

BETWEEN:

RICHARD HOMBURG,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard November 29-30, 2023 at Halifax, Nova Scotia,
and April 24, 2024 by video conference

Before: The Honourable Justice Joanna Hill

Appearances:

Counsel for the Appellant: Brian K. Awad, K.C.

Counsel for the Respondent: Devon Peavoy

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals from reassessments made under the *Income Tax Act* for the 2005 and 2007 taxation years are dismissed, with costs awarded to the Respondent. If the parties cannot reach an agreement on costs, they shall each file written submissions not exceeding 10 pages, on or before December 12, 2025.

Signed this 30th day of October 2025.

“Joanna Hill”

Hill J.

Citation: 2025 TCC 162
Date: 20251030
Docket: 2019-3485(IT)G

BETWEEN:

RICHARD HOMBURG,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Hill J.

I. Introduction

[1] Paragraph 110(1)(d) of the *Income Tax Act* provides a 50% deduction on the taxation of employee stock options, if various conditions are met. The deduction is not available if the taxpayer and the granting company were not dealing at arm's length immediately after the stock options were granted.

[2] The Minister of National Revenue denied Mr. Homburg's claim for the deduction on the basis that this arm's length requirement was not met. Mr. Homburg appealed that decision but has failed to meet his burden to demonstrate that the Minister's reassessments were incorrect.

[3] There was insufficient evidence to support Mr. Homburg's position that two family trusts had *de jure* control of the granting company through other companies in the Homburg Group. That being said, neither the assumptions of fact nor the evidence presented at trial support the Minister's position that Mr. Homburg had *de jure* control at the relevant times.

[4] However, the evidence did establish that Mr. Homburg had a factual non-arm's length relationship with the granting company according to the factors to be considered in applying paragraph 251(1)(c) of the *Income Tax Act*. Mr. Homburg had significant control and influence through his management and indirect

ownership of the granting company through other related entities in the Homburg Group.

II. Background

[5] In 2011, the Minister reassessed Mr. Homburg for the 2005 and 2007 taxation years to tax over \$8 million in stock option benefits he received from Uni-Invest Ltd. (**Uni-Invest**) and its successor, Homburg Invest Inc. (**HII**).¹ Uni-Invest granted Mr. Homburg a stock option on October 23, 2000. HII granted Mr. Homburg stock options on February 9, 2002, and June 29, 2005. Mr. Homburg exercised the options in 2005 and 2007.

[6] By way of Consent to Judgment dated September 17, 2017, the parties agreed to settle Mr. Homburg's appeals from those reassessments to reduce the stock option benefits to just over \$1.16 million.²

[7] Unfortunately, the parties' settlement did not resolve all the related issues. Instead, the 2017 Consent to Judgment contained the following paragraph leaving the application of paragraph 110(1)(d) unresolved:

5. The Appellant waives his right to object to or appeal any reassessments that are raised by the Minister with regard to 2005 and 2007 following the issuance of an order of the court in this proceeding, with the exception that the Appellant may challenge the correctness of the Minister's calculation of tax and interest payable by the Appellant, including the application of paragraph 110(1)(d) of the *Income Tax Act* and any other deductions, refunds or deferrals available to the Appellant under Canadian law. [emphasis added]

[8] In the subsequent reassessments, the Minister did not apply paragraph 110(1)(d) to reduce Mr. Homburg's taxable income for the 2005 and 2007 taxation years, and that provision is now at issue in this appeal.

A. The appeal

[9] Mr. Homburg's Notice of Appeal does not state that he had an arm's length relationship with HII or contain any material facts in this regard. Instead, the

¹ Although the parties only referred to the company as HII, I have made the distinction throughout these reasons because of the analysis required for the three separate time periods at issue.

² Court file No. 2014-3872(IT)G. By Order dated September 25, 2017, the Court allowed the appeal and referred the matter back to the Minister of National Revenue for reconsideration and reassessment in accordance with the Consent to Judgment.

pleading generally asserts that Mr. Homburg is eligible for the deduction under paragraph 110(1)(d).

[10] At trial, Mr. Homburg's counsel clarified that only the arm's length requirement is at issue. In his written and oral submissions, Mr. Homburg's counsel argued that Mr. Homburg did not have *de jure* control of HII because he transferred his assets to two family trusts, and that the Respondent otherwise failed to establish that Mr. Homburg had *de facto* control.

[11] Mr. Homburg testified in support of his appeal, along with Michael O'Hara, former in-house counsel for HII, and Don Wijismuller, trustee of the family trusts established by Mr. Homburg. Their evidence was unreliable and incomplete for a number of reasons.

[12] Mr. Homburg's oral testimony was unsupported and vague. While I appreciate that a significant amount of time has passed, it was apparent that Mr. Homburg did not adequately prepare for the hearing. He was not familiar with the limited documentary evidence and provided vague self-serving answers to downplay his role within HII and the Homburg Group. Mr. O'Hara was in-house counsel and corporate secretary for HII, but he did not have direct knowledge of relevant events or corporate documents because they pre-dated his employment with the company. Mr. Wijismuller had direct knowledge of the creation and maintenance of the family trusts Mr. Homburg established with Whitmill Trust Company Limited, but he was unable to provide detailed information regarding the assets held in the trusts.

[13] Furthermore, despite the complex nature of the various holdings within the Homburg Group of companies, Mr. Homburg relied on fewer than 25 documents. None of the documents provided a complete picture of the ownership or operation of Uni-Invest or HII during the relevant time periods.

B. Background

[14] Mr. Homburg was the founder of the Homburg Group of companies,³ which included operating, holding, and management companies in North America and Europe. The group included Uni-Invest and HII.

³ Transcript for November 30, 2023, page 64.

[15] Uni-Invest became a publicly listed company after a share exchange transaction that became effective on October 23, 2000.⁴ On that same day, Uni-Invest granted Mr. Homburg a stock option for 487,811 common shares.

[16] Through its subsidiaries, Uni-Invest owned and operated commercial, retail and residential real estate in British Columbia, Alberta, New Brunswick, Nova Scotia, and Prince Edward Island.⁵

[17] In January 2001, Uni-Invest changed its name and became HII.⁶

[18] HII acquired and operated its real estate portfolio through other companies in the Homburg Group, including holding companies, limited partnerships, and a management company.⁷

[19] HII granted Mr. Homburg additional stock options of 1,234,689 common shares on February 9, 2002, and 574,627 Class A shares on June 29, 2005.

[20] By 2006, HII owned a diverse portfolio of real estate, including office, retail, industrial, and residential apartment and townhouse properties throughout Canada, the United States, and Europe.⁸

III. Analysis

[21] The sole issue in this appeal is whether Mr. Homburg had an arm's length relationship with Uni-Invest and HII after the company granted him the stock options referred to above.

[22] Further to subsection 7(1) of the *Income Tax Act* and the 2017 Consent to Judgment, Mr. Homburg was taxed on the benefits received when he exercised the stock options in the 2005 and 2007 taxation years.

⁴ Uni-Invest Ltd. Material Change Report, dated November 2, 2000 (**Uni-Invest Material Change Report**), Exhibit A-2, Tab 1. Prior to the share exchange, Uni-Invest was Basic Realty Investment Corporation.

⁵ Uni-Invest Material Change Report, page 2.

⁶ Homburg Invest Inc. Press Release, dated January 11, 2001, Exhibit A-2, Tab 5.

⁷ Homburg Invest Inc. Material Change Report (**HII Material Change Report**) with attached Prospectus (**Prospectus**), dated June 12, 2006, page 3, Exhibit R-2, Tab 2.

⁸ Prospectus, page 3.

[23] Paragraph 110(1)(d) of the *Income Tax Act* provides a 50% reduction, effectively taxing the benefit at the same rate as capital gains.⁹ This significant reduction is only available where specific, detailed criteria are met. In the present case, the arm's length criterion is at issue.¹⁰

[24] Mr. Homburg will be entitled to the deduction if he was dealing at arm's length with Uni-Invest and HII "at the time immediately after"¹¹ the stock options were granted on October 23, 2000, February 9, 2002, and June 29, 2005.

[25] Subsections 251(1) to (6) define "dealing at arm's length" for the purpose of the *Income Tax Act*.

[26] The first question is whether Mr. Homburg and the company were related further to paragraphs 251(1)(a) and 251(2)(b), on the basis that he had *de jure* control either individually or as part of a related group. The test for *de jure* control is whether Mr. Homburg had majority voting control of the company, i.e., ownership of sufficient shares to elect the board of directors.¹²

[27] If Mr. Homburg did not have *de jure* control, then it is necessary to consider whether there was a factual arm's length relationship under paragraph 251(1)(c).¹³ That provision broadly states that "it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length".

[28] In *Keybrand*, the Federal Court of Appeal confirmed that the analysis required under paragraph 251(1)(c) considers various factors, including whether (a) there was a common mind directing the bargaining for both parties, (b) parties were acting in concert without separate interests, and (c) one party exercised *de facto* control over the other.¹⁴

⁹ *Mathieu v HMTQ*, 2014 TCC 207, para 19. *Montminy v HMTQ*, 2016 TCC 110, para 44.

¹⁰ The arm's length requirement is found in clause 110(1)(d)(ii)(B).

¹¹ *Ibid.*

¹² *Silicon Graphics Limited v HMTQ*, 2002 FCA 260, para 21 (***Silicon Graphics***).

¹³ *HMTQ v Ellen Remai, as Executrix of the Estate of Frank Remai*, 2009 FCA 340, para 28 (***Remai Estate***).

¹⁴ *Keybrand Foods Inc. v HMTQ*, 2020 FCA 201, para 50 (***Keybrand***).

[29] The analysis therefore includes but is not limited to *de facto* control. As outlined in *Silicon Graphics*, the traditional *de facto* control test is similar to the *de jure* control test in that it focuses on control of the board of directors:¹⁵

[66] The case law suggests that in determining whether *de facto* control exists it is necessary to examine external agreements (*Duha Printers*, *supra* at 825); shareholder resolutions (*Société Foncière d'Investissement Inc. v. Canada*, [1996] T.C.J. No. 1568, para. 10 (T.C.C.)); and whether any party can change the board of directors or whether any shareholders' agreement gives any party the ability to influence the composition of the board of directors (*International Mercantile Factors Ltd. v. The Queen* (1990), 90 DTC 6390 at 6399 (F.C.T.D.), *aff'd* (1994), 94 DTC 6365 (F.C.A.); and *Multiview Inc. v. The Queen* (1997), 97 DTC 1489 at 1492-93 (T.C.C.)).

[67] It is therefore my view that in order for there to be a finding of *de facto* control, a person or group of persons must have the clear right and ability to effect a significant change in the board of directors or the powers of the board of directors or to influence in a very direct way the shareholders who would otherwise have the ability to elect the board of directors.

[30] Mr. Homburg referred to this *Silicon Graphics de facto* control test instead of the broader analysis required under paragraph 251(1)(c). This error was the basis for Mr. Homburg's argument regarding the Minister's assumptions of fact and the burden of proof.

A. Assumptions and burden

[31] Mr. Homburg argued that the Minister's assumptions only supported a position of *de jure* control and that the Minister therefore had the burden of proof to establish *de facto* control.¹⁶ This argument cannot succeed because it does not accurately reflect the basis for the reassessments as stated in the Reply to the Notice of Appeal.

[32] The Reply clearly states the Minister's position that "[a]t no time was the Appellant dealing at arm's length with HII."¹⁷ The Reply contains six assumptions of fact in support of this position:¹⁸

¹⁵ *Silicon Graphics*, paras 66-67.

¹⁶ Appellant's Written Submissions, para 22. Appellant's Reply Submissions, paras 8-10.

¹⁷ Reply, para 21.

¹⁸ Reply, para 16.

Appellant's Relation to HII

m) In October 2000, the Appellant was elected President and CEO of HII, elected to the Board of Directors of HII, and elected as Chairman of the Board of Directors of HII;

n) At all relevant times the Appellant was the Chairman of the Board of Directors, President and CEO, and controlling shareholder of HII;

o) The Appellant's employment as Chairman of the Board of Directors of HII were exercised in Canada;

p) The Appellant's employment as President and CEO of HII were exercised in Canada;

q) The Appellant indirectly controls other companies within the Homburg Group of companies, including Homburg North America Limited, Homburg Uni-Corp Incorporated and Homburg Canada Incorporated;

r) These companies and the Appellant together own, on average, 55% of the issued and outstanding voting shares of HII, representing 74.52% of voting control;

[33] While the assumptions are limited, they do not solely refer to *de jure* or "voting control".¹⁹ The assumptions also broadly indicate that Mr. Homburg had a factual non-arm's length relationship with HII as its controlling shareholder, Chairman of the Board of Directors, President, and CEO, and through his indirect control of other companies within the Homburg Group. Further to established case law, the assumptions do not contain legal conclusions referring to *de jure* control or non-arm's length relationships.²⁰

[34] I therefore cannot accept Mr. Homburg's argument that the Respondent relied on a new or alternate theory of the case in this regard.

[35] I agree that the Reply does not refer to paragraph 251(1)(c) of the *Income Tax Act*. Indeed, it does not refer to section 251 at all. However, neither does the Notice of Appeal. As noted above, the Notice of Appeal also does not refer to the arm's length requirement in paragraph 110(1)(d).

[36] Mr. Homburg cannot claim unfairness or surprise in this regard. This is a General Procedure appeal with pre-trial steps that would have provided

¹⁹ Appellant's Reply Submissions.

²⁰ See for example, *HMTK v Preston*, 2023 FCA 178.

Mr. Homburg with the opportunity to confirm the Respondent's legal and factual position, if there had been any uncertainty arising from the Reply.

[37] There is no new argument that would result in a shift in the burden of proof. There is no indication that the reassessments were based solely on the position that Mr. Homburg had *de jure* control of HII.²¹ The Minister's position is more broadly stated to encompass different arm's length tests.

[38] Fundamentally, Mr. Homburg's position ignores the longstanding principle that he has the ultimate, persuasive burden to establish that the reassessments were incorrect,²² specifically that the Minister erred in concluding that he was not at arm's length with Uni-Invest and HII. As confirmed by this Court in *Damis Properties*, even if the Minister's assumptions are lacking, "the burden of proof remains on the taxpayer because the taxpayer is appealing the correctness of the assessment of tax."²³

[39] As outlined in further detail below, there were flaws in both parties' factual positions. On the one hand, the limited, broad assumptions of fact stated in the Reply cast doubt on whether there was a sufficient basis for the reassessments.²⁴

[40] On the other hand, Mr. Homburg's failure to rely on proper documentary evidence or testimony from knowledgeable sources casts doubt on whether such evidence would have established that the reassessments are incorrect. Mr. Homburg stated that relevant corporate records are in the custody of a monitor appointed by the Quebec Superior Court in 2001,²⁵ but he made no mention of any unsuccessful attempts to obtain them for the purpose of this appeal. I agree with the Respondent that a negative inference is appropriate for corporate documents that Mr. Homburg failed to request from third parties.

[41] By necessity, my conclusions are based on the limited, reliable evidence in the record before me. Further to this Court's analysis in *Damis Properties*, the burden of proof was a tie-breaking mechanism that weighed in the Respondent's

²¹ Mr. Homburg's counsel did not suggest that he was basing this argument on statements made by the Minister during the audit or in response to the Notice of Objection.

²² *Morrison v HMTQ*, 2018 TCC 220, paras 79-83.

²³ *Damis Properties Inc. v HMTQ*, 2021 TCC 24, para 246 (*Damis Properties*).

²⁴ Although Mr. Homburg did not take this position, a taxpayer may argue that even if the assumed facts are true, they do not justify the assessment as a matter of law (*HMTQ v Loewen*, 2004 FCA 146, para 8).

²⁵ Appellant's Written Submissions, para 52.

favour.²⁶ Mr. Homburg was in the best position to establish that he was at arm's length with Uni-Invest and HII, but he failed to lead sufficient evidence in this regard.

B. *De jure* control

[42] The *de jure* control test recognizes that the majority shareholder, not the directors, has effective control of a corporation.²⁷ Legal sources, such as the corporation's share register, articles of incorporation and by-laws, establish who has *de jure* control.²⁸

[43] These key documents for Uni-Invest and HII were not evidence in the present appeal.

[44] Instead, the parties relied on a few corporate documents that had summaries of the shareholdings. Mr. Homburg put excerpts of information circulars issued by the company into evidence, even though the complete documents continue to be publicly available. Those documents generally outline that various corporations within the Homburg Group were majority shareholders of Uni-Invest and HII.

(a) ownership immediately after October 23, 2000

[45] Uni-Invest's Material Change Report lists seven shareholders: Uni-Invest N.V., a Dutch public company; Homburg Euro Inc., a Nova Scotia company resident in the Netherlands; two private Dutch companies; two private Alberta companies; and an individual residing in Alberta.²⁹ Uni-Invest N.V. was the majority, controlling shareholder with 50.5% of the issued and outstanding equity shares, while Homburg Euro Inc. held 21.3%. The Uni-Invest Material Change Report contained a general statement that Mr. Homburg controlled Homburg Euro Inc., as well as 7% of the common shares and 100% of the priority shares of Uni-Invest N.V.

(b) ownership immediately after February 9, 2002

[46] In its 2002 Information Circular, HII reported that, as of March 18, 2002, Uni-Invest N.V. continued to be the largest shareholder with 49.29% of the shares, while

²⁶ *Damis Properties*, para 251.

²⁷ *Silicon Graphics*, para 26.

²⁸ *Silicon Graphics*, para 29.

²⁹ Uni-Invest Material Change Report, page 2.

Homburg Euro Inc. had 14.48%.³⁰ The 2002 Information Circular includes a footnote generally stating that Mr. Homburg indirectly controlled Uni-Invest N.V. and Homburg Euro Inc. through companies controlled by him for the benefit of his family.

(c) ownership immediately after June 29, 2005

[47] Although the timing of subsequent information circulars does not directly coincide with the period immediately after the company granted Mr. Homburg stock options on June 29, 2005, the majority shareholders remained the same in the period before and after that date.

[48] HII's 2005 Information Circular provides a snapshot as of February 15, 2005.³¹ Homburg North America Limited was the largest shareholder with 41.79% of the outstanding common shares, while Homburg Uni-Corp Incorporated had 17.71% and Hombak Holdings Ltd. had 20.50%. According to HII's 2006 Information Circular, those three companies were still the largest shareholders as of May 8, 2006.³²

[49] The 2005 and 2006 Information Circulars include footnotes generally stating that Mr. Homburg indirectly controlled Homburg North America Limited and Homburg Uni-Corp Incorporated through companies he controlled for the benefit of his family.³³ In turn, those companies indirectly owned 100% of Homburg North America Limited and Homburg Uni-Corp Incorporated.

[50] Both parties used the statements in these documents as the starting points for their analysis with respect to *de jure* control. The Respondent argued that Mr. Homburg had indirect voting control of HII's major shareholders. Mr. Homburg argued that he transferred his indirect voting control to family trusts.

³⁰ Excerpt from Homburg Invest Inc. Information Circular for the Annual General and Special Meeting of Shareholders to be held on April 26, 2002, Exhibit A-2, Tab 6, page 3 (**2002 Information Circular**).

³¹ Excerpt from Homburg Invest Inc. Notice of Annual General and Special Meeting of Shareholders to be held on April 1, 2005 and Information Circular, dated February 10, 2005, Exhibit A-2, Tab 14, page 3 (**2005 Information Circular**).

³² Excerpt from Homburg Invest Inc. Notice of Annual General and Special Meeting of Shareholders to be held on June 9, 2006 and Information Circular, dated May 5, 2006, Exhibit A-2, Tab 15, page 4 (**2006 Information Circular**).

³³ 2005 Information Circular, page 3. 2006 Information Circular, page 4.

[51] Neither party provided a sufficient basis to support their arguments.

1. Insufficient evidence regarding assets held in the family trusts

[52] Mr. Homburg argued that he did not have *de jure* control through the majority shareholder companies because the phrase “for the benefit of his family” contained in the Information Circular footnotes referred to two family trusts. He argued that the evidence supports a finding that the family trusts owned the company that controlled HII’s majority shareholders.

[53] This argument cannot succeed because of a lack of evidence. Mr. Wijismuller’s evidence was incomplete because he did not have sufficient documentation to establish the assets held in the family trusts. As the owner of Whitmill Trust Company Limited, the United Kingdom company that created and administers the family trusts, he should have been able to provide more relevant information or documents that should have been in the trust files maintained by his company. There was similarly insufficient evidence to trace the ownership of Uni-Invest or HII through the various companies in the Homburg Group during the relevant periods at issue.

[54] The family trusts were established on March 28, 1997, with Mr. Homburg as settlor and the Whitmill Trust Company Limited as trustee.³⁴ The beneficiaries of the Canadian Trust were Mr. Homburg’s first spouse and their two children.³⁵ The beneficiaries of the Netherlands Trust were Mr. Homburg’s second spouse and their daughter, as well as Mr. Homburg’s cousin.³⁶ The original trust property for each trust was 100 Dutch guilders.³⁷

[55] Mr. Homburg relied on notes in the trust account statements for the periods from March 28, 1997, to December 31, 1998, and for the December 31, 2005 year end, stating that each trust held an investment of a 50% holding in Homburg Uni-

³⁴ Instrument of trust known as “The Homburg CDN Trust”, dated March 28, 1997, Exhibit A-3, Tab 1 (**Canadian Trust**). Instrument of trust known as “The Homburg NL Trust”, dated March 28, 1997, Exhibit A-3, Tab 2 (**Netherlands Trust**).

³⁵ Canadian Trust, clause C2.

³⁶ Netherlands Trust, clause C2.

³⁷ Canadian Trust, clause C1, and Netherlands Trust, clause C1.

Corp Holding B.V., a company that held 100% of Homburg Uni-Corp Incorporated.³⁸

[56] Mr. Homburg was unable to provide additional evidence to confirm that the information contained in the notes was accurate.³⁹ Objective corroborating evidence was required because the notes contain broad statements presumably based on information provided to the trustee. The source documentation would have assisted the Court in determining whether the family trusts owned Homburg Uni-Corp Holding B.V.⁴⁰

[57] Mr. Homburg also did not have evidence to confirm that Homburg Uni-Corp Holding B.V. in turn owned Homburg Uni-Corp Incorporated. The last shareholder entry in the Homburg Uni-Corp Incorporated Shareholders' Register is dated November 21, 1994, and lists Homburg/Dover Holdings B.V. as the sole shareholder.⁴¹ Mr. O'Hara testified that Homburg/Dover Holdings B.V. subsequently changed its name to Homburg Uni-Corp Holdings B.V., but he did not have that corporate record. In any event, Mr. O'Hara also did not have direct knowledge of the corporate events when the trusts were created because he was not employed by HII until 2009.

[58] Mr. Homburg did not have evidence to establish ownership of the company's major shareholders for all three relevant time periods, namely (a) Homburg Euro Inc. or Uni-Invest N.V., for the periods after October 23, 2000, and February 9, 2002, or (b) Homburg North America Limited, Homburg Uni-Corp Incorporated, and Hombak Holdings Ltd., for the period after June 29, 2005.

[59] For example, Mr. Homburg did not have any records to establish the ownership of Uni-Invest N.V., and the purported share register for Homburg Uni-Corp Incorporated for the relevant time period was created on an unknown date for

³⁸ The Homburg CDN Trust, Trust Accounts for the Period from 28 March 1997 to 31 December 1998, Exhibit A-3, Tab 3; The Homburg CDN Trust, Trust Accounts for the Year Ended 31 December 2005, Exhibit A-3, Tab 4; The Homburg NL Trust, Trust Accounts for the Period from 28 March 1997 to 31 December 1998, Exhibit A-3, Tab 5; and The Homburg NL Trust, Trust Accounts for the Year Ended 31 December 2005, Exhibit A-3, Tab 6.

³⁹ I allowed the Respondent's objection to the document listed as "Homburg Uni-Corp Holdings B.V. – Register of Shareholders" in Mr. Homburg's Book of Documents being admitted into evidence on the basis that it was a Dutch document without a certified translation.

⁴⁰ The information contained in the notes was problematic because the values of the investment did not change between December 31, 1998, and December 31, 2005.

⁴¹ Homburg Uni-Corp Incorporated Shareholders' Register, Exhibit A-2, Tab 3.

Windmark Holdings Limited with four corporate name changes between June 8, 2007, and March 2, 2018.⁴²

[60] I agree with the Respondent's argument that Mr. Homburg relied on documents that are incomplete and do not present a complete picture of the ownership of the relevant Homburg Group companies between 2000 and 2005.⁴³

[61] Ultimately, Mr. Homburg was unable to accurately trace ownership from the family trusts through the various companies in the Homburg Group to Uni-Invest and HII for the three periods at issue.⁴⁴ *De jure* control cannot be inferred from notes, summaries, or incomplete share registers.

2. The Minister's assumptions do not support *de jure* control

[62] The above analysis also reveals the weaknesses in the Respondent's position. The Minister's assumptions regarding *de jure* control have either been effectively demolished through the evidence in the record or are clearly insufficient to support the Minister's position in this regard.

[63] Although Mr. Homburg did not make this specific argument, I cannot ignore what is clear from the record.

[64] As a reminder, the Minister relied on six assumptions of fact regarding Mr. Homburg's relationship with HII, three of which relate to *de jure* control:

n) At all relevant times the Appellant was the Chairman of the Board of Directors, President and CEO, and controlling shareholder of HII;

...

q) The Appellant indirectly controls other companies within the Homburg Group of companies, including Homburg North America Limited, Homburg Uni-Corp Incorporated and Homburg Canada Incorporated;

⁴² Windmark Holdings Limited Register of Common Shareholders, Exhibit A-2, Tab 3.

⁴³ Respondent's Written Submissions, paras 27-34.

⁴⁴ As a result, it is not necessary to consider whether Mr. Homburg (a) was still related to Uni-Invest and HII because of his relationship with the beneficiaries of the family trusts, pursuant to paragraph 251(1)(b) of the *Income Tax Act*, or (b) was required to lead evidence of the foreign law that governed how the family trusts operated.

r) These companies and the Appellant together own, on average, 55% of the issued and outstanding voting shares of HII, representing 74.52% of voting control;

[65] The assumption that Mr. Homburg was the “controlling shareholder of HII” is inaccurate because it implies that he personally held a sufficient number of shares of the company. The evidence relied on by both parties indicates that his direct ownership was minimal, even with the stock options granted to him.

[66] The remaining two assumptions lack sufficient detail because of the convoluted nature of the ownership and shareholdings within the Homburg Group. The assumptions do not contain a clear statement of the company’s major shareholders in 2000, 2002, and 2005, or trace their ownership to Mr. Homburg. For example, the assumptions do not state that Mr. Homburg controlled Uni-Invest N.V. or Homburg Euro Inc., the two main shareholders in 2000 and 2002.

[67] Notably, two of these assumptions are incomplete versions of footnotes from the 2006 Information Circular:

Assumption	Footnote⁴⁵
q) The Appellant indirectly controls other companies within the Homburg Group of companies, including Homburg North America Limited, Homburg Uni-Corp Incorporated and Homburg Canada Incorporated;	(1) Mr. Homburg, a director, Chairman of the Board of Directors and Chief Executive Officer, indirectly controls Homburg North America Limited, Homburg Uni-Corp Incorporated and Homburg Canada Incorporated through companies controlled by Mr. Homburg for the benefit of his family, which companies indirectly own 100% of the Common Shares of Homburg North America Limited, Homburg Uni-Corp Incorporated and Homburg Canada Incorporated.
r) These companies and the Appellant together own, on average, 55% of the issued and outstanding voting shares of	(3) Homburg North America Limited, Homburg Uni-Corp Incorporated, Homburg Canada Incorporated, Hombak Holdings Ltd, and Richard Homburg own, in aggregate 55.25% of

⁴⁵ 2006 Information Circular, page 4.

HII, representing 74.52% of voting control;	the issue and outstanding Voting Shares of the Corporation representing 74.52% of voting control.
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[68] The absence of more detailed assumptions is not always fatal because the Respondent may rely on evidence in the record, including from cross-examination of witnesses and an appellant's documents.⁴⁶ However, the evidence required to establish *de jure* control was not before the Court. Footnotes containing general statements are not sufficient. The Respondent's position cannot be saved by the same incomplete documents that were fatal to Mr. Homburg's argument.

[69] It is therefore necessary to determine whether Mr. Homburg had a factual arm's length relationship with Uni-Invest and HII.

[70] The Minister's limited assumptions also were insufficient to support the reassessments on the basis that Mr. Homburg did not have a factual arm's length relationship under paragraph 251(1)(c). However, the evidence in the record compensated for those deficiencies.

C. Factual non-arm's length relationship

[71] The test typically applied to determine whether there is a factual arm's length relationship under paragraph 251(1)(c) dates back to the 1991 *Peter Cundill* decision.⁴⁷ As stated above, courts consider whether (a) there was a common mind directing the bargaining for both parties, (b) parties were acting in concert without separate interests, and (c) one party exercised *de facto* control over the other.

[72] The *Peter Cundill* test is not exhaustive; not all the factors will be satisfied in every case, and some may assume particular importance in some instances.⁴⁸ Each case will depend on its own facts.⁴⁹

⁴⁶ *Jefferson v HMTQ*, 2022 FCA 81, para 28.

⁴⁷ *Peter Cundill & Associates Limited v HMTQ*, 91 DTC 5543 (FCA). As confirmed by the Supreme Court of Canada in *Canada v McLarty*, 2008 SCC 26, para 62 (**McLarty**) and the Federal Court of Appeal in *Keybrand*, para 50.

⁴⁸ *Remai Estate*, para 32.

⁴⁹ *McLarty*, para 62.

[73] The factors to be considered in each case also depend on the “particular time” at issue under the section of the *Income Tax Act* that requires the determination.⁵⁰ In this case, paragraph 110(1)(d) refers to “the time immediately after” the stock options were issued and not any particular transaction. As a result, factors related to bargaining positions, negotiations, or ordinary commercial transactions are not relevant.

[74] That being said, the conclusions reached by the trial judge in *Peter Cundill* are applicable in the present case.⁵¹ As outlined in further detail below, Mr. Homburg exercised influence and control over the affairs and future of HII that was disproportionate to his personal shareholding. The financial well-being of the company was directly dependent upon him.

[75] Moreover, while the evidence was not sufficient to establish the exact shareholdings for the purpose of the *de jure* test, the documents issued by HII repeatedly and specifically state that Mr. Homburg had indirect control of the company through his shareholdings of other companies within the Homburg Group.

[76] Mr. Homburg may not have been in *complete* control of HII, but the factual arm’s length test does not require that level of control. Indeed, considering the size of HII and the Homburg Group as a whole, complete control is too high of a standard to apply in the present case.

[77] Although the factual arm’s length analysis requires consideration of the relationship between Mr. Homburg and the company immediately after the three stock option grants, there is no meaningful difference in the relationship between 2000 and 2006. Mr. Homburg’s level of control and influence was consistent throughout. As recently stated by the Federal Court of Appeal, while the initial focus is whether there was an arm’s length relationship at those particular times, all relevant circumstances must be considered.⁵² Facts that bear on the relationship at those times, including those that occurred before and after, cannot be ignored.

1. The factual non-arm’s length relationship with Uni-Invest

[78] While the evidence in this regard is limited, the Uni-Invest Material Change Report is dated November 2, 2000, immediately after the first stock option was

⁵⁰ *Keybrand*, para 35.

⁵¹ *Peter Cundill & Associates Ltd. v HMTQ*, [1991] FCJ No 21 (FCTD), para 30.

⁵² *HMTK v Microbjo Properties Inc.*, 2023 FCA 157, para 61.

granted on October 23, 2000.⁵³ It lists Uni-Invest's seven shareholders and states that Mr. Homburg controlled the two major shareholders, Homburg Euro Inc. and Uni-Invest N.V.⁵⁴ Homburg Euro Inc. had approximately 21.3% of the issued and outstanding equity shares, and Uni-Invest N.V. had approximately 50.5%.

[79] The Uni-Invest Material Change Report therefore outlines that Mr Homburg indirectly controlled over 70% of the company. It also outlines that Mr. Homburg was appointed as Director, Chairman, Chief Executive Officer, and President of Uni-Invest, on the same day the stock option was granted.⁵⁵

[80] There is no basis to doubt the veracity of the statement regarding Mr. Homburg's control of and involvement in the company. The Uni-Invest Material Change Report was filed by Uni-Invest's Chief Financial Officer further to Alberta and British Columbia securities legislation and ends with the following statement:⁵⁶

IT IS AN OFFENCE UNDER THE SECURITIES ACT AND THE SECURITIES REGULATION FOR A PERSON OR COMPANY TO MAKE A STATEMENT IN A DOCUMENT REQUIRED TO BE FILED OR FURNISHED UNDER THE ACT OR THE REGULATION THAT, AT THE TIME AND IN THE LIGHT OF THE CIRCUMSTANCES UNDER WHICH IT IS MADE, IS A MISREPRESENTATION. [emphasis in original]

[81] I am therefore satisfied, on a balance of probabilities, that Mr. Homburg was the common, directing mind with significant influence and control over Uni-Invest, immediately after the stock option was granted on October 23, 2000.

[82] I am also satisfied that this relationship continued throughout 2002 and beyond 2005.

2. The factual non-arm's length relationship with HII

[83] There is more detailed evidence that Mr. Homburg had a factual non-arm's length relationship with HII immediately after February 9, 2002, and June 29, 2005. Information circulars issued by HII to its shareholders between 2001 and 2006 outline Mr. Homburg's continued influence and control. The historical information

⁵³ Uni-Invest Material Change Report, page 3.

⁵⁴ Uni-Invest Material Change Report, page 2.

⁵⁵ *Ibid.*

⁵⁶ Uni-Invest Material Change Report, page 3.

in a prospectus issued by the company on June 12, 2006 further confirms that non-arm's length relationship. The main considerations are as follows.

[84] First, Mr. Homburg continued as Director, Chairman, Chief Executive Officer and President of HII.

[85] Second, the company continued to publicly state that Mr. Homburg indirectly controlled HII through other companies.

[86] As of March 18, 2002, Uni-Invest N.V. held 49.29% of HII's common shares and Homburg Euro Inc. held 14.48%.⁵⁷ The 2002 Information Circular contained the following footnote outlining Mr. Homburg's controlling relationship with those two major shareholders.⁵⁸

Richard Homburg indirectly controls Uni-Invest N.V., a widely held public Dutch real estate company traded on the Amsterdam Exchange (AEX – UYVN.AS) through companies controlled by Mr. Homburg for the benefit of his family, which companies indirectly own over 7% of the common shares of Uni-Invest N.V. and 100% of the priority shares of Uni-Invest N.V. The priority shares of Uni-Invest N.V. have special rights including the right to appoint the Board of Management of Uni-Invest N.V., which manages the company, subject to the general direction of the Supervisory Board. The Supervisory Board is appointed by the common shareholders at its annual general meeting. Upon the exercise of all options and warrants directly and indirectly controlled by Mr. Homburg, he would control up to approximately 32.9% of the common shares of Uni-Invest N.V. Mr. Homburg also indirectly controls Homburg Euro Inc. through companies controlled by Mr. Homburg for the benefit of his family, which companies indirectly own 100% of the common shares of Homburg Euro Inc. Uni-Invest N.V. and Homburg Euro Inc. own, in aggregate, approximately 63.77% of the Corporation.

[87] While HII's major shareholders changed somewhat over the next few years, Mr. Homburg's indirect control did not.

[88] The 2005 Information Circular lists the major shareholders of HII as of February 15, 2005, a few months prior to the last stock option grant, as follows:⁵⁹

- Homburg North America Limited – 41.79%

⁵⁷ 2002 Information Circular, page 3.

⁵⁸ *Ibid.*

⁵⁹ 2005 Information Circular, page 3.

- Homburg Uni-Corp Incorporated – 17.71%
- Hombak Holdings Ltd. – 20.50%

[89] The 2005 Information Circular contains footnotes outlining Mr. Homburg's indirect control of those shareholders:⁶⁰

- (1) Mr. Homburg indirectly controls Homburg North America Limited, Homburg Uni-Corp Incorporated and Homburg Canada Incorporated through companies controlled by Mr. Homburg for the benefit of his family, which companies indirectly own 100% of the common shares of Homburg North America Limited, Homburg Uni-Corp Incorporated and Homburg Canada Incorporated.
- (2) Mr. Homburg and Mr. Rudolf Bakhuzen, a Director of the Corporation, each directly or indirectly control 50% of the voting preference shares of Hombak Holdings Ltd. and 46.38% and 53.62% respectively of the non-voting common shares.

[90] The 2006 Information Circular lists the company's majority shareholders as of May 8, 2006.⁶¹ By that time, HII began issuing Class A and Class B voting shares, with the former having one vote per share and the latter having 25 votes per share.⁶² The same three companies still owned or controlled more than 10% of HII's voting shares.⁶³

Name	Class A Percentage	Class B Percentage
Homburg North America Limited	22.79%	39.65%
Homburg Uni-Corp Incorporated	9.66%	16.81%
Hombak Holdings Ltd.	11.18%	19.45%

⁶⁰ *Ibid.*

⁶¹ 2006 Information Circular, page 4.

⁶² 2006 Information Circular, page 3.

⁶³ 2006 Information Circular, page 4.

[91] Footnotes in the 2006 Information Circular describe Mr. Homburg's indirect control of those shareholders as follows:⁶⁴

- (1) Mr. Homburg, a director, Chairman of the Board of Directors and Chief Executive Officer, indirectly controls Homburg North America Limited, Homburg Uni-Corp Incorporated and Homburg Canada Incorporated through companies controlled by Mr. Homburg for the benefit of his family, which companies indirectly own 100% of the Common Shares of Homburg North America Limited, Homburg Uni-Corp Incorporated and Homburg Canada Incorporated.
- (2) Mr. Homburg and Mr. Rudolf Bakhuizen, a Director of the Corporation, each directly or indirectly control 50% of the voting preference shares of Hombak Holdings Ltd. and 46.38% and 53.62% respectively of the non-voting Common Shares.
- (3) Homburg North America Limited, Homburg Uni-Corp Incorporated, Homburg Canada Incorporated, Hombak Holdings Ltd, and Richard Homburg own, in aggregate 55.25% of the issue and outstanding Voting Shares of the Corporation representing 74.52% of voting control.

[92] Third, the 2006 Prospectus for the public offer of Class A shares to investors in the Netherlands and outside Canada provides important background information regarding HII,⁶⁵ as well as detailed information regarding Mr. Homburg's influence and control through other related entities. The following information is particularly relevant for the periods between 2002 and 2005.

[93] HII expanded from being predominantly Canadian-oriented in 2003 to being an international diversified enterprise with activities in the United States and investments in Germany and the Netherlands.⁶⁶ The company owned a diverse portfolio of real estate, the vast majority through special purpose limited partnerships.⁶⁷ The general partner for each limited partnership was Homburg LP Management Incorporated. Homburg LP Management Incorporated had property and asset management agreements with Homburg Canada Incorporated on behalf of each limited partnership. Homburg Canada Incorporated was a Canadian real estate management company that managed all of HII's assets.⁶⁸

⁶⁴ *Ibid.*

⁶⁵ Mr. Homburg failed to discuss this corporate history and structure in his direct testimony and sidestepped questions on cross-examination in this regard.

⁶⁶ Prospectus, page 33.

⁶⁷ Prospectus, page 3.

⁶⁸ Prospectus, page 48.

[94] The Prospectus states that Mr. Homburg directly and indirectly controlled Homburg LP Management Incorporated and Homburg Canada Incorporated.⁶⁹ It further outlines that Homburg Canada Incorporated was a wholly owned subsidiary of Homburg Uni-Corp Incorporated, a Canadian company directly and indirectly controlled by Mr. Homburg.⁷⁰

[95] Mr. Homburg also was the Chairman and member of the Board of Management of Homburg Canada Incorporated, and the Chairman of Homburg Uni-Corp Incorporated.⁷¹

[96] The Prospectus further confirms the management of HII. The fundamental elements of the role of the Board of Directors were decision-making and operations oversight.⁷² The executive committee, as a sub-committee of the Board of Directors, was authorized to oversee the activities of the company between meetings of the Board of Directors.⁷³ Mr. Homburg was one of three members of the executive committee.⁷⁴

[97] The Prospectus also states that Mr. Homburg's direct and indirect holdings of HII amounted to 22,921,859 Class A shares and 20,506,819 Class B shares.⁷⁵ As of the date of the Prospectus, companies directly or indirectly controlled by Mr. Homburg, and Mr. Homburg personally, held 55.24% of HII's total shares, and more significantly, 76.85% of the Class B multiple voting shares.⁷⁶

[98] As a result, the Prospectus lists Mr. Homburg's control of HII as a risk factor for potential investors to consider:⁷⁷

Following the Offer, Mr. Richard Homburg will continue to control a substantial stake in our Company, and thus other shareholders will not be able to exercise total influence over our business.

⁶⁹ Prospectus, page 3.

⁷⁰ Prospectus, page 86.

⁷¹ Prospectus, page 76.

⁷² Prospectus, page 75.

⁷³ Prospectus, page 80.

⁷⁴ *Ibid.*

⁷⁵ Prospectus, page 82.

⁷⁶ Prospectus, page 86. Those companies were the major shareholders, Homburg North America Limited, Hombak Holdings Inc., Homburg Uni-Corp Incorporated, as well as Homburg Canada Incorporated.

⁷⁷ Prospectus, page 18.

After the Offer, Mr. Richard Homburg will continue to, directly or indirectly, control at least 22,921,859 Class A Shares and 20,506,819 Class B Shares, which entitles him to 60.9% of the votes attached to our Shares. As a result, other investors may not be able to exercise as much influence over the business as they might otherwise. Mr. Richard Homburg will have the ability to exercise substantial influence over the election and removal and members of the Board of Directors and will have sufficient voting power to, amongst other things, delay, deter or prevent a change of control, which could deprive you of an opportunity to earn a premium for the resale of your New Shares. Given Mr. Richard Homburg's control of Shares, he will have a significant influence on our operations and affairs. His interests may differ from the interests of other shareholders. As a result, the market price of the Class A Shares could be adversely affected.

[emphasis in original]

[99] The Prospectus also lists another risk factor that effectively outlines that Mr. Homburg was the common, directing mind with significant influence and control over HII:⁷⁸

We are strongly connected with Mr. Richard Homburg and our operations are influenced by the strategic course he envisages.

Mr. Richard Homburg is our chairman and Chief Executive Officer, chairman of the executive board of Homburg N.V., chairman and board member of Homburg Canada and Homburg LP Management and chairman of Homburg Uni-Corp Inc. Furthermore he is our founder and a major shareholder in the Company. As such we and Mr. Richard Homburg have strong links and our operations are influenced by the strategic course he envisages. Deterioration of this strong connection could have a significant impact on our operations and strategic course. It is possible that Mr. Richard Homburg might pursue business opportunities, including but not limited to real estate and development business opportunities outside the Company.

[emphasis in original]

[100] The company's public statements were the most reliable evidence presented at trial. Based on this evidence, I am satisfied on a balance of probabilities that Mr. Homburg did not have a factual arm's length relationship with HII during the relevant time periods.

IV. Conclusion

⁷⁸ Prospectus, page 11.

[101] Mr. Homburg’s position in support of his appeal has been incomplete from the outset. His Notice of Appeal had no material facts. His argument that the family trusts had *de jure* control was not supported by any evidence regarding the ownership of one of the company’s main shareholders. His position disregarded, or attempted to sidestep, his considerable influence and control over HII.

[102] Mr. Homburg had the ultimate burden to demonstrate that the reassessments were incorrect. Despite the weaknesses in the Respondent’s assumptions, Mr. Homburg was unable to establish that he had an arm’s length relationship with Uni-Invest and HII after the company issued stock options to him in 2000, 2002, and 2005. As a result, he is not entitled to the deduction under paragraph 110(1)(d) of the *Income Tax Act*.

[103] The appeals are therefore dismissed, with costs to be awarded to the Respondent. If the parties cannot reach an agreement on costs, they shall each file written submissions, not exceeding 10 pages, by December 12, 2025.

Signed this 30th day of October 2025.

“Joanna Hill”

Hill J.

CITATION: 2025 TCC 162

COURT FILE NO.: 2019-3485(IT)G

STYLE OF CAUSE: RICHARD HOMBURG AND HIS
MAJESTY THE KING

PLACE OF HEARING: Halifax, Nova Scotia

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