Citation: 2014 TCC 119

Date: 20140423

Dockets: 2010-71(IT)G

2010-70(IT)G

BETWEEN:

GUY GERVAIS,

LYSANNE GENDRON,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] In this case, Guy Gervais and Lysanne Gendron, are appealing from reassessments for the 2002 taxation year.[1]

[2] The appeals were heard on common evidence. There is no real disagreement on the facts.[2]

A simplified overview of the dispute

[3] There is no dispute regarding the amounts at issue, and to simplify this overview, I will round off the numbers.

[4] At the beginning of 2002, Mr. Gervais was a shareholder in a family business. Ms. Gendron, his spouse, was not a shareholder.

[5] In the summer of 2002, an arm's length company, BW Technologies Ltd., offered to buy the business, and the shareholders, Mr. Gervais and his brother Mario Gervais, accepted the offer to purchase before September 26, 2002.

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[1] Appeals have also been filed for the 2003 taxation year, and in the case of Ms. Gendron for 2004; the parties have informed me that adjustments for subsequent years would automatically result from the decision in respect of 2002.

[2] The parties filed two partial agreements on the facts and two books of agreed documents (Exhibits A-1 and A-2). The respondent also filed a corrected Request to Admit under section 130 of the *Tax Court of Canada Rules (General Procedure)* as well as a Response to Request to Admit under section 131 of the Rules (Exhibits I-1 and I-2). There are no credibility issues.

[6] On September 26, 2002, Mr. Gervais sold one million of his shares in the family business to Ms. Gendron for $1,000,000, the fair market value of the shares, and elected to realize his gain by disposing of his shares,[3] which resulted in Ms. Gendron's adjusted cost base being $1,000,000.

[7] Ms. Gendron knew that the offer to purchase had been accepted before she became a shareholder, and at the time that she purchased the shares, she was intending to sell them a few days later.

[8] Four days later, on September 30, 2002, Mr. Gervais gave gratuitously to Ms. Gendron one million of his shares,[4] and there was a rollover under subsection 73(1) of the *Income Tax Act*. As a result, he did not realize a gain, and Ms. Gendron was deemed to have purchased the shares at Mr. Gervais's adjusted cost base, which was a small amount. For the purposes of this review, let us say that the amount was $0.

[3] That is to say that he chose not to invoke the provisions in subsection 73(1) of the *Income Tax Act*. Therefore, there was no rollover.
[4] These were shares of the same class as those he had sold to Ms. Gendron.

[9] Seven days after the donation, on October 7, 2002, Ms. Gendron sold all of her shares in the family business to BW Technologies for $2,000,000.[5]

[10] In her income tax return for the 2002 taxation year, Ms. Gendron included a capital gain in respect of the sale of shares. In calculating her gain, she applied the mechanism in subsection 47(1) of the Act. Consequently, she considered that the cost[6] of all of her shares[7] in the family business was $1,000,000. She made the following calculations in her return:

	Proceeds of disposition	$2,000,000
minus:	Adjusted cost base	($1,000,000)
	Capital gain	$1,000,000
minus:	Portion of the gain attributed to Mr. Gervais	($500,000)
	Ms. Gendron's capital gain	$500,000
	Taxable capital gain	$250,000
minus:	Capital gain deduction	($250,000)
	Final result	$0

[5] The fair market value of each share did not change between September 26, 2002, and October 6, 2002.
[6] The adjusted cost base.
[7] The two million shares.

[11] Consequently, Ms. Gendron paid no taxes on her disposition of the company's shares and half of the gain was attributed to Mr. Gervais.

[12] According to the Minister of National Revenue (Minister), this result does not comply with the Act, and

(a) The gain made by Ms. Gendron in selling her shares should be taxed as income, not as a capital gain.

or, alternatively,

(b) The capital gain should be removed from Ms. Gendron's income and added to that of Mr. Gervais as a capital gain under the general anti-avoidance rule.

[13] According to the appellants, both appeals should be allowed.

The facts

[14] Vulcain Alarme inc., a medium-sized family business, was sold in 2002.

[15] In May or June 2002, when BW Technologies made the first offer to purchase the business, Mr. Gervais and his brother Mario were shareholders; Ms. Gendron was not a shareholder.

[16] After certain transactions described below, on October 7, 2002, BW Technologies purchased the business from, among others, Mr. Gervais and Ms Gendron.

[17] In her income tax return for the 2002 taxation year, Ms. Gendron reported a capital gain in respect of the sale of her shares in the business. She used the capital gain exemption.[8]

[18] The Minister made a reassessment in respect of Ms. Gendron on the basis that her gain from the sale of shares was income, not a capital gain.

[19] The Minister reassessed Mr. Gervais, applying the general anti-avoidance rule in order to include the gain realized by Ms. Gendron in Mr. Gervais's income as a capital gain.

[20] The Minister concedes that he cannot be correct in both appeals.[9]

[21] The Vulcain corporation is a family company started by Mr. Gervais's father, Clément Gervais. Vulcain is, among other things, a manufacturer of toxic gas monitors. They are most often used to measure carbon monoxide in parking garages.

[22] When the business was first started, his father and mother worked together, and the office was located in the basement of the family home.

[23] Since he was 14 years old, Mr. Gervais has worked in the family business in the summers.

[24] Mr. Gervais is an engineer by trade. After his studies at the École Polytechnique, he started working at the family business.[10]

[25] In 1988, when he started working for the business, the company office moved from the basement of the family home to the garage; there were four employees including his father and him.[11]

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[8] Section 110.6 of the Act: Ms. Gendron claimed a $250,000 exemption. Mr. Gervais claimed an exemption of $158,720, the exemption amount that he had not used up to that point.
[9] According to the respondent, if she is correct in Ms. Gendron's appeal, Mr. Gervais's appeal must be allowed, and if she is correct in Mr. Gervais's appeal, Ms. Gendron's appeal must be allowed.
[10] In 1986 or 1987 (transcript dated August 20, 2012, pages 19 and 22).

[26] When he started, the sales were around $750,000 to $800,000, 20% lower than the best year two years before that.

[27] After that, the business grew significantly. The business moved from the garage to a 3,600-square-foot facility. In 2000, there were about 100 employees.

Partial Agreements on the Facts

[28] The parties filed Partial Agreements on the Facts. The facts are reproduced below.[12] To make the statement of facts more logical, *I have also added some facts from evidence other than the Partial Agreements on the Facts*; I have indicated the additions in footnotes.

The parties agree that the facts listed below are true[13]

[29] Vulcain was incorporated on February 29, 1968, under Part IA of the Quebec *Companies Act* by Clément Gervais.

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[11] In addition to Mr. Gervais and his father, there was a secretary and a travelling technician, who was an employee or a contractor (transcript dated August 20, 2012, page 22).
[12] I combined the Partial Agreements on the Facts as much as possible to avoid duplication. I replaced "appellant" by the name of the person. The numbering is necessarily different.
[13] This title is in the agreement.

[30] Vulcain operated a business in the field of manufacturing toxic gas and explosives detectors.

[31] On or about February 16, 1983, Guy Gervais acquired a common share of Vulcain for $10. Since then, the share capital of the corporation has been held by Clément Gervais and his three sons, Guy, Mario and Robert.

[32] Guy Gervais and Lysanne Gendron were married in 1987.

[33] In 1988, Guy Gervais became a director of Vulcain.

[34] From 1968 until the outright sale of the Vulcain shares to BW Technologies in 2002, Vulcain share capital was always held by Clément Gervais and/or his sons.

[35] On January 26, 2001, a unanimous agreement of Vulcain's shareholders was signed by Clément Gervais, Mario Gervais and Guy Gervais.

[36] In 2002, Guy Gervais was the sole director of Vulcain.

[37] In 2002, BW Technologies presented an offer to purchase with the goal of acquiring Vulcain.

[38] In May or June 2002, the appellants learned from an intermediary's letter that a company wanted to purchase Vulcain. Soon after, they learned that it was BW Technologies in Calgary.[14]

[39] Some time later, the president of BW Technologies came to visit the company.[15]

[40] On June 12, 2002, a confidentiality agreement was signed between BW Technologies and Vulcain.

[41] Several weeks after the visit of the president of BW Technologies, the appellants received an offer to purchase for approximately $7,500,000. The offer provided a two-week period in which to respond to it and came at about the time when the appellants were getting ready to go on a trip to Maine.[16]

[42] There was a non-binding offer to purchase signed on August 31, 2002, which was amended on September 26, 2002.[17]

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[14] Paragraph added.
[15] Paragraph added; see transcript dated August 20, 2012, at pages 29 to 31.
[16] Paragraph added; see transcript dated August 20, 2012, at pages 29 to 31.
[17] Paragraph added; see the agreement of sale dated October 7, 2002, in Exhibit A-2, tab 56, paragraph 9.8, which discusses a "non-binding offer to purchase ("LOI")", that is, the offer dated August 31, 2002, and amended on September 26, 2002. I presume that LOI stands for "Letter of Intent".

[43] The offer to purchase the entire share capital was accepted by Vulcain's shareholders, Guy Gervais and Mario Gervais, before September 22, 2002.[18]

[44] Lysanne Gendron was aware of the offer to purchase and knew that it had been accepted by the shareholders before she became a shareholder.[19]

Modifications made to the share capital[20]

[45] On August 26, 2002, Vulcain's only two shareholders were Guy Gervais and Mario Gervais,[21] with the shares divided as follows:

(a) Guy Gervais held 790,000 common class A shares and 5,120 preferred class I shares; and

(b) Mario Gervais, Guy Gervais's brother, held 200,000 common class A shares and 5,120 preferred class I shares.

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[18] Paragraph added; see Exhibits I-1 and I-2. The offer was accepted on September 22, 2002; see transcript dated August 20, 2012, at page 42.

[19] Paragraph added; see Exhibits I-1 and I-2 and the transcript dated August 20, 2012, at page 73.

[20] This title is in the agreement.

[21] The company redeemed the father's shares in three stages in 2001and 2002, with the effect that as of 9 a.m. on August 26, 2002 (Exhibit A-1, tab 7), the father no longer held any shares in Vulcain. The father had held his shares through a company.

[46] On or about September 26, 2002, Guy Gervais converted his 790,000 common class A shares into 2,087,778 preferred class E shares and 4,168,192 common class B shares.

[47] For the purposes of the Act, Guy Gervais elected to use the tax rollover mechanism set out in section 85 of the Act.

[48] On or about September 26, 2002, Mario Gervais also converted his 200,000 common class A shares into 1,583,790 preferred class E shares.

[49] The preferred class E shares included, among other things, the following rights, privileges and restrictions: non-voting, non-participating, preferential and non-cumulative monthly dividend of 1% per month calculated on the "redemption value" with preference over class A, B, F, and G shares, but after class D, H, I and J shares, redeemable at the request of the shareholder or by mutual consent.

[50] On conversion, each of the class E and B shares had a fair market value of $1 per share.

[51] On September 26, 2002, Vulcain authorized the transfer of 4,168,192 common class B shares held by Guy Gervais to 9120-9957 Québec inc.

[52] On September 26, 2002, Guy Gervais transferred his 4,168,192 common class B shares to 9120-9957 Québec, a corporation in which he held all of the share capital.

[53] For the purposes of the Act, Guy Gervais elected to use the tax rollover mechanism set out in section 85 of the Act with regard to this transfer.

[54] Before September 26, 2002, Lysanne Gendron was not a shareholder in Vulcain.[22]

[55] As shown in the document entitled [TRANSLATION] "Share Purchase Agreement" dated September 26, 2002, Guy Gervais sold 1,043,889 preferred class E shares to Lysanne Gendron for $1,043,889.

[56] The agreement sets out that Lysanne Gendron could not [TRANSLATION] "assign her rights and obligations hereunder to any person without the prior consent

[22] Paragraph added.

of Guy Gervais to that effect"[23] and that, without Guy Gervais's permission, Lysanne Gendron could not sell her shares to anyone other than BW Technologies.[24]

[57] As shown in the share purchase agreement, Lysanne Gendron had to pay the purchase price by giving Guy Gervais a promissory note payable within five years with an annual interest of 4.5%.

[58] Article 2.2 of the agreement provides for five equal payments of $208,777 on December 31, 2002, 2003, 2004, 2005 and 2006 plus interest (article 2.3). Lysanne Gendron made the payments.[25]

[59] For the purposes of the Act, in his tax return for 2002, Guy Gervais chose not to take advantage of the provisions in subsection 73(1) of the Act. Consequently (for the purposes of the Act[26]):

(a) since the adjusted cost base of these shares is $43,889, Guy Gervais realized a capital gain of $1,000,000, and

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[23] Paragraph added; see transcript dated August 20, 2012, at page 72, where it is admitted that in article 6.3 of the agreement, the terms [TRANSLATION] "purchaser" and "seller" were reversed.
[24] Paragraph added; see transcript dated August 20, 2012, at pages 72 and 73.
[25] Paragraph added; see Exhibit A-2, at tabs 40 and 41.
[26] The words in parentheses are found in the Agreement on the Facts in Ms. Gendron's appeal, but not in the Agreement on the Facts in Mr. Gervais's appeal. See paragraph 22 of each agreement. This is probably an accidental omission.

(b) the adjusted cost base of the shares purchased by Lysanne Gendron was $1,043,889.

[60] As shown in a notarial act dated September 30, 2002, Guy Gervais gave gratuitously to Lysanne Gendron 1,043,889 preferred class E shares.

[61] For the purposes of the Act, Guy Gervais did not choose to have his transaction performed on September 30, 2002, be exempt from the application of subsection 73(1) of the Act. Consequently (for the purposes of the Act[27]):

(a) Guy Gervais is deemed to have disposed of shares for an amount equal to the adjusted cost base of the shares, namely, $43,889, and

(b) Lysanne Gendron is deemed to have acquired shares for an amount equal to the adjusted cost base of the shares, namely, $43,889.

[62] From September 26 to October 7, 2002, Lysanne Gendron did not intend to keep the shares of Vulcain as an investment.[28]

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[27] The words in parentheses are found in the Agreement on the Facts in Ms. Gendron's appeal, but not in the Agreement on the Facts in Mr. Gervais's appeal. See paragraph 24 of each agreement. This is probably an accidental omission.

[28] Paragraph added; see Exhibits I-1 and I-2, as the paragraph was corrected at the hearing (transcript dated August 20, 2012, pages 82 and 83).

[63] From September 26 to October 7, 2002, Lysanne Gendron did not intend to hold the shares of Vulcain over the long term and was not planning to earn property income from them.[29]

[64] Lysanne Gendron knew that she would not receive any dividends relative to the Vulcain shares during the period from September 26 to October 7, 2002.[30]

[65] On September 26, 2002, Lysanne Gendron's intention was to sell the Vulcain shares she held on or about October 7, 2002, when the contract to sell Vulcain's entire share capital to BW Technologies would be signed.[31]

[66] When Lysanne Gendron bought the shares, she did not have the financial means to pay for the shares, but she could do so because she was going to resell the shares to BW Technologies.[32]

Sales of Vulcain shares to BW Technologies[33]

[29] Paragraph added; see Exhibits I-1 and I-2.
[30] Paragraph added; see Exhibits I-1 and I-2.
[31] Paragraph added; see Exhibits I-1 and I-2.
[32] Paragraph added; see transcript dated August 20, 2012, at page 74.
[33] This title is in the agreement.

[67] On or about October 7, 2002, BW Technologies acquired the entire share capital of Vulcain for a total of $7,850,000.

[68] As shown in the contract of sale, the price was broken down as follows:

(a) $2,087,778 for 2,087,778 preferred class E shares held by Lysanne Gendron;
(b) $5,120 for 5,120 preferred class I shares held by Guy Gervais;
(c) $5,120 for 5,120 preferred class I shares held by Mario Gervais;
(d) $4,168,192 for 4,168,192 common class B shares held by 9120-9957 Québec; and
(e) $1,583,790 for 1,583,790 common class B shares held by Mario Gervais.[34]

Guy Gervais's and Lysanne Gendron's tax returns[35]

[69] In her income tax return for the 2002 taxation year, Lysanne Gendron established the average cost of 2,087,778 preferred class E shares at $1,087,778

[34] Although the Agreements on the Facts mention 1,583,790 common class B shares held by Mario Gervais, it seems that it is rather 1,583,790 preferred class E shares; see, for example, tab 55 and tab 56 (pages 4 and 20 of the document) of Exhibit A-2.
[35] This title is in the agreement.

($1,043,889 + $43,889) by applying the mechanism provided in subsection 47(1) of the Act and reported a capital gain calculated as follows:

Proceeds of disposition	$2,087,778
Adjusted cost base	($1,087,778)
Capital gain	$1,000,000
Expenses incurred for the disposition	($13,809)
Capital gain	$989,191
Capital gain allocated to Guy Gervais	($486,191)
Capital gain after allocation	$500,000
Taxable capital gain	$250,000
Capital gain deduction	($250,000)
Net	0

[70] In his income tax return for the 2002 taxation year, Guy Gervais reported a capital gain calculated as follows:

1st disposition/Lysanne Gendron/	
September 26, 2002	
Proceeds of disposition	$1,043,889

Adjusted cost base	($43,889)
Capital gain	$1,000,000

2nd disposition/gift to Lysanne Gendron/

September 30, 2002

Proceeds of disposition	$43,889
Adjusted cost base	($43,889)
Capital gain	0

Sale to BW Technologies

Proceeds of disposition	$5,120
Adjusted cost base	($5,120)
Capital gain	0

Total capital gain	**$1,000,000**
Expenses incurred for the disposition	($13,809)
Capital gain	$989,191
Capital gain allocated to Guy Gervais	$486,191
Capital gain after allocation	$1,472,382
Provision requested	($788,953)

Capital gain	$683,429
Taxable capital gain	**$341,714**
Capital gain deduction	($158,720)

[71] In 2002, the maximum amount that Guy Gervais could claim as a capital gain deduction was $158,720, namely, the balance available in respect of this deduction.

Adventure or concern in the nature of trade[36]

[72] On September 26, 2002, Lysanne Gendron:

(a) knew the terms and conditions of the sale of the entire share capital of Vulcain to BW Technologies;

(b) knew the sale price that had been negotiated between BW Technologies and Vulcain and/or Vulcain's shareholders;

(c) knew the time limit set for the sale of Vulcain's shares to BW Technologies; and

(d) knew that a significant profit would be made from the sale of Vulcain's shares and, specifically, the preferred shares.

[73] The above paragraph is the last one from the Partial Agreements on the Facts.

Other facts

[74] Ms. Gendron had worked as a salaried employee at Vulcain since 1992, but she had had some involvement in the company before then.

[75] Ms. Gendron was very active in the business. In the early 2000s, she was in charge of all of its management. Among other things, she was in charge of human resources at the New York and Toronto offices. She was constantly talking with Mr. Gervais about operations and about all of the important decisions that the business had to make.

[76] When the business bought the shares of Mr. Gervais's father, money had to be borrowed and securities given. Ms. Gendron agreed, among other things, to a hypothec on the family home as security.

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[36] This title is in the agreement.

[77] Mr. Gervais testified that when they had made the decision to sell, they had decided to get advice from the law firm McCarthy Tétrault.

[78] He asked their legal counsel to do three things:[37]

(a) to advise them during the negotiations to ensure that their interests are protected;

(b) to advise them on the taxation aspects; and

(c) to advise them regarding Mr. Gervais's wish to recognize Ms. Gendron's contribution so that she may receive $1,000,000.

[79] McCarthy Tétrault proposed the transaction structure and the appellants accepted it.[38]

[80] Mr. Gervais and Ms. Gendron were both present at the meetings with McCarthy Tétrault.[39]

[37] Transcript dated August 20, 2012, pages 32 to 35 and 49.
[38] Transcript dated August 20, 2012, page 49.
[39] Transcript dated August 20, 2012, pages 33 and 65.

Analysis

The possibilities

[81] Before analyzing the various arguments, it will be useful to give an overview of the various possible outcomes of the issues raised by the appeals before me and to establish the link between the possible outcomes and the consequences of the outcome of one appeal for the other.

[82] The respondent concedes that if she is correct with regard to one of the assessments, the other appeal must be allowed.[40]

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[40] The parties did not elaborate on the reasons why the assessment of one of the spouses necessarily implies that it is impossible that the other spouse's assessment is valid. Given my conclusions below, it will not be necessary to examine this issue, but I will make the following comment. If hypothetically the general anti-avoidance rule applied to Mr. Gervais and if, at the same time, Ms. Gendron's disposition of the shares constituted income for Ms. Gendron, the following question would have to be raised: under subsections 245(6) and (8) of the Act, would the Minister not have to revise the assessment by subtracting from Ms. Gendron's income the gain on the sale of her shares? The wording of the provision indicates clearly that a revision may be done in respect of a third party:

> 245(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment,
> (*a*) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,
> (*b*) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,
> (*c*) the nature of any payment or other amount may be recharacterized, and
> (*d*) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,
> in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.
> [Emphasis added.]

The French text is as follows:

> 245(5) Sans préjudice de la portée générale du paragraphe (2) et malgré tout autre texte législatif, dans le cadre de la détermination des attributs fiscaux d'une personne de façon raisonnable dans les circonstances de façon à supprimer l'avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, d'une opération d'évitement :

[83] In Ms. Gendron's case, the following issues are raised:

(a) Does the gain realized by Ms. Gendron constitute income or a capital gain?

(b) Is the gain realized by Ms. Gendron on the sale of the shares that she had purchased necessarily of the same nature as the gain realized on the shares that she had received as a gift?

(c) If the nature of the gain realized on the shares purchased is different from that realized on the shares received as a gift, can section 47 of the Act apply and, if not, what is the consequence?

(d) Based on the response, what is the consequence for Mr. Gervais?

[84] The first issue in Mr. Gervais's appeal is whether the general anti-avoidance rule applies and, second, if that is the case, what is the consequence?

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a) toute déduction, exemption ou exclusion dans le calcul de tout ou partie du revenu, du revenu imposable, du revenu imposable gagné au Canada ou de l'impôt payable peut être en totalité ou en partie admise ou refusée;
b) tout ou partie de cette déduction, exemption ou exclusion ainsi que tout ou partie d'un revenu, d'une perte ou d'un autre montant peuvent être attribués à une personne;
c) la nature d'un paiement ou d'un autre montant peut être qualifiée autrement;
d) les effets fiscaux qui découleraient par ailleurs de l'application des autres dispositions de la présente loi peuvent ne pas être pris en compte.

[Emphasis added.]

[85] I will examine the case of Ms. Gendron first, because, if all of the gain she realized may be allocated to Mr. Gervais, Mr. Gervais cannot have received a "tax benefit" within the meaning of section 245 of the Act and the general anti-avoidance rule cannot apply.

Lysanne Gendron – income or capital gain?

[86] The issue of characterizing the gain and the issue of whether the sale of the shares that Ms. Gendron purchased and the sale of the shares that she received as a gift should be characterized in the same way are related, and I will examine these issues at the same time.

[87] The essential facts may be summarized as follows:

(a) Ms. Gendron actively participated in the management of Vulcain. She knew about the negotiations with BW Technologies regarding the sale of Vulcain to BW Technologies; she discussed it a great deal with Mr. Gervais.

(b) Ms. Gendron purchased half of her shares in Vulcain and received the other half as a gift.

(c) Ms. Gendron had to pay for the shares that she had purchased in five instalments spread over a five-year period.

(d) Ms. Gendron had intended to resell her shares to BW Technologies before she had bought them and received them as a gift.

(e) When she purchased her Vulcain shares and when she received Vulcain shares as a gift a few days later, she knew that BW Technologies was going to purchase all of her shares in a few days.

(f) The shares purchased and the shares received as a gift were sold to BW Technologies less than two weeks after the acquisition.

[88] These circumstances are fairly different from the classic circumstances where we must distinguish between the realization of a capital property or an investment and a gain resulting from an adventure in the nature of trade.[41] The role of the Court is to apply the principles to these circumstances.

[89] There is a rich case law on the issue of whether a sale results in a capital gain from a realization of an investment or income from an adventure in the nature of trade.

[41] It is evident that, in this case, this cannot be a business except to the extent that it is an adventure or concern in the nature of trade. See the definition of "business" at paragraph 248(1) of the Act.

[90] Authors Hogg, Magee and Li summarized the main principles of the issue.[42]

[91] The following are typical examples of properties the disposition of which gives rise to a capital gain:

(a) an investment: for example, stocks and bonds held long-term in order to earn income;
(b) in the case of an individual, a property held for his or her personal use such as a painting or a cottage;
(c) a capital asset owned by a business, for example, a factory used to manufacture furniture by the business.

[92] The shares at issue are not at all similar to such properties.

[93] Intent plays a key role in characterizing a sale. Accord if to Hogg, Magee and Li:

> On the basis of the jurisprudence,[1] the issue of whether an isolated transaction is in the nature of trade turns on the intention of the taxpayer at the time when he or she acquired the property. If that intention was something else, for example, to hold the

[42] *Principles of Canadian Income Tax Law*, 8th edition (Carswell, 2013), excerpt from *Tax Partner* (Carswell, 2013

> property as an income-earning investment, or to use the property as a capital (fixed) asset in a business, or to use the property for personal purposes, then the subsequent sale of the property will be treated as a capital transaction.
>
> [1] *Irrigation Industries*, . . . , being an exception.

The shares acquired[43]

[94] The facts related to the shares that Ms. Gendron acquired are inconsistent with an investment and do not favour the conclusion that it was a sale as capital:[44]

(a) Even before Ms. Gendron acquired the shares, she had intended to resell them within a very short time.

(b) The shares produced no income while she held them.

(c) The shares were resold less than two weeks after they were acquired.

— Version 12). See chapter 11, in particular 11.1, 11.3 and 11.4(b).

[43] The parties submitted that the sale of the shares was entirely a capital gain according to the appellant and entirely income according to the respondent.

In considering the parties' arguments, it seemed to me that there was some merit in both positions, but that the merit of each position was more compelling when it was related to, in the one case, the shares received as a gift and, in the other case, the shares purchased.

At one point, I asked the parties to file additional submissions, including on the issue of whether the result was necessarily the same for the shares purchased and the shares received as a gift.

[44] Because this was not an activity of Ms. Gendron's business, this cannot be a sale of capital assets or of the inventory of a business.

[95] The three indicia I have just listed support a characterization as income.[45] A fourth indicia favouring a characterization as income is the absence of investment by Ms. Gendron at the time of the purchase; she paid Mr. Gervais over a period of five years.[46]

[96] A usual indicia of an adventure in the nature of trade seems to be missing. Normally, one would expect there to be the objective to make a profit from the resale of shares. Here, no gain or loss was expected from the resale of the shares, and Ms. Gendron resold the shares at the same price as their purchase price.

[97] I say "seems to be missing" because, although the purchase and resale produced no gain on the disposition of the shares, Ms. Gendron gained a financial benefit: she resold the shares purchased very quickly, but given that she paid Mr. Gervais with interest over a period of five years, she obtained the benefit of very advantageous cash flow.

[98] Therefore, there was no profit on the resale, but there was still a financial benefit. Businesses often seek to improve their cash flow, and an increase in cash flow is an indicia in the nature of trade.

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[45] An adventure or concern in the nature of trade.

[99] It is important to note that profit as an objective is an indicia, but not an essential condition for finding that this is an adventure in the nature of trade.[47]

[100] Traditionally, the nature of the property in question, namely, the shares, is considered to be an indicia of an investment.[48] However, the circumstances in this case are such that the fact that the nature of the property is shares has only a small impact.[49]

[101] When this principle is applied to the shares purchased, it is difficult to see how this could be anything other than income. Although there was no gain or loss on the disposition of the shares purchased, the indicia point very strongly in favour of characterizing the sale as income.

[102] However, I must consider the Supreme Court of Canada decision in *Irrigation Industries Ltd. v. M.N.R.*[50]

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[46] These four indicia are very similar to a speculative transaction.

[47] See the decision of the Exchequer Court in *M.N.R. v. Taylor*, [1956] C.T.C. 189, at pages 211 and 212, [1956-60] Ex.C.R. 3, at pages 26 and 27.

I will discuss below the Supreme Court of Canada decision in *Irrigation Industries Ltd. v. M.N.R.*, [1962] S.C.R. 346. In *Irrigation Industries*, the majority, at pages 351 and 352, and the minority, at pages 359 and 360, agree with the principles in *Taylor*.

[48] To the extent that one may consider that a share is an indicia of an investment by virtue of its nature. Given the manner in which financial markets have evolved over the last 20 to 30 years, there are good reasons to wonder whether today shares are a property whose nature is an indicia of an investment. Markets operated very differently before the last 20 or 30 years, and we should ask ourselves whether this indication, formulated in different circumstances, is still valid. In the current circumstances, should it be considered that the nature of a share is not an indicia in either direction? It is not necessary for me to answer this question.

[49] See the discussion of *Irrigation Industries*, [1962] S.C.R. 346, below.

[50] [1962] S.C.R. 346.

[103] Ms. Gendron attributes a great deal of importance to *Irrigation Industries*. This is very understandable given that the majority decision seems to suggest that there is an extremely strong presumption that the acquisition of shares of a business gives rise to the acquisition of a capital asset that generates a capital gain when the shares are sold, unless there are strong indications to the contrary.[51]

[104] In *Irrigation Industries*, 4,000 shares were purchased in February 1953,[52] and 2,400 of those shares were sold between March 10 and 13, 1953. The 4,000 shares were treasury shares.[53]

[105] The 1,600 remaining shares were sold in June 1953. Of the total purchase price of $40,000, an amount of $37,000 – almost the entire price – was financed through a bank overdraft.[54]

[106] Before the purchase of the shares, the company had borrowed $50,000 from the bank to finance the purchase of a building and was expecting to obtain a

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[51] See the first paragraph of *Irrigation Industries* on page 351 where Justice Martland cites *Barry v. Cordy*, [1946] 2 All E.R. 396. Clearly, Justice Martland accepted that there are transactions in the purchase and resale of shares, which are adventures in the nature of trade.
[52] On or about February 23, according to the minority decision of the Supreme Court, but on or about February 6 according to the Exchequer Court in *Irrigation Industries Ltd. v. M.N.R.*, [1960] C.T.C. 329.
[53] The fact that it was treasury shares is found in the majority decision at pages 348 and 354.
[54] See the third paragraph of the decision of Judge Cameron of the Exchequer Court in *Irrigation Industries*, [1960] C.T.C. 329.

mortgage of $75,000 on the building. The $75,000 was intended to be used to repay the overdraft and to reduce the amount of the bank loan.

[107] Shortly after the purchase of the shares, the bank informed Irrigation Industries that it could obtain a mortgage of only $40,000 and that it had to repay the overdraft. Soon after receiving that information, the company decided to sell the 2,400 shares and to use the money to repay the overdraft.[55]

[108] In June, the company sold the remaining 1,600 shares and reduced the bank loan.[56]

[109] I do not believe that, under the doctrine of *Irrigation Industries*, I must conclude in these circumstances that we are dealing with an investment rather than an adventure in the nature of trade for the reasons below.

[110] Except for one aspect, the majority and the minority in *Irrigation Industries* do not seem to disagree on the applicable principles and, in particular, they seem to accept the principles pronounced in *M.N.R. v. Taylor*.[57]

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[55] See the sixth paragraph of the decision of the Exchequer Court.
[56] See the seventh paragraph of the decision of the Exchequer Court.
[57] [1956-60] Ex.C.R. 3.

[111] The difference is that the majority attaches a great deal of importance to the nature of the property acquired.[58] The majority also attaches importance to the following:

> . . . In my opinion, a person who puts money into a business enterprise by the purchase of the shares of a company on an isolated occasion, and not as a part of his regular business, cannot be said to have engaged in an adventure in the nature of trade merely because the purchase was speculative in that, at that time, he did not intend to hold the shares indefinitely, but intended, if possible, to sell them at a profit as soon as he reasonably could. I think that there must be clearer indications of "trade" than this before it can be said that there has been an adventure in the nature of trade.[59]

[112] It is important to note that, in the excerpt cited above, it is accepted that an isolated transaction may constitute an adventure in the nature of trade.

[113] If the majority decision had to be understood as standing for the principle that an intention to quickly resell a share is not a clear indicia of an adventure in the nature of trade, the decision would be difficult to reconcile with the case law before[60] and after[61] the decision was rendered.

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[58] *Irrigation Industries*, [1962] S.C.R. 346, page 352.
[59] *Irrigation Industries*, [1962] S.C.R. 346, page 351.
[60] For example, *M.N.R. v. Taylor*, [1956-60] Ex.C.R. 3.

[114] However, I do not believe that this is the right manner to read the decision because the entire excerpt of *Irrigation Industries* above must be taken into account, in particular, the following: "in that, at that time, he did not intend to hold the shares indefinitely".

[115] When we read the in its sentence entirety, the principle stated is simply that the mere fact that a person acknowledges that, one day, he or she will probably resell shares is not sufficient to make it an adventure in the nature of trade. That is an accepted principle.

[116] Even if the decision is understood in that way, it is still difficult to understand why the majority believed that something else was needed to find that it was an adventure in the nature of trade given the reminder of the case law.[62]

[117] In any event, there are two important differences between the facts od the present case and the facts of *Irrigation Industries*. First, in most cases when the

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[61] For example, the subsequent decision of the Supreme Court of Canada in *M.N.R. v. Sissons*, [1969] S.C.R. 507, at page 512 (second last paragraph) and at page 514 (first sentence).

[62] This is especially true as the majority seems not to have attached any importance to the evidence before the Exchequer Court, which suggests that the sale was caused by the request of the bank to repay the overdraft (see page 357 of the Supreme Court of Canada decision and the Exchequer Court decision) and that, as a result, the circumstances changed, which could have led the trial court to conclude that, at the outset, the company had been planning to keep the shares longer and that the original intention had to have been changed when the company was unable to get the $75,000 mortgage.

purchased shares already exist, the seller terminates his or her investment in the company and the purchaser replaces the seller. In *Irrigation Industries*, the situation was different because, by buying treasury shares, Irrigation Industries did more than just acquire an investment: it increased the issuing company's capital.

[118] Economically, this has different consequences that those of buying an existing share because, in almost all cases, when someone buys existing shares of a company, this has no effect on the company's capital.[63]

[119] Purchasing treasury shares, which increases the issuing company's capital, is an indicia of an investment.[64]

[120] In this case, Ms. Gendron had not purchased treasury shares.[65]

[121] Second, in this case, there are "clearer" indicia of an adventure in the nature of trade. Not only were shares resold short-term, but the resale of the shares to BW Technologies had also been planned in advance. I do not see how there could be a "clearer" indicia than the resale of shares that was planned before the purchase.

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[63] Clearly, the fact that a share may be resold, although it does not increase the company's capital, is still a benefit for the company as it facilitates the eventual sale of treasury shares because the purchaser of treasury shares knows that it is possible to resell them.

[64] When this element is taken into account in *Irrigation Industries*, there is no longer the same degree of divergence between *Irrigation Industries* and the reminder of the case law.

[65] I note that even the purchase of treasury shares is only an indicia, no more.

[122] Consequently, *Irrigation Industries* is not applicable and, given that the indications point strongly to an adventure in the nature of trade, I find that this is an adventure in the nature of trade and that the gain on the sale of the shares purchased is income.[66]

Shares received as a gift

[123] As for the shares that Ms. Gendron received gratuitously, she realized the entire gain. She monetized the value of the shares received as a gift, but she did not make a regular commercial profit.

[124] The respondent insisted a great deal on the fact that Ms. Gendron had exactly the same intention regarding the purchased shares as those received as a gift.

[125] That is not altogether accurate. Ms. Gendron had the same intention to quickly resell all of the shares; however, there is a difference in the manner they

[66] Ms. Gendron has also argued that the shares she had acquired kept the same character that they had when Mr. Gervais had held them. This submission was made in the context of all of the shares. I will deal with it in the context of the shares received as a gift, because, regardless of the merits of these arguments within the context of a gift where a sale follows a rollover allowed under the Act, the claim cannot be applied as this is simply a purchase. By purchasing the shares from Mr. Gervais, Ms. Gendron is in the same situation as if she had purchased the shares from any other arm's length taxpayer.

were acquired. In the one case, the intention was to purchase the shares, and in the other, to accept a gift.

[126] There is a distinction between the two.

[127] Two questions arise:

(a) Does accepting a gift with the intent to resell the thing received very quickly give rise to income or a capital gain?

(b) Is the answer different in this case because it is part of a series of transactions, which also includes the purchase and resale of other shares by Ms. Gendron?

[128] Ms. Gendron received half of the shares in question as a gift in accordance with the *Civil Code of Quebec*.[67]

[129] Receiving a gift or an inheritance is very different in nature from buying property to resell. The intention to accept is not at all the same as an intention to purchase, as the decision to give something rests with the donor and not with the person who receives the gift.

[130] Simply wanting to realize the value of the gift by reselling the property received, even if it is done quickly and even if the intention existed before the gift was received, does not mean that the sale of the property is an adventure in the nature of trade. There hasto be more.

[131] For example, the mere fact that a child who is expecting to inherit the family cottage intends to resell it as quickly as possible because he wants to reduce the mortgage on his home does not mean that the sale of the cottage is an adventure in the nature of trade.[68]

[132] Therefore, the nature of the sale must be assessed differently, since the person who receives a gift naturally cannot have made an investment. Consequently, certain indicia when property is bought do not apply in the case of a gift.

[133] There are no other indicia here that would favour the finding that this is an adventure in the nature of trade. For example, Ms. Gendron made no effort to add value to the shares received as a gift.

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[67] Article 1806 et seq. of the CCQ.

[68] I am not suggesting that there cannot be any circumstances where a gift received is resold and produces income rather than a capital gain. For example, the situation would perhaps be very different if, one of two businesses that have done business together for a long time to their mutual benefit gave the other by gratuitous title some inventory to help it during a crisis. Doubtless, there are other examples. There is nothing like that in this case.

[134] Ms. Gendron brought to my attention a Quebec Court of Appeal case, *Fiducie Charbonneau c. Québec (Sous-ministre du Revenu)*,[69] which is a very interesting case. Following the death of Mr. Charbonneau, the trust received what was originally farmland that Mr. Charbonneau had used in the past and had since stopped using. Before his death, he had sold two parcels of the land. After his death, the trust sold some lots. The Court of Appeal found that all the trust had done was realize the land, which Mr. Charbonneau had begun doing, and agreed with the trust that the sales resulted in a capital gain.

[135] The Court of Appeal also referred to Interpretation Bulletin IT-218R "Profits, capital gains and losses from the sale of real estate, including farmland and inherited land and conversion of real estate from capital property to inventory and vice versa":[70]

> Farmland and Inherited Land
>
> 23. The sale, en bloc or piecemeal, by a taxpayer of

[69] 2010 QCCA 400.
[70] Canada Revenue Agency: September 16, 1986.

> (a) farmland regularly used by the taxpayer for the purpose of gaining or producing income from a farming business carried on by the taxpayer, or
>
> (b) land inherited by the taxpayer
>
> will generally give rise to a capital gain or loss, as the case may be, to the taxpayer except where, for example, the taxpayer
>
> (c) converts such land to a trading property (see 24 below), or
>
> (d) acquired the land referred to in (a) with the intention of reselling it for profit at a propitious time (see 5 above).

Evidently, the Canada Revenue Agency's interpretation cannot change the law, but it can be considered.[71]

[136] If inheriting land usually results in a capital gain or loss, logically, and no more, this is also generally true, in the absence of other factors, for property received as a gift or inheritance in the family context.

[137] There does not seem to be very much case law on this issue. This is probably because it is generally accepted that a mere resale, and nothing more, of property

[71] See *Harel v. Deputy Minister of Revenue (Quebec)*, [1978] 1 S.C.R. 851; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.

received as a gift or inherited, even if it is done shortly after the property was acquired, is a sale that results in a capital gain.

[138] The disposition of shares received as a gift took place in the larger context of the sale of Vulcain to BW Technologies, but the fact that Ms. Gendron facilitated the sale to BW Technologies does not change the nature of the sale for her.

[139] Consequently, the sale of the shares received as a gift is a capital gain.

[140] Ms. Gendron argued that the nature of the shares that she had sold had to remain the same as if Mr. Gervais had sold them by analogy with the decisions of the Supreme Court of Canada in *Continental Bank Leasing Corporation v. Canada*[72] and *Canada v. Continental Bank of Canada*.[73] Given my conclusion, it is not necessary that I examine this argument.[74]

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[72] [1998] 2 S.C.R. 298.
[73] [1998] 2 S.C.R. 358.
[74] However, as I said in an earlier footnote, even if *Continental* could apply in the case of the shares given to Ms. Gendron by analogy, this could not apply to the shares purchased where there was no rollover.

I do not need to decide if *Continental* may apply by analogy to the shares received as a gift, but I would observe that these are very different circumstances and very different provisions of the Act. In *Continental*, the bank wanted to sell to Central Capital Corporation the shares or the assets of a subsidiary of the bank, Continental Bank Leasing. If the bank had made that sale, the gain would have been a capital gain. However, for various reasons the sale was structured in a certain way through using a rollover provided by the Act. The consequence of the rollover was that the bank received a 99% interest in a partnership that contained the assets of Continental Bank Leasing. The 99% interest was resold to Central Capital Corporation by Continental Bank two days after the interest had been acquired by Continental Bank. See paragraphs 34 and 35 of the trial judgement in *Continental Bank of Canada v. Canada*, [1994] T.C.J. No. 585 (QL). The facts in *Continental Bank* are fairly complicated, but there is a summary at paragraphs 3 to 5, and the details are found at paragraphs 8 to 49. For the purposes of this case, the essential facts are that Continental Bank began with one property, which was its subsidiary, and through a rollover acquired a 99% interest in a partnership, which was resold right away.

Section 47 of the Act

[141] It is clear that section 47 applies only to capital gains for two reasons. On the one hand, the section is part of Subdivision c of Division B of Part I of the Act, that is, the part that deals with taxable capital gains and allowable capital losses. On the other hand, section 47 sets out the rules for computing the "adjusted cost base"; adjusted cost base is a concept used by the Act for calculating capital gains.

[142] Given my conclusion that the disposition of purchased shares results in income and that the disposition of shares received as a gift results in a capital gain, section 47 does not apply.

Judge Bowman, as he then was, concluded that the interest in the partnership was of the same nature as the interest that Continental Bank originally had in Continental Bank Leasing. Accordingly, the gain was a capital gain. See paragraphs 97 to 101.

In other words, in the circumstances, the sale by Continental Bank of the property substituted through a rollover, namely, the interest in the partnership, was of the same nature as the sale of the original property, Continental Bank Leasing, held by Continental Bank.

It was still the same owner. In this case, the circumstances are fundamentally different. This is a sale by a different person, Ms. Gendron, not Mr. Gervais.

In this case, once Mr. Gervais gave the shares to Ms. Gendron, he no longer had an interest in the shares and was not entitled, directly or indirectly, to the proceeds of the disposition of the resale of the shares by Ms. Gendron.

Mr. Gervais also involved on *Meixner v. The Queen*, 2005 TCC 283, relative to the shares received as a gift and also to the shares purchased.

In *Meixner*, the circumstances are rather unique. The relevant part of the judgment is related to the disposition of a house (47 Lakeside). The house was the residence of the appellant, Ms. Meixner, and her former spouse from 1982 to 1996, but her mother-in-law had owned the house until her death in 1994.

Although her former spouse and her former brother-in-law were the mother-in-law's heirs, the house at 47 Lakeside was still registered in the mother-in-law's name when it was put up for sale in August 1997. It was only right before the sale that, based on the documents, Ms. Meixner acquired the house. The Court concluded that Ms. Meixner and her former spouse had an equal beneficial interest and that Ms. Meixner had paid nothing to acquire her interest. If

[143] Because section 47 cannot apply, the cost of the shares received as a gift is $0, and the cost of the shares purchased is simply what Mr. Gervais had paid.[75]

[144] For that reason, with regard to the shares purchased, Ms. Gendron's gain is $0.[76]

[145] With regard to the shares received as a gift, the result is that Ms. Gendron realized a capital gain of $1,000,000 all of which must be allocated to Mr. Gervais under section 74.2 of the Act.[77]

[146] Accordingly, Ms. Gendron has no taxable gains resulting from the sale of her shares.

[147] I note that one consequence of this result is that Ms. Gendron did not use her capital gain exemption under section 110.6 of the Act, which she would be able to use in the future.

Ms. Meixner paid nothing, this logically implies that she received her interest as a gift. Given that fact, I do not see how *Meixner* could help the appellants with respect to the purchased shares.

[75] The shares were bought through a single transaction, and it is not necessary to refer to *M.N.R. v. Anaconda American Brass Ltd.*, [1956] A.C. 85.

[76] Under subsection 10(1.01) of the Act, Ms. Gendron must use the purchase price of her shares to determine the gain. The result would be the same even though the transaction took place before subsection 10(1.01) was in effect.

[77] I note that there are some expenses to deduct, which slightly reduce the capital gain and the capital gain attributed. See paragraph 69, above.

Guy Gervais — general anti-avoidance rule

[148] Given that the entire gain of Ms. Gendron is allocated to Mr. Gervais, it is clear that there cannot be any "tax benefit" under the general anti-avoidance rule and that, as a result, the rule cannot be applied. Therefore, it is not necessary for me to examine the potential application of this rule.

[149] The practical result for Mr. Gervais is the same as that of the Minister's assessment, according which Ms. Gendron's entire gain must be included in his income.

Conclusion[78]

[150] In conclusion, the result is that Ms. Gendron should not be taxed on any gain, but that Mr. Gervais should be taxed on the entire gain.

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[78] Regarding Ms. Gendron, the respondent's theory was that the entire gain on the sale of shares constituted income. At one point, I raised the following question: even if this was correct, would section 74.1 not cause the entire gain to be allocated to Mr. Gervais?

Given my findings above, it is not necessary to answer that question. However, I note the following.

Both parties' position was that section 74.1 cannot apply to a business income and that, given that the definition of "business" includes adventures in the nature of trade, section 74.1 cannot apply in this case if the sale of the shares is in the nature of trade.

Subsection 74.1(1) reads as follows:

If an individual has transferred or lent property (otherwise than by an assignment of any portion of a retirement pension under section 65.1 of the *Canada Pension Plan* or a comparable provision of a provincial pension plan as defined in section 3 of that Act), either directly or indirectly, by means of a trust or by any other means whatever, to or for the benefit of a person who is the individual's spouse or common-law partner or who has since become the individual's spouse or common-law partner, any income or loss, as the case may be, of that person for a taxation year from the property or from property substituted therefor, that relates to the period in the year throughout which the individual is resident in Canada and that person is the individual's spouse or common-law partner, is deemed to be income or a loss, as the case may be, of the individual for the year and not of that person.

When all the words that are irrelevant in this context are removed, the essence of the section is as follows:

If an individual has transferred . . . property . . . to . . . a person who is the individual's spouse . . . , <u>any income</u> . . . of that person . . . <u>from the property</u> . . . is deemed to be income . . . of the individual . . . and not of that person.

[Emphasis added.]

The definition of "property" in subsection 248(1) of the Act is very broad, and, at first glance, subsection 74.1(1) seems to include business income <u>from</u> transferred property. The essential text of the subsection is not:

If an individual has transferred . . . property . . . to . . . a person who is the individual's spouse . . . , any income <u>from property</u> . . . of that person . . . from the property . . . is deemed to be income . . . of the individual . . . and not of that person.

[Emphasis added.]

There are old cases that take for granted that the predecessor of subsection 74.1(1) applied to business income, while they should have, based on the circumstances, performed a certain distribution to determine which part of the business income came from the transferred property and which part came from other sources; see *Goodman v. M.N.R.*, 3 Tax A.B.C. 280, and *Trinca v. M.N.R.*, 3 Tax A.B.C. 354.

Subsequently, in *Robins v. M.N.R.*, [1963] C.T.C. 27, the Exchequer Court said that the provision applied only to property income, not to business income. However, it is *obiter* because the Exchequer Court concluded that there had been no transfer.

Several months later, in *M.N.R. v. Minden*, [1963] C.T.C. 364, at page 382, the Exchequer Court, again in *obiter*, seems to have made the opposite conclusion, namely, that the provision could apply to business income. The Exchequer Court did not refer to *Robins*.

Finally, in *Lackie v. Canada*, [1979] F.C.A No. 700 (QL), a decision of the Federal Court of Appeal, the parties agreed that the provision could not apply to business income, and the Court of Appeal proceeded on that basis without analyzing the issue.

Accordingly, strictly speaking, the Court of Appeal did not decide on the issue, but given that it was aware of the issue, we must take into account that it had proceeded on that basis.

I also note that, in some interpretation bulletins, the Canada Revenue Agency stated that section 74.1 cannot apply.

Therefore, there is a provision the wording of which suggests a very broad application and there are two lines of jurisprudence. If the issue had to be decided, would it not be important to take into account the principle that it is

[151] The Court will communicate with the parties in order that the appropriate draft judgments be prepared to give effect to this decision.[79] The Court will also communicate with the parties regarding the costs.

Signed at Ottawa, Ontario, this 23rd day of April 2014.

"Gaston Jorré"

Jorré J.

Translation certified true

on this 29th day of July 2014

François Brunet, Revisor

desirable that the law be predictable and that it seems to be largely accepted that subsection 74.1(1) cannot apply to business income?

[79] See Rule 169 of the Rules.

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