non-capital loss and SR&ED deduction tax attributes available only.

(4) There is overwhelming evidence the Appellant conducted serious due diligence to confirm the existence, quantity and use of the tax attributes, through independent accountants and their own solicitors. The evidence is that the total closing costs of the transaction, excluding the $3.9 million above, including accounting and legal fees was approximately $900,000.00, a significant amount evidencing their focus on the tax attributes. The volume of due diligence evidence focusing on the tax attributes was huge.

(5) There was no price allocated to Biomerge’s reporting issuer status and public exchange registration which renders the suggestion that the primary purpose of the transaction was to use a cleansed corporation having such status not credible.

(6) The evidence of Mr. Tonken was that the cost of acquiring a clean corporation with such issuer status was about $250,000. It begs the question why such a conversion candidate was not pursued or why it did not simply incorporate a new corporation as these options would have accomplished their non-tax purpose if that was the primary purpose.

(7) There was no evidence given by the Appellant as to why they needed to acquire a public corporation with issuer status when Total already possessed issuer status in the larger provinces and substituted its own public listing status for the new entity resulting from the series, (namely the Appellant), rather than that of Biomerge. There was also no evidence of what value or use they made or would have made of any such Biomerge issuer status. Total was already registered on the more valuable TSX while Biomerge was registered on the lower NEX and no evidence was given to suggest it could not have substituted that TSX registration into a new corporation or other target at less cost.

(8) Although the Appellant's concerns with respect to the SIFT rules and the choice to convert Total Trust to a corporation were business reasons, there is no evidence of any urgency to do so out of Mr. Halyk's stated fear that "the normal growth" guidelines in those rules would hinder growth. There was no evidence of an acquisition or acquisitions in the works or contemplated that could lead to equity issuances of $50 million in any given year or the doubling of its market capitalization from October 1, 2006, the start of the CCAA transactions to 2010, when the Total Conversion transactions were completed. That would have exposed the Appellant to the consequences of the SIFT distribution tax at an earlier stage than 2011. Frankly, if there was any such concern, it begs the question as to why the Appellant would not have simply bought a public shell company or incorporated a new one earlier.

[66] Although the above should be sufficient to demonstrate the overall avoidance character of the series in question, it should be noted that unlike Spruce Credit relied upon by the Appellant above, there were indeed steps inserted into an otherwise commercial transaction that I agree were avoidance transactions. These include the step to cash out the Biomerge non-voting shares and the partial cash-out of the voting shares which were exchanged for part-cash and shares in New Total which clearly served to eliminate the bulk of the interest held by the original shareholders of Biomerge, including most of the majority interest indirectly held by Tonken and Mathews through Nexia. This was not just an exchange of shares and trust units but a cash out of most of the prior shareholders' interest in Biomerge such that they only held 0.2% of the equity interest in New Total while the Total unit holders ended up with 99.8%.

[67] It is clear that concerns about the application of the SIFT Rules in 2011 were secondary to the primary purpose of this Total Conversion series: the buying and selling of tax attributes.

[68] As earlier mentioned, the sole purpose of the additional step of creating a new class of non-voting shares by Xillix to issue to Nexia, within the expanded series, was to transfer most of the equity interest in Xillix to Nexia in a manner that avoided Nexia acquiring de jure control. Nexia ended up with 80% of the equity in the publically traded Xillix while at the same time acquiring a large block of voting common shares - 45%-in an otherwise large and disparate body of shareholders, none of whom then controlled Xillix.

[69] I find that the second condition required for GAAR has been satisfied and will now consider the third condition.

Abusive Tax Avoidance: Whether the transactions giving rise to the tax benefit were abusive.

[70] As stated in *Deans Knight Income Corp* v Canada, 2023 SCC 16 ("Deans Knight") at paragraph 56, relying on Canada Trustco and Copthorne:

> [56] The third step of the GAAR analysis is frequently the most contentious… Analyzing whether the transactions are abusive involves first, determining the object, spirit and purpose of the relevant provision and, second, determine whether the **result** of the transactions frustrated that object, spirit and purpose… (emphasis mine)

[71] As set out in Copthorne, at paragraph 72, abusive tax avoidance exists "(1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provisions in a manner that frustrates or defeats its object, spirit or purpose" and these are often intertwined.

[72] The Respondent takes the position that the transactions were an abuse of s.111(5) dealing with non-capital losses, s.111(4) which parallels s.111(5) for net capital losses, s.37(6.1) which effectively parallels s.111(5) with respect to SR&ED deductions as well as an abuse of the SIFT conversion rules in s.85.1(8) and s.88.1(2) which are the provisions particular to the facts of this case.

[73] The Appellant takes the position that if the Court determined that the relevant series as expanded included the CCAA transactions, then this case is distinguishable from Deans Knight, for reasons I will address later, that result in no abuse of s.111(5), s.111(4) and s.37(6.1) and there was no policy of the Act at the relevant time that restricted the choice of corporations utilized in carrying out the trust conversion under s.85.1(8) nor was there any general policy at the relevant time that restricted the ability to utilize the tax attributes of a conversion candidate under s.85.1(7) and (8) and 88.1(2) and hence no abuse of the SIFT conversion rules.

[74] I will first address the purported abuse of s.111(5) and parallel provisions and then that of the SIFT conversion rules.

s.111(5)and parallel provisions

[75] While I will restrict my analysis to paragraph 111(5) of the Act, the same will apply to the parallel provisions dealing with net capital losses and SR&ED deductions.

[76] The first step of the abuse analysis requires determining what the object, spirit and purpose of the provision is.

[77] There is no need to conduct a detailed analysis to determine the object, spirit and purpose (the "OSP") of s.111(5) as the SCC explicitly set this out in their recent decision in Deans Knight at paragraph 113:

> [113]…the object, spirit and purpose of s.111(5) is to prevent corporations from being acquired by unrelated parties in order to deduct their unused losses against income from another business for the benefit of new shareholders. Parliament sought to ensure that a lack of continuity in a corporation's identity was accompanied by a corresponding break in its ability to carry over non-capital losses. This is the rationale underlying the provision and properly explains why Parliament enacted s.111(5).

[78] And at paragraph 118, "In this case, s.111(5) demonstrates Parliament intended to deny unused losses to unrelated third parties who take the reins of a corporation and change its business."

[79] The second step of the abuse analyses requires me to determine whether the **result** of the transactions frustrates that OSP.

[80] I have rendered the word "result" in bold to make a point. The Appellant has essentially argued in oral and written argument that the SCC test in Deans Knight is not only a "results" test. In analysing the decisions in Deans Knight, *The King V MMV Corporate Partners Inc.*, 2023 FCA 234 ("MMV") and MP Properties the Appellant essentially argues that the factual analysis to be undertaken by the Court should mainly focus on determining whether the rights and benefits of the original shareholders were affected in such a manner as to result in "the functional equivalent of de jure control" and concludes this did not happen as a result of the CCAA transactions. The Appellant appears to be elevating only one aspect of the "how" the Court in Deans Knight arrived at its conclusion, using factors that impacted the rights and benefits of the original shareholders, i.e. rendering their majority vote or de jure control meaningless via a contract to essentially shift the reins to different person, to a subtest within the results test. Nevertheless it couches it in terms so as to suggest that we should treat the factors that achieve this functional equivalency of control,

or fail to, as the "approach" and "guidelines" the Court is directed to follow as the factor to focus on.

[81] Indeed in paragraphs 215 and 216 of its written submissions, the Appellant argues:

> 215. The Respondent will attempt to suggest that the Court should simply compare the results of the series of transactions in issue against the underlying rationale of the Loss Streaming Rules to find abusive tax avoidance, relying upon statements in the recent decisions of MMV and MP Properties in support.
>
> 216. Taking the Respondent's position to its logical conclusion, the Respondent would be asserting that MMV or MP Properties stand for the proposition that the Respondent is not required to establish, as a question of fact before this Court, the existence of the functional equivalent of an acquisition of de jure control or the existence of other hallmarks of control to find an abuse of the Loss Streaming Rules. Such a position is flawed and not supported by a careful review of Deans Knight, MMV and MP Properties. It is also inconsistent with the Respondent's burden of proof under the abuse portion of the GAAR analyses.

[82] Deans Knight was clear that the requirement for finding misuse and abuse is a question of fact that requires consideration of the circumstances as a whole to see if they achieved the outcome Parliament sought to prevent [see par 121 and 122]. In paragraph 122 the Court stated that:

> [122]…the abuse analysis is comparative: it asks courts to assess the transactions at issue in light of the provisions rationale to determine whether the results achieved by the transactions frustrates this rationale...

[83] It follows that all circumstances must be considered in the context of each case. Deans Knight, MVV, and MP Properties all used this approach. There are no circumstances or facts that must be specifically included or ignored and the Court must determine what weight to give each of them and as a whole in deciding whether the results achieved frustrate the rationale of the provision. It follows that an analysis of any control circumstances is not the only analysis that is relevant, and Deans Knight, MVV and MP Properties all considered a multitude of often differing circumstances.

[84] What is clear from the wording the SCC used in enunciating the rationale of s.111(5), however, is that the focus is to determine the "results" of the transactions: whether they achieved an outcome Parliament sought to prevent, and so the Appellant is incorrect in its position above suggesting such is flawed.

[85] Graham J. in MP Properties at paragraphs 145 to 183, analysed asset changes to the target company, the lack of employees, changes in share structure, changes in the business character (including name change), fundamental changes in shareholdings and board of directors, and whether there was a significant shift in control of the target corporation that initially had the subject losses, as well as who controlled the series of transactions to conclude that the series of transactions fundamentally transformed the Appellant and in doing so frustrated the rationale of s.111(4). Deans Knight also considered factors that determined whether the target corporation had been fundamentally transformed and what shareholder rights and benefits had been obtained by the company who affected the series of transactions including the impact of an agreement that restricted the normal rights of shareholders whether specifically or otherwise.

[86] The analysis the Court will focus on, adopting the approach of Graham J in MP Properties, will be on comparing the results of the series of transactions in this case and not on comparing its series of transactions to the series of transactions in Deans Knight [see par 141], the approach confirmed by the FCA in MVV [see par 144 of MP].

Results Analysis

The series of transactions evidence the following:

(1) Changed Business Activity

[87] Xillix was in the business of medical imaging. This business ceased to operate as the assets of this business were sold off to satisfy its creditors, some during receivership as contemplated in the Plan of Restructuring that occurred during the CCAA transactions. No employees remained other than Messrs. Tonken and Matthews who inserted themselves into management and the leased premises where Xillix had conducted its business was also abandoned such that Xillix became an insolvent shell of a company having only its tax attributes and corporate existence as a public corporation that were marketed for sale.

[88] Once the Total Conversion series was completed, particularly through the amalgamation of TESL, the main operating subsidiary of the Total group, with Biomerge (then New Total) the business of Total was inserted into Biomerge; namely the business of oil drilling services and equipment for the

oil exploration industry described earlier; a completely new and different business.

(2) Change in Assets and Existing Liabilities

[89] Not only was there a total change from the type of business Biomerge (originally Xillix) had carried on but there was an insertion of valuable assets as well as the existing liabilities of TESL into Biomerge. Only the tax attributes of Biomerge were utilized by the new entity as even its public reporting issuer status on the NEX was not utilized by the new entity which substituted the Total TSX registration into it.

(3) Changed Name

[90] The name of the business was changed several times during the series, from Xillix to Biomerge and eventually to the name of the Appellant.

(4) Change in Share Structure

[91] The share structure of Xillix was also substantially changed from voting common shares publicly traded to the introduction of non-voting common shares with the same participation in dividends and distribution on wind-up as the original voting shares but which were issued to Nexia pursuant to the conversion of debt to equity under the Debenture described in the CCAA series for the admitted reason of avoiding an acquisition of de jure control by Nexia to preserve the tax attributes of Xillix.

[92] The share structure changed again when Biomerge, a BC based corporation, filed articles of continuance in Alberta, where a new class of voting shares displaced the previous share structure of Biomerge to set up the reverse takeover by an exchange transaction utilized to convert Total's trust units to these new shares of Biomerge.

(5) Change in Ownership

[93] There was a near total change, no pun intended, in the ownership of Biomerge. Xillix started off as a widely held public corporation that after insolvency and restructuring transactions, including the issuance of non-voting shares, ended up with an ownership structure that saw 80% of its equity interest owned by a new shareholder, Nexia, who acquired 45% of the

voting common shares and 100% of the non-voting shares to avoid de jure control acquisition. Frankly, it is quite clear that had the tax benefit been utilized by Nexia at that time the Minister would have applied GAAR then and I am satisfied would have been successful.

[94] Share ownership of course changed again after the exchange transaction referred to in the Total Conversion series where the Total trust unit holders ended up with 99.8% of the voting common shares and equity in the resulting Appellant's existence.

[95] The ownership result above referenced was mostly due to the fact that part of the transactions included all the non-voting common shares of Biomerge held by Nexia being cashed out as well as the cash consideration given to the voting common shareholders of Biomerge which included Nexia resulting in most of the value of such voting shares being cashed out. It should be noted that any voting shareholder of Biomerge holding less than a block of shares of 4,219 shares were cashed out in full as well.

[96] Since the original shareholders of Xillix owned 55% of the common shares thereof, it appears certain that the equity interest of those original shareholders was about .1% of the Appellant, but of course the evidence is that this interest was cashed out in later steps.

(6) Use of the Attributes

[97] The Appellant, as the successor to Xillix, claimed its tax losses and SR&ED deductions in 2010 and 2011 for the benefit of the almost entirely new and unrelated shareholders of the Appellant.

(7) Shift in Control

[98] There was a significant shift in control throughout the expanded series. The evidence is that Xillix's publicly traded shares were held by a wide and disparate group of shareholders such that no one person or group of persons appears to have held de jure control. Xillix had a board of directors and slate of officers who continued in those roles when Xillix sought and was given creditor protection under the Alberta CCAA until the President of Xillix died before it could complete a restructuring, leading to Xillix being placed into Receivership that triggered the resignation of the remaining slate of officers and directors. While the Receiver held the reins of Xillix under the terms of

receivership and thus can be argued to have had the temporary functional equivalence of control under those terms which the Appellant seemed to acknowledge in argument, it would be a stretch to find the terms of receivership and the receivers statutory and fiduciary duties as an avoidance transaction although factually speaking it does demonstrate a lack of continuity of Xillix.

[99] Notwithstanding the fact they stepped into the roles of officers and directors during the receivership, to ensure the agreed plan of restructuring could proceed under the Investment Agreement and to facilitate those transactions as signing authorities, Mr. Tonken and Mathews and their friendly nominees, Mr. Forrester and Kirkham, were entitled to become and became the new directors and officers of Xillix pursuant to the terms of the Investment agreement; which required the old ones to resign and gave Nexia the right to appoint new officers and directors.

[100] In my view Nexia acquired the necessary level of control, whether one calls it the functional equivalence of control, de facto control or otherwise, in the following ways:

(i) It had the contractual right to appoint the officers and directors of Xillix pursuant to the Investment Agreement which, together with the Plan of Restructuring, obligated it to sell the remaining assets of Xillix for the benefit of its shareholders.

(ii) I do not agree with the Appellant’s position that the Investment Agreement was terminated once the Restructuring plan was completed and the duties of the receiver ended. Xillix, under amended terms of the Agreement and Restructuring plan, avoided bankruptcy and continued as an entity and was bound by the terms thereof to complete a sale to find value for its shareholders.

(iii) Although the original shareholders still held 55% of the voting shares in Xillix, later renamed, such that Nexia did not have de jure control, it is clear they had by economic necessity and an unwritten agreement, agreed to allow Nexia to take the reigns of actual control to finish the transactions that would enable them to realize something on their initial investment. As Mr. Tonken testified, they would have got nothing if they did not go along with the Investment Agreement that immersed Messrs. Tonken and Mathews via Nexia into the mix with an injection of funds that paid off remaining creditors and cleansed the corporation for sale of its tax attributes. It is also clear they did go along as the Nexia slate of officers and directors were not at any time removed until the series of transactions were near an end to make way for the nominees of Total. It was Nexia, through the efforts of Tonken and Matthews, who completed the one stated goal of the Restructuring plan, namely, to realize value for the shareholders through the sale of Xillix's tax attributes that was of economic importance to such shareholders.

(iv) The fact that the BC Supreme Court did not require the approval of the original shareholders of Nexia to approve the plan of restructuring is clear evidence those original shareholders had diminished rights by their loss from economic circumstances.

[101] Given the above circumstances, there was zero chance the original shareholders of Xillix would exercise any voting rights to remove a board of directors who had a contractual obligation to realize value from the tax attributes as well as a fiduciary one in their legal requirement to act in the best interest of those shareholders. They went along under economic necessity and were rewarded when their interests were cashed out later. As Tonken alluded to in testimony, they had no choice.

(8) Control of Transactions

[102] Having regard to my finding that Nexia had the necessary level of control of Xillix from my comments above, it follows that Nexia had complete control of the transactions in its capacity as the Seller of Biomerge tax attributes.

[103] On the other hand, it is clear to me that Total had complete control of the transactions found in the Total Conversion series as the Buyer of Biomerge tax attributes and, in my opinion, took overall control of the series from Nexia at this point. It is clear that Nexia loaned Xillix $4.4 million dollars pursuant to its convertible Debenture loan earlier reference based $0.55 for each dollar of tax attributes. Nexia and Total negotiated a price of $0.52 per dollar of those available tax attributes and the evidence showed Nexia would be losing money overall. It is also clear Nexia had borrowed funds on the security of its assets to enable it to make the Debenture loan, which borrowed funds bore an 11%

interest rate at the time and was anxious to complete the deal with Total to obtain the liquidity to pay off the borrowed funds and get the shares in Nexia released from escrow, a term of the Nexia's purchase of Cavalon's shares from Tonken (spouse) and Mathews in which the purchase price was paid by the issuance of Nexia shares to them.

[104] As mentioned above, most of the value of the shares Nexia owned in Xillix was paid in cash either through the purchase for cancellation of 100% of the non-voting shares or the bulk of the consideration for those voting shares exchanged for cash and shares in New Total. It was a condition of the Nexia/Total Agreement that Nexia enter into a Support Agreement to vote its shares in support of the Arrangement Agreement all but making it certain that the vote of the security holders of Xillix required to approve the deal with Total, which required a 2/3 majority vote of the total voting and non-voting shareholders of Biomerge voting together as a single class, would be assured given that Nexia had 80% of such securities and hence could deliver an 80% vote.

[105] Given the obvious necessity for Nexia to complete this deal and the fact it contracted to deliver the deal to Total, which would result in the Total unit holders ending up with almost all the issued securities in New Total - 99.8%, as well as require the nominees of Nexia to resign as officers and directors of Biomerge, suggests to me Total took over control of the series of transactions once the Arrangement Agreement was entered into.

[106] The Appellant's argument that the deal was still not a certainty since it was also conditional upon no more than 5% of the shareholders of either side dissenting, is simply not credible in the circumstances. As I mentioned earlier, the original shareholders of Xillix went along out of economic necessity with the Restructuring plan as their only hope to realize some value for their investment. Nexia clearly committed to supporting the deal. The likelihood that such original shareholders of Biomerge would scuttle their only hope for some sort of payout is not only highly unlikely but would be inconsistent with their conduct to date. In fact, the evidence is that only 1.6% of the non-Nexia shareholders even cast a vote so the Appellant's concerns were not only extremely remote but did not materialize.

[107] Moreover, to address the elephant in the room, it is clear to me that Total had the necessary level of control, in any event, upon entering into the Arrangement Agreement with Nexia as such agreement by it own terms

> severely restricted the rights of Biomerge shareholders. In subparagraphs 3.2(r) and (s) of that agreement, and in other provisions, Biomerge covenanted not to directly or indirectly permit a number of actions normally requiring the approval of directors and shareholders of a corporation such as making any dividend distribution, amending its constating documents, issuing, pledging, or redeeming any of its shares, reorganizing or liquidating, selling or encumbering any of its assets, acquiring any assets or liabilities and so forth; such that the shareholders and directors of Biomerge were prevented from doing essentially anything that would change it to something other than a shell of a company having tax attributes.
>
> [108] Frankly, in the real world no board of directors or officers of a corporation would risk a finding of gross negligence and breach of fiduciary duties to its shareholders by agreeing to place the profitable business and assets of their corporation into hands and control of an insolvent company. Notwithstanding the ethereal arguments the Courts seem to hear in these type of cases, the terms of agreement between such parties ensure that the Buyer retains "control", regardless of what nomenclature is given to such term - being de jure, de factor, actual, necessary level of or the functional equivalence of control - to achieve the results of acquiring the tax attributes. Nexia and Total here had all the control they needed to complete their respective transactions.

[109] At this point I would like to address the Appellant's arguments that suggest this case is distinguishable from Deans Knight because none of the Biomerge shares were purchased or acquired and because the result of new shareholders owning 99.8% of New Total was the result of the permitted exchange method in s.85.1(8) of the Act (one of the two methods Parliament enacted to permit the conversion of Income Trusts to corporations under the SIFT rules) that resulted in the dilution of the original Biomerge equity interest to the 0.2% level. Fair value was given on the exchange.

[110] In Deans Knight, the reduction in the original shareholders equity interest was diluted only by using the mechanism of an Initial Public Offering. I see no difference in the result. As the SCC determined in expressing the rationale of s.111(5), the results of the transactions are the focus, not the mechanics that achieved them. In any event, as my colleague pointed out in MP Properties at paragraph 142:

> [142]…the series of transactions in Deans Knight is not the only way that loss trading can be abusive. As I mentioned before, each case must be decided on its own facts.

[111] Here, like in Deans Knight and MP Properties, the only link between Xillix, prior to the series of transactions, and the Appellant after them, were the tax attributes in issue. The impugned transactions resulted in a total transformation of Xillix –a complete lack of the continuity of its identity- while imbuing a new entity with new shareholders to benefit from its tax attributes – a result completely contrary to spirit, object and purpose of each of s.111(5) in respect of non-capital losses, s.111(4) in respect of net-capital losses and s.37(6.1) in respect of SR&ED deductions. The Minister was therefore correct in denying the Appellant the losses and deductions in issue in this appeal using the GAAR.

[112] Looking back at the bird's eye view of the transactions I referenced at the beginning of this decision, the reality of what happened here is that a willing seller in the business of selling tax attributes of failed companies takes the reins of such a company and markets and sells them to a willing unrelated buyer for use against their income. If these are not the type of transactions Parliament sought to stop by the enactment of the loss streaming rules in s.111(5) and parallel provisions, I don't know what are. The results speak for themselves.

Abuse of SIFT Rules

[113] Having regard to my findings above, it is not necessary for me to determine whether there was an abusive avoidance of the SIFT rules but I would like to comment on some of the arguments and issues raised in the Appellant's arguments.

[114] I would like to address the argument of the Appellant at paragraph 173 of its written submissions that there is no policy in the SIFT rules "placing restrictions on the utilization of corporate tax attributes following a SIFT conversion" and at paragraph 177 where the Appellant suggests that while "there were detailed rules in subsection 111(5) that dealt with the streaming of losses for corporations there were no such rules or evident policy related to the streaming of losses of trusts". The context of these arguments is that the Appellant assumed only the Trust Conversion series were relevant to this case, which I disagreed with. However, in paragraph 225 of its argument in the context of assuming the CCAA transaction were included in the relevant series, the Appellant suggests there was no abuse of the loss streaming rules since "Total did not use the share structure of Biomerge that was put in place under Nexia's investment in Biomerge… did not purchase Nexia's shares of

Biomerge… instead exchanged their trust units for shares in Biomerge with s.85.1(8), diluting the interest of the Predecessor Biomerge Shareholders in Biomerge down in a manner reflective of relative fair market value.”; to suggest “there can be no factual abuse of the Loss Streaming Rules if the purported avoidance transaction undertaken by Total is not used in the manner contemplated”.

[115] To the extent the Appellant infers that the use of the conversion rules cannot be an avoidance transaction because the use of those rules may not have abused the purpose of those specific rules, he would be incorrect in my view for a few reasons.

[116] Firstly, this case cannot be properly characterized as a loss streaming of trusts case. The tax benefit was used by the Appellant, a corporation and hence is subject to the corporate loss streaming rules of s.111(5) of the Act and parallel provisions. In any event, the losses in issue here were not losses of the Trust that were streamed, they were of Xillix via Nexia.

[117] Secondly, the conversion of the Trust to the corporation of New Total pursuant to s.85.1(7) and (8) and s.88.1(2) of the Act, resulted in the corporation owning the shares of TESL hence creating a parent-subsidiary relationship. It was the subsidiary that operated the main businesses of the group and had the profits against which the losses and deductions in issue were later claimed. New Total itself was essentially Biomerge rebadged with new shareholders but no active business or business assets as a result. It was only the next step in the series, that of amalgamating New Total and TESL to create the Appellant, that inserted the new business and substantial business assets, operations and profits into the mix. There is no evidence New Total could have used the tax attributes at the conversion stage. This was a series of transactions as determined by me earlier, not a single trust to corporate conversion transaction under the SIFT rules.

[118] Thirdly, such a position would ignore the reach and purpose of GAAR itself. The use of a provision as per one or more of its intended purposes does not mean such use could not be considered an avoidance transaction that abused the rationale of another provision like s.111(5); particularly when the rationale of such provision reflects the foundational principles of Act described in detail in Deans Knight [See paras.84-85] to deny trading in losses between unrelated parties.

[119] The Conversion Transactions forming part of the relevant series of transactions is part of the whole transactions the Court must consider. Even if the actual Conversion Transactions using the SIFT rules exchange method were found not to be avoidance transactions, which I disagree with in this instance, the remaining

avoidance transactions are an abuse of s.111(5). As stated earlier, the Court need only find that one of the transactions in the series was an avoidance transaction. Having found an abuse of s.111(5), the fact there may or may not be an abuse of the SIFT rules does not detract from this finding.

[120] Fourthly, it must be made clear that technical compliance with any provision of the Act does not serve to prohibit a finding of abusive tax avoidance.

[121] The SCC in Deans Knight, relying on Copthorne, at paragraphs 71 and 72 stated:

> [71]… the proposition that the GAAR can have almost no role where Parliament has legislated a specific anti-avoidance rule is to read a restriction into s.245 without a basis for doing so. It ignores the fact that the GAAR was enacted in the first place partly because specific anti-avoidance rules are among those most commonly found to have been abused in GAAR decisions…
>
> [72] This Court in Copthorne largely rejected the argument that where Parliament had drafted detailed provisions, then a taxpayer that has technically complied with these provisions cannot frustrate their rationale (paras.108-11). Simply put, specific and carefully drafted provisions are not immune from abuse. As with any other provision, GAAR ensures that the rationale behind such provision is not frustrated by abusive tax strategies. (emphasis mine).

[122] Clearly, if technical compliance with specific anti-avoidance rules cannot circumvent the application of GAAR then neither can technical compliance with other provisions.

[123] Fifthly, and in any event, I disagree with the Appellant's assertion in paragraph 190 of its written argument, that "there was no clear and unambiguous policy restricting the use of a candidate's tax attributes on a SIFT conversion".

[124] As the Respondent has pointed out, Parliament's stated policy in enacting the SIFT rules was to create a level playing field between income trusts and corporations by creating an additional level of tax at the Trust level. The use of s.85.1(7) and (8) and s.88.1(2) results in what is known as the exchange method Parliament sanctioned as one of the two methods to convert an income trust to a corporation on a tax deferred basis to avoid that new tax. More specifically s.85.1(8) effects a tax free rollover of the trust units to a corporation while the subsequent wind-up of the trust into the Corporation under s.88.1(2) effects the transfer of the Trusts assets and tax attributes to the corporation. To suggest it could be used to acquire the tax attributes of an existing corporation as part of a series of transactions containing avoidance

transactions would mean that a corporation used as part of a trust conversion would have a tax advantage no other corporation would have if it acquired losses contrary to s.111(5) or parallel provisions and thus frustrate the goal of creating a “level playing field” described above.

[125] The Appellant’s argument that since the wording of the above provisions did not prohibit the acquisition of the candidate corporation’s tax attributes and that since s.256(7)(c) of the Act applies to corporations and not to income trusts in deeming acquisition of control to be acquired in a reverse takeover, then the absence of both such prohibiting language and of such a deeming rule in the context of income trusts must mean such an acquisition could not be an abusive transaction. The Appellant points to the fact it is only subsequent to the introduction of the SIFT rules that s.256(7)(c.1) was enacted applying the deeming of acquisition of control in a reverse takeover involving a trust and hence the absence of any such rule existing at the time of these transactions is further evidence it was not intended to be prohibited.

[126] Frankly, the fact s.111 was not amended to exclude income trust conversion transactions can be equally argued to mean Parliament did not intend to exclude them. Moreover, as mentioned before, s.111(5) and any parallel provisions apply to a “corporation” thus any conversion candidate would be caught by the clear wording of the provision. It was simply not necessary for Parliament to have addressed this in the SIFT Conversion rules. The fact it enacted s.256(7)(c.1) to apply the deeming rule to trust conversions serves to clarify the policy as well as provide automatic denial of such losses rather than resorting to the GAAR and thus creates greater certainty for taxpayers. Moreover, as the Respondent has pointed out, subsequent amendments to provisions do not mean the rationale of those provisions is changed [see Deans Knight at par 98] and the Supreme Court in Deans Knight had no difficulty in enunciating it’s rationale for s.111(5) without stating any such exception.

[127] I find no merit to the Appellant’s arguments and would find that the Appellant’s use of the exchange method in the facts of this case also resulted in an abuse of the rationale of the SIFT rules contrary to the GAAR.

Conclusion

[128] The appeals are dismissed on the basis of the foregoing.

[129] Costs are awarded to the Respondent. The parties shall have until March 4, 2024 to reach an agreement on costs, failing which the Respondent shall have a until April 4, 2024 to serve and file written submissions on costs and the Appellant shall have 30 days following the service of the Respondent’s submissions above to file and serve a written response. Any such submission shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing limits, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 2nd day of February 2024.

“F.J. Pizzitelli”

Pizzitelli J.

CITATION:	2024 TCC 12
COURT FILE NO.:	2016-367(IT)G
STYLE OF CAUSE:	TOTAL ENERGY SERVICES INC. AND HIS MAJESTY THE KING
PLACE OF HEARING:	Calgary Alberta Edmonton, Alberta
DATE OF HEARING:	June 20-24, 2022 & June 27-29, 2022 January 15, 2024 & January 16, 2024
REASONS FOR JUDGMENT BY:	The Honourable Justice F.J. Pizzitelli
DATE OF JUDGMENT:	February 2, 2024

APPEARANCES:

Counsel for the Appellant:	Jehad Haymour Wesley Novotny Sophie Virji Anna Lekash
Counsel for the Respondent:	Matthew Turnell Neva Beckie Alexander Wind Eric Brown

COUNSEL OF RECORD:

For the Appellant:

Name:	Jehad Haymour et al.
Firm:	Bennett Jones LLP

For the Respondent:

Shalene Curtis-Micallef
Deputy Attorney General of Canada
Ottawa, Canada