A-445-11, 2012 FCA 272, 2012 CAF 272 – Mainville J.A. (Nadon, Gauthier JJ.A. concurring) --12/10/30 -- Tax – Income tax – Tax avoidance – General anti-avoidance rule (GAAR) – Abuse or misuse – Avoidance transaction – Tax benefit – M was sole shareholder of taxpayer — Plan was implemented just before taxpayer's year end, which involved incorporating new company ("Newco") – Taxpayer subscribed for common shares of Newco for $5,600,250 – Newco paid stock dividend on common shares held by taxpayer by issuing to taxpayer preferred shares redeemable for $5,500,250 and had paid up capital of $56 – Newco issued additional common shares to taxpayer for consideration of $200,000; this step was window dressing to give common shares some value – Common shares were sold for $200,000; purchaser was new trust whose beneficiaries were relatives of M– Taxpayer borrowed $5,600,000 from Newco; and granted security interest in property to Newco– Transactions were reported as increasing loss from operations; $56 was recorded as revenue from stock dividend and subscription price for common shares was deducted as part of cost of sales – Overall result was that taxpayer's loss from operations included net loss of $5,600,194 – M claimed motive was creditor protection and he and taxpayer were named as defendants in litigation in United States in 2001 – Loss was applied to eliminate most of taxpayer's tax payable under Income Tax Act for 1999, 2000 and 2001 taxation years – Minister of National Revenue assessed taxpayer finding that general anti-avoidance rule (GAAR) applied to loss on disposition of shares – Taxpayer's appeal was allowed – Trial judge found transactions within series had same primary purpose as whole – Trial judge found tax purpose of series was clear from evidence and acknowledged by taxpayer – Trial judge found creditor protection purpose was less clear – Trial judge found Minister argued that object and spirit of Act is to permit losses to be deducted only if they are not artificially created losses – Minister appealed – APPEAL ALLOWED – Transaction violated GAAR -- Taxpayer was prejudiced by some new arguments submitted on appeal: that common shares were not acquired by taxpayer as inventory or part of adventure in nature of trade, and that shares were capital property and capital gains provisions of Act should have been applied to losses from sale, and these arguments were not heard -- New legal arguments could be made on appeal as they were based on evidentiary record, although practice was not condoned – Taxpayer to receive increased costs due to improper actions of Minister in raising new arguments on appeal – Object, spirit or purpose of sections 3, 4, 9 and 111 of Act was that in order to be used for taxation purposes, business losses must be grounded in some form of economic or business reality – Former subsection 245(1) had little relevance and was not part of core portions of Act for GAAR consideration -- Provisions of Act relating to capital losses were not relevant for ascertaining treatment of business losses -- GAAR could not be used to import meaning to terms income, profit or loss -- Trial judge did not consider purpose of relevant provisions in respect of GAAR, but matter was reviewable on appeal – Loss was paper loss only – Transactions were vacuous and artificial -- No air of economic or business reality was associated with loss, and consequently, transactions which created loss defeated underlying rationale of sections 3, 4, 9 and 111, to extent that provisions allowed for use of business losses.

Global Equity Fund Ltd. v. R.

Her Majesty the Queen, Appellant and **Global Equity Fund** Ltd., Respondent

Citation: 2012 CarswellNat 4117, 2012 FCA 272, [2013] 1 C.T.C. 135, 2013 D.T.C. 5007 (Eng.), 440 N.R. 140, 2012 CAF 272
Federal Court of Appeal
M. Nadon, Johanne Gauthier, Robert M. Mainville JJ.A.
Heard: October 11, 2012
Judgment: October 30, 2012
Year: 2012
Docket: A-445-11

Proceedings: reversing *Global Equity Fund Ltd. v. R.* (2011), 2011 CarswellNat 4286, [2012] 1 C.T.C. 2224, 2011 TCC 507, 2011 CCI 507, 2011 CarswellNat 6006, 2011 D.T.C. 1350 (Eng.) (T.C.C. [General Procedure])

Counsel: William Softley, Margaret McCabe, for Appellant

Jehad Haymour, Sophie Virji, for Respondent

Subject:
Income Tax (Federal); Civil Practice and Procedure

Table of Authorities

Cases considered by *Robert M. Mainville J.A.*:

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s. 3(c) — considered
s. 3(d) — considered
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s. 9 — considered
s. 111 — considered
s. 111(1) — referred to
s. 111(1)(a) — considered
s. 111(3) — referred to
s. 111(8) — referred to
s. 152(9) — considered
s. 152(9)(a) — considered
s. 152(9)(b) — considered
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APPEAL by Minister of National Revenue from judgment reported at *Global Equity Fund Ltd. v. R.* (2011), 2011 CarswellNat 4286, [2012] 1 C.T.C. 2224, 2011 TCC 507, 2011 CCI 507, 2011 CarswellNat 6006, 2011 D.T.C. 1350 (Eng.) (T.C.C. [General Procedure]), allowing appeal by taxpayer from assessment by Minister finding transaction violated General Anti-Avoidance Rule.

***Robert M. Mainville J.A.*:**

1 This is an appeal by Her Majesty the Queen (the "Crown") from a judgment of Woods J. of the Tax Court of Canada (the "Tax Court judge"), cited as 2011 TCC 507 (T.C.C. [General Procedure]), allowing the appeal of Global Equity Fund Ltd. ("Global") with respect to reassessments for the 1999, 2000 and 2001 taxation years issued by the Minister of National Revenue (the "Minister"). The Minister, relying on the general anti-avoidance rule (the "GAAR") set out in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act"), had disallowed a business loss in the amount of $5,600,194 claimed by Global following the disposition of shares it held in 953565 Alberta Ltd. That loss arose from the implementation of a planning technique known in the tax community as a "value shift".

2 For the reasons set out below, I would allow this appeal and restore the Minister's assessments under the GAAR.

Background facts

3 The facts are fully set out in the decision of the Tax Court judge and need not be repeated. It suffices for the purposes of this appeal to set out the following summary. Some of the provisions of the Act which are relevant appear in an annex to these reasons.

4 Global was incorporated in 1999 for the purpose of investing in credit facilities and private placements. Its sole shareholder is a trust whose beneficiaries include Mr. Riaz Mamdani, his spouse, their children, grandchildren, parents, siblings, nieces and nephews. At the time the concerned transactions were entered into, Mr. Mamdani and his wife had two very young children.

5 At some point, Mr. Mamdani sought professional advice to implement strategies for Global in order to defer tax. A plan for this purpose was developed and implemented just prior to September 30, 2001, which was Global's taxation year end. The plan may be summarized as follows:

a. a new corporation, 953565 Alberta Ltd. ("Newco") was incorporated;

b. a new trust was set up whose beneficiaries were Mr. Mamdani's children and grandchildren (the "Children's Trust");

c. Global subscribed to common shares of Newco for a consideration of $5,600,250;

d. Newco declared a dividend on the common shares held by Global in the form of non-voting preferred shares which were redeemable and retractable for $5,600,250 and which had a paid-up capital of $56;

e. Newco issued additional common shares to Global for a consideration of $200,000; however, it was acknowledged in the Tax Court that this step was inserted as window dressing in order to give the common shares some value;

f. Global sold all the common shares it held in Newco to the Children's Trust for a consideration of $200,000; it was as a result of this sale that Global claimed a loss of $5,600,194;

g. a loan was made by Newco to Global for $5,600,000; the loan bore interest at prime plus 2% and the loan agreement provided for an equity participation of 25% of the increase in fair market value of Global's assets while

> any part of the loan remained outstanding; an amendment to the loan agreement was made a few months later which deleted the interest and increased the equity participation to 50%;
>
> h. Global granted an interest in its property to Newco to secure the loan.

6 At the time the plan was implemented, it was contemplated that the loss resulting from the sale of the common shares of Newco to the Children's Trust might be a business loss for tax purposes since Global itself was involved in the business of trading securities. Consequently, in the income statement and balance sheet filed with Global's corporate tax return for 2001, the transactions were reported as increasing its losses from operations. $56 was recorded as revenue from the stock dividend, and the subscription price for the common shares of Newco was deducted as part of the cost of sales. The overall result was that Global claimed a net business loss of $5,600,194. The claimed loss gave rise to a significant tax benefit through the elimination, or near elimination, of tax payable under the Act for Global's 2001, 2000 and 1999 taxation years.

7 Pursuant to notices of reassessment dated April 11, 2005, the Minister, applying the GAAR, reassessed Global to deny this loss in its 2001 taxation year and the carry-back of the loss from the 2001 taxation year to the 1999 and 2000 taxation years. Global appealed to the Tax Court of Canada.

The decision of the Tax Court of Canada

8 The Tax Court judge allowed the appeal on the GAAR issue even though she found that the transactions were “highly artificial” and that the loss resulted “from a shuffle of paper” by which “no real economic loss was suffered” (reasons of the Tax Court judge at para. 4). She also noted that she may well have upheld the reassessments under the GAAR had the Crown raised different arguments (*ibid.* at para. 9).

9 Since it was conceded that the transactions gave rise to a tax benefit, the issues before the Tax Court judge were whether the transactions were “avoidance transactions” within the meaning of the GAAR and whether there was a misuse or abuse of the provisions of the Act relied upon to achieve the tax benefit that triggered the GAAR.

10 The Tax Court judge found that the transactions were “avoidance transactions”, notwithstanding Global's submissions that they were entered into for the purpose of creditor protection (*ibid.* at paras. 61, 62 and 76). This finding is not challenged in this appeal. In any event, there was abundant and cogent evidence before the Tax Court judge for her to reach such a finding.

11 The Tax Court judge also found that the transactions did not result, directly or indirectly, in a misuse or abuse of any provisions of the Act under the meaning of subsection 245(4). It is this conclusion which the Crown challenges in this appeal.

12 The Tax Court judge noted that in the GAAR analysis required to conclude a misuse or abuse of any provision of the Act, the first task is to interpret the provision giving rise to the tax benefit to determine its object, spirit or purpose. The judge noted that the burden of this task is placed on the Crown. She found that the Crown had not satisfied its burden with respect to this element of the GAAR (reasons of the Tax Court judge at paras. 85 to 88).

13 Global relied on sections 3, 4, 9 and 111 of the Act to achieve the tax benefit. The Crown did not take issue with this (*ibid.* at para. 87). The Crown's position was not to allege that any specific provision of the Act had been misused or abused, but rather that the transactions resulted in an abuse having regard to the Act as a whole. The Crown's position is set out in detail at paragraphs 89, 90 and 91 of the Tax Court judge's reasons, and the following extract from the Crown's argument (reproduced at para. 89 of the Tax Court judge's reasons) summarizes that position:

> The minister has not alleged that a specific provision has been misused in this arrangement. Rather, the transactions in the Series of Transactions resulted directly or indirectly in an abuse having regard to the provisions of the Act read as a whole, all within the meaning of subsection 245(4) of the Act. The Minister argues that the object and purpose of the provisions of the Act read as a whole is to permit only *bona fide* losses as deductions from income or capital gains.

14 The Tax Court judge held that the Crown had failed to establish that the object, spirit or purpose of the Act was to restrict business losses to real losses realized outside of an economic unit, as had been submitted to her. The Tax Court judge reached that conclusion following an analysis found in paragraphs 90 to 100 of her reasons, which I reproduce here for ease of reference:

> [90] It is important to note that the Crown does not allege that any of the provisions relied on for the tax benefit (s. 3, 4, 9, 111) have been misused. Section 9 appears to be a key provision relied on by Global as it brings in commercial principles in calculating income and loss. The Crown acknowledges that this provision, read alone, permits the deduction of the loss claimed by Global.
>
> [91] The essence of the Crown's argument is that the object and spirit of the provisions relied upon by Global are influenced by other provisions in the *Act*. These provisions all restrict the deduction of losses in one way or another. It is submitted that, as a result of these other provisions, the object and spirit of the provisions relied on is disclosed. As a result, only real losses realized outside the economic unit may be deducted.
>
> [92] The problem that I have with the Crown's argument is that the provisions referred to by the Crown are limited in scope. None of them, either separately or together, in my view, are suggestive of the broad object and spirit that business losses are limited to real losses realized outside the economic unit.
>
> [93] The provisions relied on by the Crown are s. 18(13), 18(14), 18(15), 40(3.3), 40(3.4), 54, former section 55, and s. 111(3), 111(4) and 111(5). They are reproduced in an appendix.
>
> [94] Only one of these provisions deals with artificial losses in general. It is former section 55(1), which was repealed when the GAAR was introduced. When it was in force, it only applied to transactions on capital account.
>
> [95] The Crown acknowledges that some of the other provisions are also targeted to capital losses. They are s. 40(3.3), 40(3.4), 54 and 111(4).
>
> [96] In the case of provisions which target capital losses, I do not believe that Parliament intended that they inform as to the object and spirit of the provisions relied on by Global. The legislative schemes relating to business and capital transactions are generally distinct.
>
> [97] As for provisions that apply to business losses, the Crown relies on s. 18(13), 18(14), 18(15), 111(3) and 111(5). The problem that I have with relying on these provisions is that each of them has a narrow focus.
>
> [98] Subsections 18(13), 18(14) and 18(15) are restricted to losses from a money lending business and adventures in the nature of trade. Subsection 111(3) narrowly targets a double deduction of losses. Subsection 111(5) restricts the deduction of losses on a change of control.
>
> [99] I am unable to discern a general policy from these provisions, separately or together, that restricts business losses in the manner that the Crown suggests. The provisions are too narrowly drawn to disclose an intention by Parliament of a general restriction against the deduction of artificially-created business losses.
>
> [100] For this reason, I have concluded that the first step of the abuse analysis has not been satisfied by the Crown. In particular, the Crown has failed to establish that the object and spirit of the provisions relied upon for the tax benefit is to restrict business losses to "real losses realized outside the economic unit."

Positions of the parties in this appeal

(a) The appellant Crown's position

15 The submissions made by the Crown in this appeal are substantially different from those it made in the Tax Court of Canada.

16 *First*, the Crown now specifically relies on sections 3, 4, 9 and 111 of the Act for the GAAR analysis. In its memorandum, the Crown offers at least two distinct but related rationales for these provisions: (a) the first new rationale is that the object, spirit or purpose of sections 3, 4, 9 and 111 is to allow the deduction of business losses "only to the extent that they reflect an underlying actual economic loss" so as "to ensure that a taxpayer's loss for a taxation year is an actual and accurate loss that reflects a true picture of the taxpayer's business operations over a defined period of time" (Crown's memorandum at paras. 59 and 61); (b) the second rationale is that the object, spirit or purpose of these provisions is to allow the deduction of true losses that reflect an actual "reduction in wealth" (Crown's memorandum at para. 71).

17 The Crown relies for these rationales on the common dictionary meaning of the terms "income", "loss", and "business" found in sections 3, 4 and 9 of the Act, and on the decisions of the Supreme Court of Canada in *Stewart v. R.*, 2002 SCC 46, [2002] 2 S.C.R. 645 (S.C.C.) ("*Stewart*") and *Canderel Ltd. v. R.*, [1998] 1 S.C.R. 147 (S.C.C.) ("*Canderel*").

18 *Second*, the Crown now also relies on former subsection 245(1) of the Act which read as follows:

> In computing income for the purposes of this act, no deduction may be made in respect of a disbursement or an expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce income.

19 Although this provision was repealed as a result of the adoption of the GAAR, and though it only dealt with expenses and disbursements, the Crown nevertheless submits that the intended effect of incorporating it into the GAAR was to maintain a general statutory assumption against transactions that produce artificial results in computing losses for taxation purposes.

20 *Third*, the Crown now also submits that the common shares of Newco were not acquired by Global as inventory, or as part of an adventure in the nature of trade, that is, for resale at a profit. As a logical consequence, the Crown adds that the loss resulting from the transactions should have been denied under section 9 of the Act.

21 *Fourth*, the Crown now also adds that these shares were capital property in the hands of Global, and that the provisions of the Act which address capital losses as part of the capital gains regime introduced in 1972 should therefore be considered and applied in this case. The Crown refers to two recent decisions of the Tax Court of Canada where the capital loss deductions in transactions similar to those under consideration in this appeal were denied on the basis of GAAR. Since the hearing of the appeal in this case, these two Tax Court decisions have been affirmed by our Court: *Triad Gestco Ltd. v. R.*, 2012 FCA 258 (F.C.A.) ("*Triad Gestco*") and *1207192 Ontario Ltd. v. R.*, 2012 FCA 259 (F.C.A.) ("*1207192 Ontario*").

22 *Fifth*, whether or not the loss in issue is deemed a capital loss, the Crown submits that the same rationale as determined by the Tax Court of Canada in these two above-mentioned cases should be applied to the interpretation of sections 3, 4, 9 and 111 of the Act, since the transactions in this case are substantially similar to those considered in *Triad Gestco* and *1207192 Ontario Ltd.*.

23 *Finally*, relying on the comment of the Tax Court judge (at para. 102 of her reasons) that she would have no hesitation in finding that the transactions at issue frustrate the object and purpose of the provisions relied upon in light of their vacuous nature, the Crown submits that this Court should conclude likewise.

(b) The respondent Global's position

24 Global notes that the Crown failed to satisfy the first step of the abuse analysis before the Tax Court judge. It submits that the judge's finding on this matter is unassailable, as is clearly apparent from the fact that the Crown does not challenge in this appeal the judge's interpretation of the Act or any of the relevant provisions which it had put to her.

25 Since in a GAAR analysis the onus is on the Minister to identify the object, spirit or purpose of the provisions of the Act that are claimed to have been frustrated or defeated, Global asks how the Crown can argue in this appeal that there is some "clear" rationale that only permits the deduction of true losses representing "a decrease in wealth" when it keeps changing its mind and takes inconsistent and incompatible positions in this Court and in the Tax Court of Canada. Global submits that the Crown cannot be said to have met its burden in such circumstances, as the taxpayer should be entitled to the benefit of the doubt.

26 In addition, Global notes that the Crown now argues in this appeal against its own admissions made before the Tax Court judge and against its reassessment position. Global adds that if the Crown believed that the non-capital loss could be disallowed under section 9 of the Act, or that the loss was actually a capital loss and not a business loss, the Minister could have reassessed on that basis and the Crown could have pled such positions, led evidence, and argued the same before the Tax Court judge. None of this was done.

27 Global further submits that the new rationale put forward by the Crown relying on sections 3, 4, 9 and 111 of the Act is, in essence, the Haig-Simons economic formulation of income as the net accretion of wealth between two points in time, a formulation which has not been enacted into law by Canada or any other country. It refers for this purpose to the discussions of the Haig-Simons formulation found in P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (Toronto: Carswell, 2010) at pp. 82-83; and in V. Krishna, *Fundamentals of Income Tax Law* (Toronto: Carswell, 2009) at pp. 111 to 113.

28 Global adds that nowhere in the text of sections 3, 4, 9 or 111 of the Act is there any reference to the term "artificial" or "true losses" or "decreases in wealth", or any suggestion of there being any rationale that these provisions are only intended to permit the deduction of "true losses representing a decrease in wealth" as advanced by the Crown, or that "true losses" are included in any calculation relevant to these provisions. Global further submits that nothing is stated nor implied in section 111 that the loss carry over rules only apply to what the Minister determines to be "true losses representing a decrease in wealth". For Global, regardless of how losses arise or whether a taxpayer continues to have income from the relevant source, paragraph 111(1)(*a*) provides that non-capital losses may be carried forward and carried back a number of years.

29 Global also notes that there are numerous provisions of the Act that deem income or loss to arise in certain circumstances. For Global, this establishes that the context of the Act does not support the Crown's position that only true losses representing a decrease in wealth may be claimed.

30 Global also notes that former subsection 245(1) relied upon by the Crown applied to deductions of disbursements or expenses that would unduly or artificially reduce income, and neither of these circumstances exist in this case. The appeal before this Court rather relates to a disposition of property on income account at a loss.

31 Finally, Global notes that the Crown is relying on an *obiter* comment made by the Tax Court judge in order to support the second part of the subsection 245(4) test, *i.e.* whether the transactions at issue frustrate or defeat the rationale of the concerned provisions of the Act. Global submits that such a conclusion cannot rationally flow from an *obiter* comment which does not even identify the provisions of the Act which are allegedly frustrated or defeated.

The issues

32 The principal issues to be determined in this appeal may be stated as follows:

> i. Can the Crown rely in this appeal on new arguments which were not raised by the Minister in assessing the taxpayer nor relied upon by the Crown in the Tax Court of Canada?
>
> ii. Do the transactions in issue result in a misuse or abuse of the provisions relied upon by the taxpayer within the meaning of subsection 245(4) of the Act?

Can the Crown rely in this appeal on new arguments which were not raised by the Minister in assessing the taxpayer nor relied upon by the Crown in the Tax Court of Canada?

33 Most of the arguments raised by the Crown in this appeal were not raised by the Minister in reassessing the taxpayer, nor relied upon by the Crown in the Tax Court of Canada.

34 Subsection 152(9) of the Act governs the right of the Minister to advance an alternative argument in support of an assessment. That provision was first introduced into the Act in 1998 as a legislative response to the ruling of the Supreme Court of Canada in *Continental Bank of Canada v. R.*, [1998] 2 S.C.R. 358 (S.C.C.). It provides for the following:

> **152.** (9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act
>
> (a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and
>
> (b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.
>
> **152.** (9) Le ministre peut avancer un nouvel argument à l'appui d'une cotisation après l'expiration de la période normale de nouvelle cotisation, sauf si, sur appel interjeté en vertu de la présente loi:
>
> a) d'une part, il existe des éléments de preuve que le contribuable n'est plus en mesure de produire sans l'autorisation du tribunal;
>
> b) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

35 The following principles have been found to apply when the Minister seeks to rely on subsection 152(9): (a) the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment; (b) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(*a*) and (*b*), which speak to the prejudice to the taxpayer; and (c) the Minister cannot use subsection 152(9) to reassess outside the time limitations set out in the Act, or to collect tax exceeding the amount of the assessment under appeal: *Walsh v. R.*, 2007 FCA 222, 367 N.R. 127 (F.C.A.) at para. 18.

36 Applying these principles to this appeal, I find that Global is prejudiced by some of the new arguments submitted for the first time in this appeal. Specifically, the Crown's arguments that (a) the common shares of Newco were not acquired by Global as inventory or as part of an adventure in the nature of trade, that is for resale at a profit, and should consequently have been denied under section 9, and (b) that these shares were capital property and the capital gains provisions of the Act should have been applied to the losses resulting from their sale.

37 These two new arguments involve issues of mixed fact and law for which an evidentiary basis was not established in the Tax Court of Canada. Had these arguments been initially made by the Minister or the Crown, Global might have adduced relevant evidence in the Tax Court of Canada to counter them. As a result of the evidentiary prejudice to Global, the Crown is precluded from raising these arguments in this appeal, and these arguments shall therefore be disregarded.

38 The other arguments raised by the Crown are all legal arguments made on the basis of the existing evidentiary record, and they may therefore be advanced in this Court. The transactions at issue are the same, no new reassessment is proposed, no additional tax exceeding the amounts of the concerned reassessments is claimed, and no new evidence is required to sustain or to counter these new arguments. Moreover, Global's counsel acknowledged at the hearing of this appeal that no evidentiary prejudice resulted from these arguments.

39 Though I conclude that some of the Crown's new arguments may be properly raised in this appeal, I cannot condone the Crown's conduct in acting as it has. Taking into account the handling of this litigation by the Crown, it is not surprising that the Tax Court judge cautioned (at para. 9 of her reasons) about the limited jurisprudential value of her decision. The taxpayer in this case has thus had to respond to ever moving Crown arguments and positions, and some of these are plainly contradictory to prior positions taken by the Crown. This is not a proper way of conducting GAAR litigation where one of the principal questions at issue is the discharging of the Crown's burden to identify the object, spirit or purpose of the provisions of the Act claimed to have been frustrated or defeated.

40 As a result, Global has had to assume in this case the costs of defending itself from ever changing Crown positions concerning the GAAR in this appeal and before the Tax Court of Canada. Taking into account that this is a GAAR case, and the substantial and numerous changes in positions taken by the Crown, I am of the view that Global should be awarded its costs in this Court and in the Tax Court of Canada, irrespective of the result of this appeal. Moreover, in this Court, Global's costs should be determined on a two counsel basis at the high end of column V of Tariff B.

Do the transactions in issue result in a misuse or abuse of the provisions relied upon by the taxpayer within the meaning of subsection 245(4) of the Act?

(a) The required analysis

41 As already noted, the parties agree that the loss resulting from the transactions at issue give rise to a tax benefit within the meaning of subsection 245(1) of the Act. Moreover, Global does not challenge the finding of the Tax Court judge that these transactions were avoidance transactions under the meaning of subsection 245(3).

42 The principal issue before us, therefore, is whether these avoidance transactions amount to misuse or abuse under the meaning of subsection 245(4). The relevant extracts of subsection 245(4) read as follows:

> **245.**(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction
>
> > (a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of
> >
> > > (i) this Act,
> > >
> > > …
>
> or
>
> > (b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.
>
> **245.** (4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas:
>
> > a) qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants:
> >
> > > (i) la présente loi,
> > >
> > > [...]

> b) qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble.

43 The inquiry under subsection 245(4) contains two parts. The first step is to determine the object, spirit or purpose of the provisions of the Act that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids. The second step is to examine the factual context of the case in order to determine whether the avoidance transactions defeat or frustrate the object, spirit or purpose of the provisions in issue: *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) at paras. 55 to 62 ("*Canada Trustco*"); *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.) at paras. 69 to 73 ("*Copthorne*").

44 The first step is essentially a question of law, but it is incumbent on the Crown to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated: *Canada Trustco* at paras. 44 and 65. The textual, contextual and purposive analysis is employed for this purpose in order to search for the rationale resulting from the words used in the provisions or which underlies these words and which may not be captured by the bare meaning of the words themselves: *Copthorne* at para. 70.

45 In addition to the provisions of the Act that are relied on for the tax benefit, the consideration of context may involve an examination of other sections of t"not every other section of the Act will be relevant in understanding the context of the provision at issue. Rather, relevant provisions are related 'because they are grouped together' or because they 'work together to give effect to a plausible and coherent plan' (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 361 and 364)."

46 The second step requires a consideration of whether the transactions fall within or frustrate the identified purpose of the concerned provisions of the Act. This is necessarily a fact intensive inquiry: *Canada Trustco* at para. 44. The analysis will lead to a finding of abusive tax avoidance where the result of the avoidance transactions (1) achieves an outcome that the statutory provisions relied on were intended to prevent; (2) defeats the underlying rationale of these provisions; or (3) circumvents certain provisions in a manner that frustrates or defeats their object, spirit or purpose: *Lipson v. R.*, 2009 SCC 1, [2009] 1 S.C.R. 3 (S.C.C.) at para. 40; *Canada Trustco* at para. 45. These considerations are not independent of one another and may overlap: *Copthorne* at para. 72.

47 In applying this test, there is no distinction between an "abuse" and a "misuse", since subsection 245(4) requires a single unified approach: *Canada Trustco* at para. 43; *Copthorne* at para. 73.

48 In any event, the GAAR may only be applied to deny a tax benefit when the abusive nature of the transactions is clear, and if the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer: *Canada Trustco* at paras. 50 and 66; *Copthorne* at paras. 68 and 72.

(b) The object, spirit or purpose of the provisions of the Act that are relied on for the tax benefit

49 It is not disputed that the provisions relied on by Global for the tax benefit resulting from the transactions are sections 3, 4, 9 and 111 of the Act. These are the core provisions for the purposes of the analysis under paragraph 245(4), and the Crown now recognizes - in this appeal - that it is the object, spirit or purpose of these provisions which must be determined for the purposes of the GAAR.

50 However, the Crown adds that in determining the object, spirit or purpose of these provisions, consideration must given to (a) former subsection 245(1) of the Act, and to (b) the provisions of the Act concerning capital losses. I disagree. Though in addition to the provisions of the Act that are relied on for the tax benefit, the consideration of context may involve an examination of other sections of the Act, as noted above, not every other section of the Act will be relevant in understanding the context of the provisions at issue. Rather, other provisions are relevant either because they are grouped together with the directly relevant provisions or because all these provisions work together to give effect to a plausible and coherent plan: *Copthorne*, at para. 91.

51 Former subsection 245(1) has little or no relevance in the circumstances of this appeal. That subsection provided that in computing income under the Act, no deduction in respect of a disbursement or expense made or incurred in respect of a transaction or operation would be allowed in circumstances that would unduly or artificially reduce income. The circumstances contemplated under that former subsection simply do not occur in the transactions at issue in this appeal. The transactions before this Court do not concern artificial disbursements or expenses, but rather a loss on income account following the disposition of shares. Consequently, even if it had not been repealed, former subsection 245(1) would simply have been too remote from the transactions at issue in order to be considered for the purposes of the required analysis.

52 Nor may the Crown rely on the provisions of the Act relating to capital losses in order ascertain the object, spirit or purpose of sections 3, 4, 9 and 111 of the Act as they concern the use of business losses for taxation purposes. The provisions of the Act relating to capital losses are distinct from those relating to business losses, and these provisions usually operate independently from one another. The Crown offers no support for its suggestion that the rationales for capital losses and business losses are aligned and instruct each other. To accede to the Crown's position would be to search for an overriding policy in the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. The Crown's approach would send this Court on the search for an overreaching policy to override the wording of the provisions of the Act, and it would inappropriately place the formulation of taxation policy in the hands of this Court. This is precisely what the Supreme Court of Canada instructs us not to do: *Canada Trustco* at paras. 41-42:

53 The issue at hand, therefore, is to identify the object, spirit or purpose of sections 3, 4, 9 and 111 of the Act. However, it is not necessary to analyse all aspects of these basic provisions of the Act, but only their object, spirit or purpose as it may relate to the use of a business loss for taxation purposes.

54 Section 3 provides the basic mechanism for determining a taxpayer's income for a taxation year. It sets out separate sources of income (office, employment, business or property) and capital gains that are aggregated in subsections 3(*a*), (*b*) and (*c*) and computed separately according to different rules. Subsection 3(*d*) then allows a set-off of the taxpayer's loss for the year from employment, business or property against that aggregated amount.

55 Section 4 sets out that a taxpayer's income or loss for a taxation year from an office, employment, business, property or other source is the taxpayer's income or loss computed in accordance with the Act.

56 Section 9 provides (a) that a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year, and (b) the taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss for the taxation year from that source computed by applying the provisions of the Act respecting the computation of income from that source, with such modifications as the circumstances require.

57 Section 111 allows a taxpayer to carry-forward and carry-back certain losses, including business losses, for a certain number of statutorily defined years.

58 Regarding income and losses that are sourced in a business, it is apparent from reading these provisions that their underlying rationale is to make the taxpayer subject to tax on business profits in the year the profits are realized, and relieved from tax to the extent that there has been a business loss in that year. Business losses of a given year may also be carried back or carried forward to other years within a specified statutory period in order to offset for taxation purposes certain other income sources.

59 The Act does not define the key expressions used in these provisions, notably the terms “income”. “profit” and “loss”. The fact that these key terms remain undefined is clearly a deliberate legislative choice. The GAAR cannot and should not be used to impute a special overarching meaning to these expressions. The use of GAAR for such a purpose would inappropriately place the formulation of fundamental taxation policy in the hands of the courts: *Canada Trustco* at para. 41. As a general principle, courts should avoid judicial innovations and rule making in tax law: *Stewart* at para. 4. As aptly noted by Iacobucci J. in *Canderel* (at para. 41): “The law of income tax is sufficiently complicated without unhelpful judicial

incursions into the realm of lawmaking. As a matter of policy, and out of respect for the proper role of the legislature, it is trite to say that the promulgation of new rules of tax law must be left to Parliament."

60 The Crown suggests in this appeal that only the deduction of business losses that reflect an "actual reduction in wealth" or "an actual economic loss" should be recognized for income tax purposes under sections 3, 4, 9 and 111 of the Act. These two expressions suggested by the Crown may have a meaning in the context of economic theory or even some aspects of fiscal policy, but it is not clear that they aptly describe all business losses that are or should be recognized as such for income tax purposes. I do not agree with the Crown that it is necessary, in the context of these proceedings, to impart such an overarching meaning to the concept of a business loss, an exercise which Parliament has itself deemed inappropriate.

61 The analysis required here under the GAAR and concerning the treatment of a loss resulting from a business source under sections 3, 4, 9 and 111 of the Act must consequently be much more modest.

62 The policy or purpose underlying these provisions is grounded in the words of the provisions themselves. However, as part of the analysis, we must also "look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find a meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Income Tax Act": *Canada Trustco* at para. 47. The fundamental rationale underlying these provisions is that, in order to be used for taxation purposes, business losses must be grounded in some form of economic or business reality. As noted in *Canderel* at para. 53, "[i]n seeking to ascertain profit, the goal is to obtain an accurate picture of the taxpayer's profit for the year." That same common sense principle applies to a business loss, thus harmonizing the concept of business loss with the related concept of profit under the Act.

63 There is some flexibility in the concept of business loss. Nevertheless, a textual, contextual and purposive interpretation of sections 3, 4, 9 and 111 of the Act as they relate to that concept, leads to the rationale that if a business loss is to be used for taxation purposes under those provisions, there must, at the very least, be an air of economic or business reality associated with that loss.

(c) Do the transactions at issue defeat or frustrate this object, spirit or purpose?

64 Determining whether the transactions at issue defeat or frustrate this underlying policy or purpose is a question of mixed fact and law. In this case, the Tax Court judge did not consider the issue, save to comment (at para. 102 of her reasons) that had she agreed with the Crown's position on the first step of the analysis under subsection 245(4), she would have concluded that the second step was satisfied. I agree with Global that this *obiter* comment cannot support a conclusion on the second part of the analysis.

65 It is thus necessary to consider whether this analysis should be remitted to the Tax Court judge for a new determination in accordance with these reasons. The matter could indeed be returned to the Tax Court judge. However, it is well established that appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record where they deem such an assessment to be in the interests of justice and feasible on a practical level: *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 (S.C.C.) at para. 103; *Hollis v. Birch*, [1995] 4 S.C.R. 634 (S.C.C.) at para. 33. In this case, this Court has a complete record on which to make a determination on the second step of the subsection 245(4) analysis. Determining the issue now will avoid further delaying the proceedings. Moreover, I am of the view that the interests of justice would be well served by this Court finally deciding the matter.

66 The loss generated by Global as a result of the transactions resulted from a value shift between one of the classes of shares held by Global to another class of shares it held. This is simply a paper loss. The fundamentals of the transactions are simple: the inherent value of the common shares in Newco held by Global was moved to the preferred shares issued to Global, with the result that the common shares were left with little value but still with a high cost associated to them, while the preferred shares issued as a dividend had a high value but a low associated cost. Nothing was gained or lost, however in selling the common shares to the Children's Trust, Global technically realized a large loss on paper.

67 The vacuity and artificiality of transactions may confirm their abusive nature: *Mathew v. R.*, 2005 SCC 55, [2005] 2 S.C.R. 643 (S.C.C.) (*sub. nom. Kaulius v. The Queen*) at para. 62. The Tax Court judge found that the transactions at issue in this case were "vacuous" and "highly artificial". I agree. Like the proverbial rabbit out of the magician's hat, the loss which occurred as a result of these transactions was pulled out of thin air. These transactions are nothing more than a paper shuffle carried out with the purpose of creating an artificial business loss for the purpose of avoiding the payment of taxes otherwise owed on the profits resulting from the real-world business operations of Global.

68 There is no air of economic or business reality associated with the loss, and consequently, I find that the transactions which created this artificial loss defeat the underlying rationale of sections 3, 4, 9 and 111 of the Act, to the extent that these provisions allow for the use of business losses for income taxation purposes.

Conclusions

69 I would therefore allow this appeal with respect to the GAAR issue. Nevertheless, for the reasons set out above, Global should be entitled to its costs in this Court and in the Tax Court of Canada. In this Court, Global's costs should be determined on a two counsel basis at the high end of column V of Tariff B.

***M. Nadon J.A.*:**

I Agree.

***Johanne Gauthier J.A.*:**

I Agree.

Appeal allowed.

Annex

Income Tax Act, R.S.C. 1985, c. 1 (5th supp.) (the "Act")

- Section 3 of the Act:

3. The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

(b) determine the amount, if any, by which

(i) the total of

(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and

(B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,

exceeds

(ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,

(c) determine the amount, if any, by which the total determined under paragraph (*a*) plus the amount determined under paragraph (*b*) exceeds the total of the deductions permitted by subdivision e in computing the taxpayer's income for the year (except to the extent that those deductions, if any, have been taken into account in determining the total referred to in paragraph (*a*), and

(d) determine the amount, if any, by which the amount determined under paragraph (*c*) exceeds the total of all amounts each of which is the taxpayer's loss for the year from an office, employment, business or property or the taxpayer's allowable business investment loss for the year,

and for the purposes of this Part,

(e) where an amount is determined under paragraph (*d*) for the year in respect of the taxpayer, the taxpayer's income for the year is the amount so determined, and

(f) in any other case, the taxpayer shall be deemed to have income for the year in an amount equal to zero.

• Paragraph 4(1)(*a*) of the Act:

4. (1) For the purposes of this Act,

(a) a taxpayer's income or loss for a taxation year from an office, employment, business, property or other source, or from sources in a particular place, is the taxpayer's income or loss, as the case may be, computed in accordance with this Act on the assumption that the taxpayer had during the taxation year no income or loss except from that source or no income or loss except from those sources, as the case may be, and was allowed no deductions in computing the taxpayer's income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that source or to those sources, as the case may be, and except such part of any other deductions as may reasonably be regarded as applicable thereto; and

…

• Section 9 of the Act:

9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

(2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

(3) In this Act, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.

• Subsections 111(1), (3) and (8) of the Act (in part):

111. (1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such portion as the taxpayer may claim of the taxpayer's

(a) non-capital losses for the 20 taxation years immediately preceding and the 3 taxation years immediately following the year;

…

(3) For the purposes of subsection 111(1),

(a) an amount in respect of a noncapital loss, restricted farm loss, farm loss or limited partnership loss, as the case may be, for a taxation year is deductible, and an amount in respect of a net capital loss for a taxation year may be claimed, in computing the taxable income of a taxpayer for a particular taxation year only to the extent that it exceeds the total of

(i) amounts deducted under this section in respect of that non-capital loss, restricted farm loss, farm loss or limited partnership loss in computing taxable income for taxation years preceding the particular taxation year,

(i.1) the amount that was claimed under paragraph 111(1)(*b*) in respect of that net capital loss for taxation years preceding the particular taxation year, and

(ii) amounts claimed in respect of that loss under paragraph 186(1)(*c*) for the year in which the loss was incurred or under paragraph 186(1)(*d*) for the particular taxation year and taxation years preceding the particular taxation year, and

(b) no amount is deductible in respect of a non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss, as the case may be, for a taxation year until

(i) in the case of a non-capital loss, the deductible noncapital losses,

(ii) in the case of a net capital loss, the deductible net capital losses,

(iii) in the case of a restricted farm loss, the deductible restricted farm losses,

(iv) in the case of a farm loss, the deductible farm losses, and

(v) in the case of a limited partnership loss, the deductible limited partnership losses,

for preceding taxation years have been deducted.

…

(8) In this section,

…

"non-capital loss"

«perte autre qu'une perte en capital»

"non-capital loss" of a taxpayer for a taxation year means, at any time, the amount determined by the formula

(A + B) - (D + D.1 + D.2)

where

A is the amount determined by the formula

E - F

where

E is the total of all amounts each of which is

(a) the taxpayer's loss for the year from an office, employment, business or property,

(a.1) an amount deductible under paragraph 104(6)(*a.4*) in computing the taxpayer's income for the year,

(b) an amount deducted under paragraph (1)(*b*) or section 110.6, or deductible under any of paragraphs 110(1)(*d*) to (*d.3*), (*f*), (*g*), (*j*) and (*k*), section 112 and subsections 113(1) and 138(6), in computing the taxpayer's taxable income for the year, or

(c) if that time is before the taxpayer's eleventh following taxation year, the taxpayer's allowable business investment loss for the year, and

F is the amount determined under paragraph 3(*c*) in respect of the taxpayer for the year,

B is the amount, if any, determined in respect of the taxpayer for the year under section 110.5 or subparagraph 115(1)(*a*)(vii),

C [Repealed, 2000, c. 19, s. 19(4)]

D is the amount that would be the taxpayer's farm loss for the year if the amount determined for B in the definition "farm loss" in this subsection were zero,

D.1 is the total of all amounts deducted under subsection 111(10) in respect of the taxpayer for the year, and

D.2 is the total of all amounts by which the non-capital loss of the taxpayer for the year is required to be reduced because of section 80;

…

• Subsections 245(1) to (5) of the Act:

245. (1) In this section,

"tax benefit"

«avantage fiscal»

"tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty;

"tax consequences"

«attribut fiscal»

"tax consequences" to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount;

"transaction"

«opération»

"transaction" includes an arrangement or event.

(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

(3) An avoidance transaction means any transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or

(b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

(i) this Act,

(ii) the *Income Tax Regulations*,

(iii) the *Income Tax Application Rules*,

(iv) a tax treaty, or

(v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

(b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

(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.

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