



## INCOME TAX

### ASSOCIATED COMPANIES

Tax liability — Appeal from Tax Court of Canada (T.C.C.) decision (2019 TCC 150) confirming assessment issued by Minister of National Revenue (Minister) under *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, s. 160(1); dismissing appeal on ground that consideration given by appellant in context of set-off inadequate, therefore, s. 160(1) engaged — S. 160(1) providing that when person transferring property to non-arm's length person, transferee, transferor jointly, severally liable to pay any amount that transferor was liable to pay under Act for taxation year in which transfer occurred, any preceding years — Under s. 160(1)(e), transferee's liability limited to excess of fair market value of property transferred over fair market value of consideration given for property — Provision applying whether or not transferor or transferee aware of any tax liability at time of transfer — Appellant, non-arm's length affiliate (Oldco), their sole shareholder, Mr. Piche, undertaking reorganization involving number of preordained transactions in course of which Oldco's assets transferred to appellant — Respondent arguing that transactions properly viewed as series of transactions, that overall result of series being that Oldco received insufficient consideration from appellant for transferred property, thereby triggering appellant's liability under s. 160(1) — T.C.C. rejected respondent's contention insofar as based on overall result of series — However, T.C.C. held that single transaction entered into during reorganization did trigger application of s. 160(1), confirmed assessment on this basis — Appellant maintaining that T.C.C. correctly held that overall result of series of transactions not engaging s. 160(1) but contended that T.C.C. erred in upholding assessment based on single transaction that T.C.C. identified — Respondent challenging T.C.C.'s conclusion on overall result achieved by series, submitting that single transaction, distinct from one identified by T.C.C., had effect of triggering application of s. 160(1) — Reorganization transactions all took place in March 2002 — In 2003, Minister reassessed Oldco for its 2000, 2001 taxation years for \$13,368.48 — In 2004, Minister then reassessed Oldco for its 2002 taxation year for \$113,366.10 — In March 2014, Minister assessed appellant for \$287,223.51 pursuant to Act, s. 160(1) — By that assessment, appellant held jointly, severally liable to pay Oldco's tax liability for 2000, 2001, 2002 taxation years plus accrued interest on basis that it did not give adequate consideration for property transferred to it by Oldco on March 19, 2002 — Whether existence, value of consideration given by appellant to Oldco must be determined at time when assets conveyed to appellant as T.C.C. holding or after completion of reorganization in light of overall result as respondent contending — Respondent suggesting as preliminary issue that shareholder Mr. Piche was aware that there might be unknown liabilities, including tax liabilities, that avoiding these liabilities was motivating factor behind reorganization — Law clear that intent to avoid payment of outstanding taxes not prerequisite for application of s. 160(1); however, improper motive, if present, can inform way in which Court views transactions, assesses their impact — Not open to respondent to take such position at late stage, having chosen not to challenge Mr. Piche's evidence at trial — Purpose of s. 160(1) to protect tax authorities against any vulnerability that may result from transfer of property between non-arm's length persons for consideration that is less than fair market value of transferred property — Four cumulative criteria triggering application of s. 160(1) "clear", "self-evident": (1) transferor must be liable to pay tax under Act at time of transfer; (2) there must be transfer of property; (3) transferee must be person with whom transferor was not dealing at arm's length or to otherwise designated transferee; (4) fair market value of property transferred must exceed fair market value of consideration given by transferee for property — In present case, first three criteria not disputed — Sole issue whether appellant gave adequate consideration for property transferred to it by Oldco — Concept of "series of transactions" allowing courts to look to overall result sought to be achieved in

assessing legal effect of series but having no application where, as here, each of transactions was entered into in pursuit of *bona fide* non-tax purpose — Such concept foreign to s. 160(1) — As well, introductory words in s. 160(1) (“[w]here a person has ... transferred property, either directly or indirectly, by means of a trust or by any other means whatever”) capturing all forms of transfers including those resulting from combined effect of multiple transactions, whether preordained or not — In present case, assets associated with new business were transferred in straightforward transaction at step 3 of reorganization so that no need to resort to broad introductory language to identify transfer that took place — Significantly, broad introductory language aimed at broadening notion of transfer; having no bearing on manner in which adequacy of consideration given for property transferred to be determined, which issue addressed separately by s. 160(1)(e)(i) — Absent sham or statutory language to contrary, of which none present, no basis on which respondent could ignore transfer of assets from Oldco to Newco for consideration equal to their fair market value at time of transfer — Finally, transfer of property taking place instantaneously both at civil, common law — Precise, clearly identifiable time when transfer taking place under both legal systems is notion that Parliament seizing on in providing both that value of property determined at time it was transferred; value of consideration given determined at that time — T.C.C. correctly holding that adequacy of consideration given must be measured against value of property transferred by way of “snapshot” taken at point in time when transfer taking place — In present case, not disputed that appellant giving Oldco adequate consideration at that time — T.C.C., acting on own initiative, went on to hold that mutual set-off of promissory notes—step 6 of reorganization—was distinct transaction that gave rise to transfer for which Oldco not given adequate consideration — Not open to T.C.C. to hold that Newco note had “considerable” value, that Oldco note had “nominal” value since both backed by same assets — Whatever value Newco note may have had, assets backing Oldco note could not be less, vice versa — Oldco note representing *bona fide* debt in face amount of \$30 million — Law clear that payment of *bona fide* debt cannot trigger application of s. 160(1), which is what took place when notes discharged — It followed that T.C.C. could not uphold assessment on alternative ground it identified — Finally, respondent’s novel ground for upholding assessment that although promissory note having face value of \$30 million issued to redeem Oldco’s class C shares as part of reorganization, no consideration effectively given to Oldco in return rejected — Appeal allowed.

EYEBALL NETWORKS INC. V. CANADA (A-308-19, 2021 FCA 17, Noël C.J., reasons for judgment dated January 29, 2021, 24 pp.)