Tax Accommodation Parties and Novel Applications of Section 160

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INTRODUCTION

The Minister of National Revenue ("Minister") and the Canada Revenue Agency ("CRA"), historically have taken a dim view of transactions involving tax "facilitators" and "accommodators". The CRA has issued public statements cautioning against the use of tax facilitators, including comments that the CRA would apply section 84.1[1] or the general anti-avoidance rule ("GAAR") if a purchaser corporation acts as an accommodator or facilitator for a taxpayer to strip surplus at capital gains rates or to realize on adjusted cost base ("ACB") and potentially avoid the application of section 84.1.[2] The Minister has reassessed taxpayers where facilitators and accommodators have been used.[3] The Department of Finance briefly joined the Minister's cause by proposing a new section 246.1 that, according to the Explanatory Notes, specifically targeted taxpayers which used an "accommodating third party"[4] who assisted with surplus stripping. Section 246.1 was abandoned in December 2017, following criticism that the existing jurisprudence gave the CRA adequate means of preventing the circumvention of section 84.1 through the use of facilitators.[5]

The Minister now has turned to section 160 to collect tax revenue and "chill" the market for tax facilitators. This article explores this use of section 160 and a compendium of recent cases which serve to broaden the potential application of section 160, apply the provision in unprecedented contexts and embolden the Minister in her use of the provision. Many taxpayers who have utilized tax facilitators are now receiving section 160 assessments relating to transactions that had been completed as far back as fifteen years ago. The Minister's current use of section 160 should be of great concern to anyone who has utilized a tax facilitator in the past, regardless of how long ago the actual commercial transactions took place.

SECTION 160 – AN OVERVIEW

The purpose of section 160 is to allow the CRA to assess a non-arm's length transferee of property for the unpaid taxes, interest, and penalties of a transferor under the Act.[6]

The four requirements for section 160 to apply were summarized by the Federal Court of Appeal ("FCA") in *Livingston.*[7] For section 160 to apply, there must be:

(1) a transfer of property;[8]

(2) between parties not dealing at arm's length;

(3) for no consideration or for inadequate consideration; and

(4) the transferor must be liable to pay tax under the Act at the time of the transfer.

Where section 160 applies, generally the transferor and the transferee are jointly and severally liable to pay the transferor's tax, interest, and penalty payable under the Act equal to the lesser of:

(1) the difference between the FMV of the transferred property at the time of the transfer and the FMV of the consideration given by the transferee for the property; and

(2) the tax liability of the transferor for the year in which the transfer is made or in any preceding year.[9]

Intent on the part of the transferor to avoid tax, or even knowledge of the tax debt, is not required for the provision to apply.[10] Where the transferor is subsequently reassessed for an increased amount owing for the taxation year in which the property transfer took place, the reassessed tax liability is treated as existing at the time of the property transfer. In transactions involving tax facilitators, the fact that a vendor corporation involved with a tax facilitator did not owe any income tax at the time of the transactions does not prevent the CRA from issuing a later reassessment to the vendor corporation, and then using section 160 to assess persons who received dividends from the vendor corporation. Limited Period FOR ASSESSING under section 160.

A transferee under section 160 may be assessed "at any time", so that there is no time limitation period on such an assessment. In *Addison & Leyen Ltd*.,[11] the Supreme Court of Canada confirmed that the Minister has no time limit within which to use section 160 and, theoretically, never is statute-barred from assessing under section 160, even if any further reassessment of the primary tax debtor would be statute-barred.

Paragraph 160(1)(*e*) requires that the transferor must have been liable to pay an "amount" under the Act. Liability for tax is not contingent upon the existence of an accurate assessment of the transferor, and is not affected by an incorrect or incomplete assessment, or by the fact that no assessment has been issued.[12] The Court in *Simard-Beaudry Inc.*[13] confirmed that the operation of the Act as a whole creates a liability for tax. So, tax liability is not created by, or dependent upon, an assessment. The CRA has stated that "[a] taxpayer's liability to pay tax remains the same, regardless whether a notice of assessment is mistaken or is not sent at all."[14]

In the context of section 160, the amount for which a transferor is potentially liable does not need to be an amount that has been fixed by an assessment on or prior to the date of transfer. The CRA's position is that a transferee may be liable under section 160 even if the transferor has not been assessed because the CRA considers the transfer of property to create the liability of the transferee under section 160.[15] Exposure to section 160 liability potentially could persist forever, beyond any normal reassessment period for the transferor, because liability is not created by an assessment and it is only reassessments that can become statute-barred. The proposition that a tax liability can exist regardless of whether an assessment has been made was confirmed in *Jurak*.[16] In that case, the Court held that a third party became liable for the tax liability of a non-arm's length primary tax debtor notwithstanding that no reassessment had been issued to that primary tax debtor.

In *Gaucher,* a taxpayer assessed under section 160 attempted to raise a limitation period defence with respect to the underlying primary tax assessment.[17] The Tax Court held that this limitation period defence could not succeed. On appeal, the FCA held that in the case of a section 160 assessment of a second person for the tax assessed against a primary taxpayer, "that second person must have a full right of defence to challenge the assessment made against her, including an attack on the primary assessment on which the second person's assessment is based".[18] The appeal was sent back to the Tax Court but the parties reached a settlement.

The FCA's reasoning turned on the existence of the underlying assessment on the particular facts of that case; the Court did not comment on the outcome of a limitation period defence in the absence of an assessment of the primary tax debtor. If a transferor's tax liability exists under applicable provisions of the Act, but no assessment has been issued to the transferor and the normal reassessment period for the transferor has past, that will not be the end of the matter. In the authors' view, section 160 permits the Minister to assess a non-arm's length transferee at any time for the transferor's underlying tax debt despite the absence of an assessment in respect of that underlying tax debt.

THE ONUS OF PROOF REGARDING THE CORRECTNESS OF THE UNDERLYING PRIMARY TAX ASSESSMENT

The recent decision in *Monsell*[19] serves as a reminder of the taxpayer's onus to disprove the correctness of a derivative assessment. This decision also shows that in certain circumstances, the taxpayer can challenge this onus and shift the burden of proof to the Minister. The two taxpayers, Tammy, and her spouse, Peter, were assessed under section 160 for certain tax debts of a corporation ("Newgate") controlled by Peter's mother. Peter was the only signing authority on Newgate's bank accounts. In 2007, Newgate issued cheques to Tammy and Peter in the amounts of $41,500 and $15,000, respectively, allegedly for no consideration. Newgate ceased operations in 2010 and was dissolved in 2012. Newgate received reassessments for its 2005, 2006, and 2007 taxation years. The basis for the 2005 and 2006 reassessments was not clear, but the 2007 reassessment was based on the denial of the small business deduction. To collect Newgate's tax debts, the Minister reassessed Tammy and Peter under section 160 on the ground they received money from Newgate, with which they did not deal at arm's length, for no consideration.

In appealing their assessments, Tammy and Peter argued that all of the documents and information related to the underlying reassessments were in the CRA's possession and, therefore, the Minister had the onus of proving the correctness of those underlying reassessments.

As a taxpayer has disproportionate knowledge of that taxpayer's circumstances in a self-reporting tax system, in a tax appeal the taxpayer ordinarily bears the onus of establishing that an assessment or a reassessment is incorrect. However, in certain circumstances, and contrary to that general rule, "where the facts concerning the underlying reassessments are exclusively or peculiarly within the knowledge of the Minister, the onus will shift to the Minister to show the correctness of the underlying reassessments."[20]

The Tax Court in *Monsell* acknowledged that the appellants were entitled to challenge the correctness of an underlying primary tax assessment of the transferor. Justice D'Auray accepted the appellants' testimony that despite being non-arm's length with Newgate, their involvement was minimal, notwithstanding that Peter had signing authority for that corporation. The appellants never were involved in the management of Newgate and never had control or access to its tax records. Furthermore, the appellants attempted to acquire the corporate records pertaining to the 2005 and 2006 taxation years but were unsuccessful in their efforts. A CRA auditor testified that Newgate was audited in 2005 and 2006 and that the tax audit records were sent to another department of the CRA, which, however, could not locate them. The likely explanation was that the documents were lost or destroyed. D'Auray J. held that since the 2005 and 2006 documents were no longer available to the appellants, it was unfair for them to bear the burden of proving that the underlying assessments were incorrect, and consequently the onus for those taxation years shifted to the CRA.

The facts were different in the 2007 taxation year. Newgate's 2007 tax return was available to the appellants, as was the return of an associated corporation. The Minister had relied solely on the income tax returns filed by both corporations to reassess Newgate's 2007 taxation year. Because the documents relevant to the reassessment of Newgate for the 2007 taxation year were available to the appellants, D'Auray J. held that the onus of proving the underlying primary tax reassessment was incorrect remained with the appellants. The appellants were unable to discharge that onus and, as a result, the 2007 appeal was dismissed.

What can be distilled from *Monsell* is that a party assessed under section 160 can, as a defence, try to prove the underlying reassessment of the primary taxpayer was incorrect. In rare situations, such as the complete absence of records, the burden of proof may shift to the Minster. In *Monsell*, the appellants expended exhaustive efforts attempting to acquire the tax records for the transferor's 2005 and 2006 taxation years with a view to proving the underlying corporate primary tax debt did not exist. D'Auray J. emphasized the appellants' efforts as a reason why it was appropriate for the burden to shift to the Minister to establish the primary tax debt existed, and the CRA's evidence that it lost or destroyed the records provided further support for the onus being on the Minster.

A section 160 assessment may be made many years after the taxation year in which the primary liability arose. Consequently, records may no longer be available. In those cases, a prudent taxpayer who makes *bona fide* efforts to obtain information from the CRA, at the very least, should have an argument that the onus of proof shifts to the Minister.

APPLICATION TO PARAGRAPH 55(3) REORGANIZATION TRANSACTIONS

In *Eyeball Networks*,[21] the Tax Court determined that a related party divisive reorganization under paragraph 55(3)(*a*) included a transfer of property on the basis that a debt set-off was a transfer of property for less than FMV consideration to which section 160 could therefore apply. If this decision is affirmed by the FCA, it would represent a considerable expansion of the circumstances in which section 160 might apply.

For commercial reasons, the appellant ("Newco") acquired approximately $30 million of information technology assets and patents from a corporation ("Oldco"). Mr. Piche ("Piche") was the sole shareholder, director and officer of both Oldco and Newco. In consideration for the acquired assets, Newco assumed Oldco's commercial liabilities and issued preferred shares with a redemption amount equal to the estimated FMV of the acquired assets less the assumed liabilities. Piche transferred preferred shares of Oldco with a redemption amount equal to that estimated FMV to Newco. Both transfers took place under section 85 and were subject to price adjustment clauses in the relevant transfer agreements. Subsequent to the transfers, Oldco redeemed its preferred shares owned by Newco for a demand promissory note in the amount of $30 million. Newco also redeemed its preferred shares owned by Oldco for a promissory note in the amount of $30 million. A mutual debt cancellation agreement then was executed, pursuant to which the debts were set off against one another.

The Minister later reassessed Oldco for increased income taxes payable for taxation years which preceded the reorganization. By that time, Oldco's business had been wound down and the CRA was unable to collect the reassessed amounts from Oldco. The Minister then assessed Newco under section 160 on the basis that the "economic reality"[22] of the reorganization was that Opco's business assets had been transferred to Newco for no consideration. According to the Minister's characterization of the reorganization, none of the transfers had occurred for consideration because for each transfer the consideration issued was transitory; the Newco preferred shares and the Newco note disappeared in the course of the sequential steps of the reorganization. Newco contended that the transfer of assets from Oldco was in consideration for shares with a FMV equal to the FMV of the transferred properties.

Justice Bocock rejected the Crown's attempt to use "economic reality" to apply section 160 on a step transaction basis. The transactions were properly implemented to ensure symmetry between the preferred shares issued and the FMV of the transferred property. However, it was open to the court to determine whether the initial value of the consideration provided for the acquired assets changed at some point during the transactions.

The Court held that the debt set-off resulted in a transfer of property for inadequate consideration for purposes of section 160. The Oldco note and the Newco note were property, since they were both negotiable instruments. Furthermore, when the notes were cancelled by set-off there was a transfer of property, since a set-off obviates otherwise necessary cross-payments between mutual creditors and debtors. Set-off truncates the procedures that otherwise would be necessary to satisfy the mutual debts into one transaction; satisfying mutual obligations otherwise would have required transfers of property between the debtors and creditors. Since the set-off avoids these steps, Bocock J. concluded that a set-off is a transfer of property.

After determining that a set-off was a transfer of property, Bocock J. went on to make findings of fact with respect to the FMV of the notes. Because the Newco note was backed by the assets acquired from Oldco, that note's FMV was $30 million. In contrast, Bocock J. found the FMV of the Oldco note was nominal at the time of the set-off. The Court apparently did not consider evidence, expert or otherwise, as to the FMV of either note in arriving at this conclusion, and the Court appears not to have considered that the FMV of the Oldco note was supported by the Newco note with a FMV of $30 million.

Bocock J.'s conclusion of law that a set-off constitutes a transfer of property, and his finding of fact that the Oldco note had a nominal FMV, were the basis for his dismissal of the appeal. The set-off of the valuable Newco note held by Oldco against the worthless, according to Bocock J., Oldco note held by Newco resulted in a transfer of property from Oldco to Newco for no consideration at a time when Oldco owed tax, and thus the requirements of section 160 were satisfied.

The absence of expert evidence on valuation may limit the precedential value of this case. The appellant presented little or no evidence to establish the FMV of the promissory notes. The conclusion that the Oldco note had nominal FMV is questionable because, at the time of set-off, Oldco was in possession of a demand promissory note backed by Newco's assets. Even if a discount were to be applied to reflect the enforcement costs of collecting the debt, the finding that the note had no value at all appears unsupportable.

The practical difficulty with Bocock J.'s conclusions can be illustrated using a hypothetical scenario in which Newco obtains from a third party a "daylight" loan in order to repay the Newco note. The result of that repayment clearly would be a transfer of property for FMV consideration. Oldco then would have $30 million of cash on hand to repay the Oldco note, which legal obligation at that time would be supported by $30 million of assets. As a result, the cash repayment would be a transfer of property for FMV consideration. With respect, it makes no sense that a such a circulation of cash to effect payment of the equal and offsetting liabilities owing between the parties precludes the application of section 160, while a cash-free set-off results in a transfer for inadequate consideration to which section 160 applies.

Eyeball Networks has been appealed to the FCA. The appellant will have the opportunity to have its argument heard by three more judges.

THE INTERACTION OF SECTION 160 AND THE GAAR

594710 British Columbia Ltd. illustrates an interesting interaction of section 160 and the GAAR.[23] In 2006, 594710 British Columbia Ltd. ("Holdco") was the sole shareholder of a subsidiary corporation ("Partnerco"). Partnerco and three other corporations (together, the "Partnercos") were the four limited partners of a limited partnership with a real estate development business ("Partnership"). Each of the Partnercos was wholly-owned by a holding corporation (together, the "Holdcos"). In 2006, the Partnership realized business income of $13 million. In an effort to avoid tax on the Partnership's income, the Holdcos and Partnercos entered into transactions with an unrelated public corporation ("Nuinsco") which had available tax attributes.

On May 25, 2006, the Partnership made a $8.5 million loan to the Partnercos. The Partnercos then declared and paid a "high-high" stock dividend to the Holdcos by issuing preferred shares with an ACB and paid-up capital

("PUC") of $8.5 million. The Partnercos immediately redeemed the preferred shares, using the $8.5 million borrowed from the Partnership to pay the redemption price. Each redemption resulted in neither a deemed dividend nor a capital gain because the ACB and the PUC of the redeemed shares were each equal to the redemption amount.

On May 26, 2006, the Partnercos declared and a paid a "high-high" stock dividend to the Holdcos by issuing redeemable preferred shares with an ACB and PUC of $3.4 million. The Holdcos then sold their shares of the Partnercos to Nuinsco on May 29, 2006 for $3.5 million, with no capital gain or loss realized. The Partnership loaned funds to Nuinsco to fund these share purchases. The share purchases resulted in an acquisition of control and a deemed year-end for each of the Partnercos.

On May 30, 2006, the Partnercos were wound up into Nuinsco. The winding-up made Nuinsco the sole limited partner of the Partnership and Nuinsco assumed the Partnercos' $12.9 million debt to the partnership. At the end of its fiscal period on May 31, 2006, the Partnership allocated net income of $12.1 million to Nuinsco as the sole limited partner. Finally, on June 1, 2006 and June 26, 2006, a total of $12.9 million was distributed to Nuinsco and used to repay the debt owing to the Partnership. The Partnership was dissolved on June 28, 2006.

The Minister reassessed the Holdcos under section 160 and the GAAR. On a stand-alone basis, the statutory requirements of section 160 were not met because the transfers of property occurred in a taxation year of the Partnercos ending before the tax liability was incurred and all transfers of property were made for FMV consideration. However, the Minister's assessments were premised on the GAAR applying to an allegedly abusive circumvention of section 160 through the use of the "high-high" stock dividends, the share redemptions and the deemed year-end.

In the Tax Court, Rossiter C.J. found that the sale of the Partnerco shares to Nuinsco was an avoidance transaction, and he held that the purpose of section 160 is to prohibit a party that incurs a tax liability from transferring property to a non-arm's length party to escape the tax liability. The transfer of cash from the Partnership to the Holdcos (via Nuinsco) in one taxation year, followed by the incurring of tax liability in another taxation year through triggering a deemed year-end thus was an abuse of section 160. However, the GAAR did not apply as Rossiter C.J. was unable to find a tax benefit.

In searching for a tax benefit, the Court focused on three transfers: (i) the stock dividend by the Partnercos; (ii) the subsequent redemption of the Partnercos' shares; and (iii) the loan from the Partnership to Nuinsco together with the payment by Nuinsco on the purchase of the shares of the Partnercos. Following *Algoa Trust*,[24] Rossiter C.J. held there was no tax benefit realized in relation to section 160 from the payment of a stock dividend, because the payment of a stock dividend was not e a transfer of property. The redemption of the preferred shares did not result in a tax benefit in relation to section 160 because FMV consideration was exchanged. The loaning of money from the Partnership to Nuinsco to satisfy the purchase price for the Partnercos' shares was, viewed in context, an indirect transfer of property for section 160 purposes, and the share purchase price exceeded their FMV. However, there was no reduction in the FMV of Partnercos' assets since they still were limited partners of the Partnership and the only change was that cash was replaced by a promissory note, so there was no tax benefit. In the absence of a tax benefit, Rossiter C.J. held that the GAAR did not apply.

In reversing the Tax Court, the FCA held that the conclusion there was not a tax benefit was a palpable and overriding error. The Tax Court failed to consider whether the combination of a stock dividend followed by an immediate redemption of those shares was an indirect transfer from the Partnercos to the Holdcos. The FCA held that these two steps together were equivalent to a cash dividend, and that *Algoa Trust* confirms that a cash dividend is a transfer of property without consideration for the purposes of section 160.[25]

Furthermore, the FCA characterized the object, spirit and purpose of section 160 as imposing joint and several liability where a transfer of property occurs in the same taxation year as that in which a tax liability arises, or in a later taxation year. Section 160 was circumvented in this case by causing an indirect transfer of property to occur prior to a deemed year-end, as part of a series devoid of any non-tax purpose. This circumvention frustrated the purpose of section 160 for the reasons articulated by the Tax Court. The GAAR applied to the Holdcos, with the same tax consequences as those that would arise if section 160 applied.

This case is of concern to tax practitioners for several reasons. First, where transactions are structured so as to ensure that a transfer of property occurs prior to the time when tax liability of the transferor arises, the GAAR may be used to bring about the same result as that which would arise if section 160 applied. Secondly, as in *Eyeball Networks,* there is an apparent expansion of what is a transfer of property for below-FMV consideration. Notwithstanding that all transactions in *594710 British Columbia Ltd.* took place for FMV consideration, the economic equivalence to a non-FMV transfer was sufficient to allow for recharacterization using the GAAR.

TAX ACCOMMODATION PARTIES

These recent section 160 decisions are relevant to transactions involving tax accommodation parties because such transactions have one or more of the following characteristics:

(1) the taxpayer having limited access to the records of the accommodator or the post-closing records of the target corporation, which restricts the ability of the taxpayer to challenge the correctness of the primary tax assessment;

(2) the use of pre-ordained transactions taking place at FMV, such as stock dividends followed by a redemption or PUC increases followed by a FMV sale to the accommodator, all intended to ensure that no transfer of property occurs for less than FMV consideration;

(3) the use of consideration that may have an initial value that is different from what the arm's-length parties agree to be the FMV;

(4) the use of loans between entities to fund the payment of purchase prices, including, in many cases, a loan from a target corporation to an accommodator to finance the FMV purchase of the shares of the target corporation; and

(5) the reliance on the timing of deemed year-ends pursuant to subsections 249(4) and 256(9) to ensure that income of the target corporation arises in a taxation year when the target corporation is controlled by the accommodator.

The use of the GAAR to expand the scope of what is a below-FMV transfer of property, coupled with the absence of any limitation period for assessing under section 160, means that the CRA now can assess parties to accommodator transactions that occurred many years ago. Taken to its logical conclusion, the decision in

594710 British Columbia Ltd. indicates that the GAAR could permit a section 160-type assessment if the accommodator ultimately paid for the shares of the target corporation using the target corporation's cash. In that case, the accommodator's attempt to shelter the target corporation's taxable income using its tax attributes or a tax plan ultimately will not succeed.

A taxpayer assessed under section 160 (including a GAAR-based section 160 assessment) bears the burden of proving that the assessment is incorrect and may be forced to establish that the accommodator's primary tax elimination planning was legally effective and not frustrated by the GAAR. If the court hearing the taxpayer's section 160 appeal refuses to shift the onus of proving the primary liability of the transferor , the taxpayer will have to seek records from an arm's-length person who is not party to the appeal in order to have a reasonable prospect of success. In our experience, prior to examinations for discovery neither the CRA nor the accommodator party will generally be willing to provide the documents required to establish what the accommodator did post-closing and the basis for the accommodator's liability. So, the burden of proof may be a formidable obstacle.

CONCLUSION

Recent decisions reveal new arguments and techniques available to the Minister in using section 160 to combat arrangements involving tax accommodation parties. Challenging a section 160 assessment received by a taxpayer who has relied on tax accommodation strategies likely will be considerably more difficult in light of this jurisprudence.

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[1] All statutory references herein are to the *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("Act") unless otherwise indicated.
[2] ICAA May 2008 CRA Tax Roundtable, January 2009, response to question 7.
[3] For example, see *RMM Canadian Enterprises Inc. v. R*., 97 DTC 302 (T.C.C.).
[4] Private Corporations – Explanatory Notes Relating to the Income Tax Act and the Income Tax Regulations, July 18, 2017, Application of ss. 246.1(1):

> (b) the amount was received or receivable, directly or indirectly in any manner whatever, from a person with whom the individual was not dealing at arm's length (*including in situations where an accommodating third party that purportedly deals at arm's length with the individual is used as an intermediary to avoid subsection (1)*); …

[5] The Joint Committee on Taxation of The Canadian Bar Association and Chartered Professional Accountants of Canada, Re: July 18, 2017: Part D of Tax Planning Using Private Corporations — "Converting Income into Capital Gains" Proposals, October 2, 2017.
[6] *Medland v. R.*, 98 DTC 6358 (Fed. C.A.) at para. 14; *Raphael v. R.*, 2000 DTC 2434 (T.C.C. [General Procedure]) at para. 19. This judicial articulation of the purpose of s. 160 does not refer to the other fundamental requirement which is that the transfer of property must be for no consideration or consideration that is less than the fair market value ("FMV") of the transferred property.
[7] *Livingston v. R.*, 2008 DTC 6233 (F.C.A.) at para. 19; affirming 2007 DTC 943 (T.C.C. [Informal Procedure]) [*Livingston*].
[8] Under s. 160, this transfer can be either "directly or indirectly."
[9] Under para. 160(1)(*d*), the transferee and transferor also may be jointly and severally liable to pay a part of the transferor's Part I tax equal to the amount by which the tax for the year is greater than it would have been but for the attribution rules in ss. 74 to 75.1 of the Act. The remainder of this article will focus on the application of paragraph 160(1)(*e*).
[10] *Supra* note 7.
[11] *Addison & Leyen Ltd v. Canada*, 2007 DTC 5365 (S.C.C.) at para. 10.
[12] Subsection 152(3).
[13] *R. v. Simard-Beaudry Inc.*, 71 DTC 5511 (Fed. T.D).
[14] CRA Views, "Assessing a taxpayer's legal representative" 2010-0378861I7 (3 November 2010).
[15] CRA Views, "Non-arm's length transfer of property" 2008-0300311I7 (9 January 2009).
[16] *Jurak v. R.*, 2003 DTC 557 (T.C.C. [General Procedure]), affirmed 2003 DTC 5419 (Fed. C.A.).
[17] *Gaucher v. R*. 2000 DTC 6678 (Fed. C.A.) [*Gaucher*].
[18] *Ibid* at para. 7.
[19] *Monsell v. The Queen*, 2019 DTC 1029 (T.C.C. [General Procedure]) [*Monsell*].

[20] *Mignardi v. R*. 2013 TCC 67 (T.C.C. [Informal Procedure]) at para. 41; *Andrew v. R.*, 2015 DTC 1046 (T.C.C. [General Procedure]) at para. 64.
[21] *Eyeball Networks Inc. v. The Queen*, 2019 DTC 1112 (T.C.C. [General Procedure]), currently under appeal to the FCA [*Eyeball Networks*].
[22] The phrase "economic reality" appears to have been part of the reasoning of the Minister in *Eyeball Networks*.
[23] *594710 British Columbia Ltd. v. Her Majesty the Queen* (2019), 2019 CarswellNat 434, 2019 CarswellNat 435 (S.C.C.), leave to appeal refused from *Canada v. 594710 British Columbia Ltd.*, 2018 DTC 5111 (F.C.A.); reversing *594710 British Columbia Ltd. v. R.*, 2017 DTC 1004 (T.C.C. [General Procedure]) [*594710 British Columbia Ltd.*].
[24] *Algoa Trust v. R.*, 93 DTC 405 (T.C.C.) at para. 51.
[25] *Ibid* at para. 49.