Federal Court of Appeal | Cour d'appel fédérale

Date: 20160622

Dockets: A-296-15
A-195-16

Citation: 2016 FCA 186

CORAM: **NOËL C.J.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

KRUGER INCORPORATED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on April 13, 2016.

Judgment delivered at Ottawa, Ontario, on June 22, 2016.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: SCOTT J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] These are consolidated appeals brought by Kruger Incorporated (the appellant). The appeal in file A-296-15 is from a decision by former Chief Justice Rip of the Tax Court of Canada (2015 TCC 119), sitting as a supernumerary judge (the Tax Court judge), allowing in part the appellant's earlier appeal against a reassessment issued by the Minister of National Revenue (the Minister) with respect to its 1998 taxation year. By this reassessment, the Minister

denied business losses aggregating $91,104,379 which the appellant claimed in its tax return for that year. The losses in question arise from dealing in foreign exchange options.

[2] The appeal in file A-195-16 is directed at the cost award made by the Tax Court judge in favour of Her Majesty the Queen (the Crown or respondent) in the course of a separate judgment rendered some six months after the decision on the merits (2016 TCC 14). The appellant in lodging this appeal merely seeks to insure that the Court is in a position to address this award in the event that its appeal on the merits is successful.

[3] The primary issue turns on the method according to which the appellant can compute income from dealing in foreign exchange options pursuant to section 9 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). The Tax Court judge agreed with the Minister's contention that in computing income from that source, the profit or losses could only be recognized when realized, thereby rejecting the appellant's use of mark to market accounting as an acceptable method for computing income under the Act. However, he accepted, in part, the appellant's alternative argument that its foreign exchange option contracts were inventory, and could on that account give rise to a loss based on their value at year end.

[4] The appellant takes issue with the conclusion reached by the Tax Court judge on the primary issue and both parties challenge the conclusion which he reached on the alternative issue.

[5] For the reasons which follow, I would allow the appeal on the basis that the Tax Court judge did not adhere to established case law and did not follow the framework of analysis set out in *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147 [*Canderel*] in rejecting mark to market accounting. I would also find in the alternative that, having regard to the meaning of the word "inventory" as defined in subsection 248(1) of the Act and the findings of fact made by the Tax Court judge, it was not open to him to hold that any of the foreign exchange option contracts to which the appellant was a party, on December 31, 1998, were inventory.

[6] In the reasons which follow, the contracts to which the appellant was a party during the relevant period are at times referred to as foreign exchange option contracts or foreign exchange options; nothing turns on this difference. The provisions of the Act which are relevant to the analysis are reproduced in Annex I.

BACKGROUND AND FACTS

[7] The relevant facts are set out in detail in the decision under appeal and need not be repeated. It is sufficient for present purposes to provide a brief summary.

[8] The appellant is a long established manufacturer of newsprint and other paper products (Reasons, para. 11). The better portion of its receivables (approximately 80%) has traditionally been in US dollars (*idem*, para. 12).

[9] In order to reduce its exposure to foreign currencies, principally the US dollar, the appellant began during the 1980's to purchase and sell foreign currency option contracts

(Reasons, para. 13). Over time, it developed considerable expertise in dealing with these options to the point that it began "to generate and produce profits [from this activity] on an individual profit center basis" (*idem*, para. 18).

[10] The appellant eventually became an industry leader in terms of volume of dollar purchases of derivative products ranking amongst the top three or four non-banking enterprises in Quebec, after the Caisse de Dépôt and Hydro-Québec (Reasons, paras. 14 and 38).

[11] The appellant both bought and sold (i.e.: wrote) foreign exchange options (Reasons, paras. 18, 24 and 35). The writer's upside is limited to the premium it charges for issuing the option but the potential downside is unlimited as it hinges on the evolving strength or weakness of the respective currencies at play. In contrast, the purchaser can lose no more than the premium which it pays to acquire the option but benefits from a conversely unlimited upside.

[12] Starting in 1997, the appellant began to account for its foreign exchange operations using mark to market accounting for financial reporting purposes. The Tax Court judge suggests that 1998 was the initial year (Reasons, para. 24), but the evidence indicates that mark to market began to be used in 1997 (Appeal Book, Vol. 15, p. 3005).

[13] All the foreign exchange option contracts to which the appellant was a party at the close of its 1998 taxation year were entered into during that year and were to be exercised during the following year (Reasons, para. 3). Amongst these, the contracts written by the appellant exceeded the contracts that it purchased by a margin of four to one (*idem*, para. 30). The

appellant attributes the magnitude of the loss which it recorded at the close of its 1998 taxation year to the high number of contracts which it held at that time and the historical dip which the Canadian dollar took in relation to the US dollar in the course of that year (*ibidem*, paras. 29 to 33).

[14] Mark to market accounting is an accrual method of accounting whereby both the writer and the purchaser value the option at market as at balance sheet date – in this case December 31, 1998 – and recognize any change in the market value as a gain or loss for the period (Reasons, para. 2e; Expert Report of Patricia L. O'Malley, Appeal Book, Vol. 12, p. 2410, paras. 26, 32 and 33). For that purpose, the premium reflects the value of the option at inception, positive in the case of the purchaser and negative for the writer (Appeal Book, Vol. 17, pp. 3393 to 3397).

[15] All or almost all of the foreign exchange option contracts in issue were "European options" i.e.: options which are traded privately – "over the counter" in trade terms – and which may only be exercised on their expiry date (Reasons, para. 2b and h). These options could be transferred before that date with the consent of the non-transferring counterparty (*idem*, para. 45). The parties could also choose to lock in the profit or limit the loss inherent in these options (i.e.: close the position) by entering into an offsetting option contract (*idem*, para. 43; Appeal Book, Vol. 2, p. 227; Vol. 13, pp. 2700 to 2711). In this regard, the foreign currency option market was and continues to be fully liquid (Appeal Book, Vol. 2, pp. 207, 208 and 227; Vol. 13, pp. 2681, 2716 to 2718; Vol. 17, p. 3364). The appellant decided to close "very few" positions prior to maturity in 1998 (Reasons, para. 29) and to "roll over" its options to 1999 in

the expectation that the Canadian dollar would firm up in the short term, which it did (*idem*, paras. 31 to 33).

[16] For the purpose of computing income from its foreign exchange option operations for the year in issue, the appellant marked to market the value of each contract to which it was a party at year end and deducted as a loss the difference between their value at inception based on the above computation (*idem*, para. 14) and their value at year end, as provided by the financial institutions or banks which were the counterparties to these contracts. In addition, the appellant "deferred and amortized" the premiums paid and received over the term to maturity of the related option (although the notes to the financial statements indicate that only the premium income received on written options was treated this way (Appeal Book, Vol. 2, p. 244), the working papers show that for tax purposes this treatment was applied to all premiums, both received and paid (Appeal Book, Vol. 10, pp. 2032 to 2057)). As a result, the net amount of premiums to December 31, 1998 was included in income for that year, i.e. $18,696,881, and the balance, i.e. $32,883,453, was deferred to 1999 (Reasons, para. 4, footnote 4).

[17] By notice of reassessment issued July 15, 2002, the Minister denied the claimed loss, taking the view that the appellant could not use the mark to market method of accounting, but had to record income in conformity with the principle of realization. Consistent with this principle – according to which the premium is taken into account only when the option expires or is transferred – the Minister removed from income the premiums which the appellant had included. The net effect of the reassessment was to add to the declared income of the appellant the amount of $72,407,498 i.e.: the difference between the loss claimed – $91,104,379 – and the

amortized portion of the premiums – $18,696,881. The large corporations tax under Part I.3 of the Act was reassessed accordingly.

[18] Because all the options held by the appellant at the close of its 1998 taxation year were to expire during the following year, and because the loss or profit generated over the life of any given contract is the same regardless of the method used, the underlying issue is one of timing only (Reasons, para. 68).

DECISION OF THE TAX COURT JUDGE

[19] The Tax Court judge first addressed the contention advanced by the Crown that the appellant did not implement the mark to market method of accounting given that it amortized the net amount of premiums for the year in issue (Reasons, para. 8). The Tax Court judge was invited to dismiss the appeal on the basis that even if the appellant was entitled to use mark to market accounting, it had not in fact implemented this method.

[20] This submission was advanced on the heel of uncontested expert evidence adduced by the Crown which showed that the amortization of the premiums did not conform with mark to market accounting (Expert Report of Patricia L. O'Malley and related PowerPoint slide "Comparison Between MTM and Kruger's Method", Appeal Book, Vol. 12, p. 2410, paras. 26, 32 and 33, and p. 2463J; Vol. 17, p. 3345).

[21] The Tax Court judge refused to consider the respondent's submission on this point because the argument was not announced in the Crown's pleadings. He noted that although the

appropriateness of amortizing the premiums in mark to market accounting had been raised, it was not alleged that the "very foundation of [the appellant's] method of valuing its option contracts was [thereby] being challenged" (Reasons, para. 10).

[22] Although the Crown maintains that the argument was properly advanced (Memorandum of the Crown, para. 52), no cross-appeal was brought nor does the Crown seek the reversal of the judgment issued by the Tax Court judge on this ground (Memorandum of the Crown, Part IV, "Order Sought").

[23] The Tax Court judge therefore conducted his analysis on the basis that mark to market accounting was implemented and went on to consider whether the use of this method was permitted (Reasons, paras. 85 and following). After reviewing the case law, including in particular the decisions of the Supreme Court in *Canadian General Electric Co. v. M.N.R.*, [1962] S.C.R. 3 [*Canadian General Electric*]; *Friedberg v. Canada*, [1993] 4 S.C.R. 285 [*Friedberg*]; *Canderel*; and *Friesen v. Canada*, [1995] 3 S.C.R. 103 [*Friesen*], the Tax Court judge expressed the view that "a general principle of taxation is that neither profits nor losses are recognized under the Act until realized except if the Act provides an exception to the realization principle" (Reasons, para. 104).

[24] Although he found that the method employed by the appellant was consistent with well accepted business principles and generally accepted accounting principles (GAAP), the Tax Court judge observed that, with the exception of sections 142.2 to 142.5 of the Act and section 1801 of the *Income Tax Regulations*, C.R.C., c. 945 (the ITR), no legislative provision

authorizes the use of mark to market valuation. Because foreign exchange option contracts do not come within the ambit of sections 142.2 to 142.5 of the Act, the Tax Court judge held that Canada Revenue Agency's (CRA) administrative policy allowing banks and financial institutions to use mark to market accounting with respect to these contracts, was of no assistance to the appellant (Reasons, para. 115).

[25] The Tax Court judge went on to hold that absent a statutory provision authorizing the appellant to depart from the realization principle, the foreign exchange option contracts had to be valued at their historical costs, so that no loss of profit could be recognized from dealing in these contracts until they were actually disposed of or expired (Reasons, para. 114).

[26] Before closing on this issue, the Tax Court judge indicated that even if he had found that the appellant was entitled to use mark to market accounting, he "would not find that the inconsistent bank values used by [the appellant] was [sic] properly applied in calculating its losses" (Reasons, para. 116). While the values ascribed by bank models were reliable, he was concerned by the fact that the appellant obtained its values from different banks which used different models. His confidence was "shaken" by evidence showing that two reputable banks – the Bank of Nova Scotia and J.P. Morgan – had ascribed substantially different values to two identical foreign exchange option contracts (*ibidem*).

[27] The Tax Court judge went on to address the appellant's alternative contention that its foreign exchange option contracts were inventory and that it was therefore entitled to value these contracts at year end at the lower of cost or fair market value pursuant to subsection 10(1) of the

Act or on a strict fair market value basis pursuant to section 1801 of the ITR. He began by noting that inventory requires the existence of property, "the cost or value of [which] must be relevant in computing a taxpayer's income from a business" (Reasons, para. 124).

[28] According to the Tax Court judge, the appellant was carrying on the business of speculating on foreign exchange option contracts, which sometimes involved "selling and purchasing" those contracts (Reasons, paras. 38 and 125). He quoted the definition of "inventory" in subsection 248(1) and noted that there is no requirement that qualifying property be held for sale (*idem*, paras. 123 and 124).

[29] The Tax Court judge went on to find that the foreign exchange option contracts purchased by the appellant, because they conveyed rights, qualified as inventory as they constituted "property" within the meaning of the definition found in subsection 248(1) of the Act. He reached the opposite conclusion with respect to the contracts written by the appellant, as they only embodied liabilities (Reasons, paras. 121, 122, 130 to 132).

[30] The Tax Court judge therefore held that the purchased foreign exchange contracts were inventory, but that the written contracts were not. Giving effect to this conclusion, the judgment which he issued allows the appeal and permits the appellant to value its purchased contracts on a mark to market basis. Because of the concerns which he expressed about the reliability of the values used by the appellant, the judgment specifies that "[t]his assumes the values are not in dispute" (Judgment, Appeal Book, Vol. 1, p. 6), thereby leaving it to the Minister to accept or refuse the appellant's values.

[31] As it turned out, the appellant's values were accepted. In the debate which ensued as to costs, the Crown took the position that the appellant could not claim to have been successful at trial because although the appeal was allowed, the judgment given did not have the effect of reducing the amount of taxes payable by the appellant for the year. For the purpose of making this demonstration, the Crown asked the Minister to execute the judgment. In giving effect to the judgment, the Minister's official used the appellant's values based on the advice that "according to the evidence tendered at trial, the best estimate of the fair market value of the inventory of foreign currency option contracts owned by [the appellant] as of December 31, 1998 is the marked to market value determined by the financial institutions which were the counterparties to the contracts" (Affidavit of Denis Dionne, sworn September 15, 2015, para. 6b, filed during the hearing of the appeal). The Tax Court judge accepted this demonstration and relied on this evidence to hold that the Crown was entitled to a measure of costs notwithstanding that the appeal was allowed (Reasons in support of the cost award in file A-195-16, paras. 4 and 20).

POSITION OF THE PARTIES

- *The Appellant*

[32] The appellant submits that mark to market accounting is an appropriate way of computing income derived from its foreign exchange option contracts pursuant to section 9 of the Act, and advances a number of arguments in support of that proposition.

[33] First, the appellant contends that the basic objectives of GAAP overlap significantly with profit computation for tax purposes, as they both strive for "an accurate picture of income for the

year, one that depicts the reality of the financial situation of the taxpayer for the year" (Memorandum of the appellant, para. 51).

[34] Second, the appellant argues that the Tax Court judge erred in applying the principle of realization as an overarching principle which must be followed, absent a statutory provision providing otherwise. In the appellant's view, the decisions of the Supreme Court in *Canderel* and *Ikea Ltd. v. Canada*, [1998] 1 S.C.R. 196 [*Ikea*] exemplify the flaw in the Tax Court judge's decision, for in both decisions there would not have been any dispute had the principle of realization been given the sweeping effect propounded by the Tax Court judge (Memorandum of the appellant, paras. 55 to 57).

[35] Thus, the Tax Court judge failed to follow the framework set out in *Canderel* which requires first a determination as to whether valuating the foreign exchange option contracts in accordance with the mark to market method as the appellant did is appropriate in the sense that it provides an accurate picture of profit for the 1998 taxation year. Had he done so, the Tax Court judge would have found that the mark to market method was appropriate. This conclusion is reinforced by the decision of the Supreme Court in *Canadian General Electric* where it was held that gains and losses on income account resulting from foreign currency fluctuation may be recorded on an accrual basis for tax purposes. This is clear authority, argues the appellant, that mark to market accounting should take precedence over the realization principle with respect to its foreign exchange option contracts (Memorandum of the appellant, paras. 58 to 60).

[36] The appellant adds that the decision of the Supreme Court in *Friedberg* does not bar the use of an alternative method, as the only issue before the Court in that case was whether the Crown had demonstrated that the taxpayer's adoption of the realization method was inappropriate. *Friedberg* does not foreclose the use of profit computation methods other than realization in appropriate circumstances (Memorandum of the appellant, para. 62).

[37] Third, the appellant submits that the introduction of mandatory mark to market valuations for financial institutions through sections 142.2 to 142.6 of the Act was intended to ensure that income is measured appropriately. The CRA's administrative policies extending that treatment to foreign exchange option contracts held by financial institutions, notwithstanding that such contracts fall outside the scope of these provisions, reinforces this conclusion (Memorandum of the appellant, paras. 63 to 67).

[38] Fourth, the appellant argues that while realization produces certainty of result, this is not the test mandated by section 9 of the Act. It is rather the mark to market method which produces the best measure of the results of its business of dealing in foreign exchange option contracts. Indeed, although its losses at the end of the 1998 taxation year were not "realized", they nevertheless "could have been crystallized at any time, given the very liquid … option market, by purchasing offsetting contracts from their bank counterparties or other banks" (Memorandum of the appellant, para. 71).

[39] Finally, the appellant asserts that the inconsistency found by the Tax Court judge in respect of the values it used in computing its income pursuant to the mark to market method is

attributable to clerical errors which it made in preparing its expert report. The appellant maintains that once the proper calculations are made, the differences between the values provided by the different bank counterparties are inconsequential (Memorandum of the appellant, paras. 39 to 42).

[40] Turning to the inventory issue, the appellant asserts that for purposes of the Act, "[a]ll property that is not capital property is inventory" citing *inter alia Friesen*, paras. 28, 32, 66 and *C.A.E. Inc. v. The Queen*, 2013 FCA 92, para. 77 (*C.A.E.*) (Memorandum of the appellant, para. 85). Because the foreign exchange option contracts were not capital property, it necessarily follows that they are inventory (*ibidem*).

[41] Beyond this, the appellant argues that there is no basis for the Tax Court judge's conclusion that the written contracts were not property and could not, on that account, be inventory. Specifically, the appellant submits that the written options embody more than just a liability and therefore come within the definition of "property" in subsection 248(1) of the Act (Memorandum of the appellant, para. 95):

> The [writer] of the contract thus has two rights that subsist throughout the contract until maturity … : (i) the right to retain the premium, pending the outcome of the contract at maturity, and (ii) the right to receive from the purchaser the contract price … contingent upon the purchaser exercising the option …

[42] Finally, the appellant notes that the Tax Court judge's decision leads to an asymmetrical treatment because the income from its purchased contracts is required to be computed on the basis of marking these contracts to market at year end whereas the income from its written contracts is only recognized upon realization. This imposition of different methods of profit

computation to a single business, the appellant argues, cannot yield an accurate picture of the profit from that business (Memorandum of the appellant, paras. 104 and 105).

[43] The appellant accordingly asks that the appeal be allowed with costs throughout.

- *The Crown*

[44] From the Crown's perspective, the issues to be decided are whether the Tax Court judge erred in law in concluding that:

- The mark to market method did not provide an accurate picture of the appellant's income and that the realization method should apply;

- The options written by the appellant do not constitute inventory whereas the purchased options do (Memorandum of the Crown, para. 26).

[45] In addressing the first issue, the Crown stands by the reasons advanced by the Tax Court judge and submits that he correctly held that section 9 of the Act does not allow the appellant to value its foreign exchange option contracts on a mark to market basis. Indeed, absent a provision to the contrary, profit for tax purposes is only recognized when realized. While mark to market accounting is consistent with GAAP, the Crown maintains that GAAP are mere interpretative aids and do not amount to rules of law. The Tax Court judge therefore properly concluded that income generated by the appellant's foreign exchange option contracts had to be recognized on a realization basis, especially as his decision conforms with *Friedberg*, where it was similarly determined that the mark to market method was not appropriate notwithstanding that it may have

better described the taxpayer's profit for some other non-tax purposes (Memorandum of the Crown, paras. 34 to 38).

[46] The Crown's further argument before the Tax Court judge that the claimed loss should be denied based on paragraph 18(1)(*e*) of the Act (Reasons, para. 5) was not pursued on appeal.

[47] With respect to the second issue, the Crown argues that neither the written or purchased options qualify as inventory. The Crown asserts that the appellant "did not carry on the business of selling and purchasing option contracts", as its business was rather "to enter into option contracts with a view to exercise the rights under those it [purchased], and with the hope that its counterparty would not exercise the right it had under the option it wrote" (Memorandum of the Crown, para. 48). As such, the appellant's business was "only based on the execution of the option contracts per se" (*ibidem*).

[48] With specific reference to the written options, the Crown submits that the Tax Court judge correctly found that these options did not qualify as property in the appellant's hands and could not on that account be inventory. The ownership of these options rather rested in the hands of the financial institutions that acquired them (Memorandum of the Crown, para. 49).

[49] However, the Crown argues that the Tax Court judge erred in concluding that the purchased options are inventory as they were not held for sale, a condition which must be met before property can qualify as inventory (Memorandum of the Crown, para. 50).

[50] In this respect, the Crown takes issue with the appellant's contention that *Friesen* stands for the proposition that property that is not capital property is necessarily inventory. According to the Crown, "[r]eading the … decision in this manner would lead to an absurd result where cash on hand or accounts receivable appearing on the balance sheet would qualify as inventory" (Memorandum of the Crown, para. 47).

[51] The Crown therefore asks that the appeal on the merits be dismissed with costs, and that the cost award made by the Tax Court be affirmed.

ANALYSIS

- *Mark to market vs realization*

[52] The determination of a taxpayer's income from a business pursuant to subsections 9(1) and (2) of the Act gives rise to a question of law (*Friesen,* para. 41; *Associated Investor v. M.N.R.*, [1967] 2 Ex. C.R. 96, p. 101; *Canderel*, paras. 32 and 53 at point 1). As such, the Tax Court judge's conclusion that this determination must be made in accordance with the principle of realization is to be assessed on the standard of correctness.

[53] The precise issue which arises, independently of considerations relating to the treatment of inventory, is whether the foreign exchange option contracts to which the appellant was a party at the close of its 1998 taxation year can give rise to a loss or profit in the absence of an actual transfer or disposition. This in turn depends on whether the appellant was authorized under the Act to use mark to market accounting in ascertaining the profit or loss generated by its dealings

in foreign exchange derivatives or whether it was bound to apply the principle of realization, as the Tax Court judge held.

[54] Before turning to this question it is essential to understand the exact nature of the appellant's business. In this regard, the Tax Court judge found that the appellant "carried on a business of speculating on foreign exchange currency options" (Reasons, para. 38). For that purpose, the options held by the appellant in 1998 could be closed by purchasing an offsetting option contract (*idem*, para. 43), rolled over to the next year (*idem*, paras. 31 to 33) or transferred subject to obtaining the consent of the counterparty (*idem*, para. 45). He further found that this business was conducted separate and apart from the appellant's core business and on a large scale, in a manner similar to sophisticated traders in foreign exchange options (*idem*, para. 38). The Tax Court judge also accepted that by writing more options than it purchased, the appellant heightened the speculative risk inherent in its foreign exchange dealings but also increased the potential for large profits (*ibidem*).

[55] The Tax Court judge had before him extensive evidence as to how income generated by this type of activity is to be portrayed for accounting and financial reporting purposes. The record is clear that speculative activity of this type is best reflected by valuing option positions at market as of the balance sheet day and by recognizing any change in value from the beginning to the end of the period as a gain or loss in the income statement (Reasons, paras. 2e, 60 and 62). This is the position advocated by GAAP both in Canada and the U.S. as well as by the U.S. Financial Accounting Standards Board (FASB) (*idem*, para. 58). No evidence going the other way was introduced on this point.

[56] Despite this evidence and the fact that the Minister accepts that banks and other financial institutions report their income from such activity according to the mark to market method of accounting (Reasons, para. 73), the Tax Court judge held that the appellant could not avail itself of this method. Rather, it had to abide by the principle of realization. The reasons which led the Tax Court judge to this conclusion are encapsulated in the following passage (Reasons, para. 114):

> The realization principle is basic to Canadian tax law. It provides certainty of a gain or a loss. Without some support of the statutory language or a compelling interpretation tool it ought not be cast aside. This is found in sections 142.2 to 142.5; these provisions, like subsection 1801 of the ITR, are exceptions to the realization principle and a departure from the general principle that assets are valued at their historical cost.

[57] The Tax Court judge noted that sections 142.2 to 142.5 did not authorize the use of the mark to market method with respect to foreign exchange option contracts as these do not come within the defined meaning "mark to market property" (Reasons, para. 111). He further noted that even though the CRA allows banks and financial institutions to use mark to market accounting, this does not assist the appellant as his task is to apply the law rather than CRA's administrative policies (*idem*, para. 115). The suggestion is that mark to market accounting is not an acceptable method of reporting income derived from dealing in foreign exchange options regardless of who uses this method.

[58] Because he was unable to identify any provision in the Act or the ITR which "requires or authorizes" a departure from the realization principle, the Tax Court judge held that this principle was binding on the appellant. He came to this conclusion despite finding that the mark to market method is consistent with well accepted business principles, is GAAP's preferred basis of

accounting for foreign exchange option contracts and that the FASB and international accounting recognize that income generated by such dealings is best depicted in accordance with this method (Reasons, para. 105).

[59] I agree with the appellant that in so holding the Tax Court judge treated the realization principle as an overarching principle, an approach which runs counter to the decisions of the Supreme Court in *Canderel* and *Ikea*. It is clear from both these decisions that the realization principle can give way to other methods of computing income pursuant to section 9 of the Act where these can be shown to provide a more accurate picture of the taxpayer's income for the year (see in particular *Ikea*, paras. 40 and 41).

[60] The Supreme Court in *Canadian General Electric*, a decision rendered some fifty years earlier, reached a similar conclusion in a context more closely connected to the present one. The issue in that case was whether foreign exchange profits inherent in Canadian General Electric's (CGE) US dollars liabilities, as evidenced by outstanding promissory notes, could be brought into income on an accrued basis according to the relative value of the Canadian dollar at year end (CGE's position), or whether they could only be recognized in the year in which the notes were actually retired (the Minister's position). The Supreme Court, in a split decision, upheld CGE's position and rejected the Minister's position that realization was mandatory.

[61] The Tax Court judge appeared to distinguish this decision on the basis that the foreign currency income in issue in that case was generated in the context of CGE's core business (i.e.: the selling of electrical products acquired from US suppliers) and not in the pursuit of a separate

business (Reasons, para. 96). While this was no doubt a factor given that CGE reported its income on an accrual basis, it is clear from the reasons of the judges forming the majority (Martland J., Cartwright J., Ritchie J.) that they would not have accepted CGE's method of reporting its foreign exchange profits unless they were satisfied that it provided a fair reflection of the income derived from the outstanding notes (*Canadian General Electric*, paras. 35 and 41). The proposition which flows from this decision is that both methods had their virtues and that CGE was entitled to adopt the one of its choice, subject to applying it consistently (*idem*, paras. 41 and 42). In my respectful view, *Canadian General Electric* is in direct contradiction with the Tax Court judge's holding that realization is an overarching principle which applies in the absence of a provision authorizing or requiring the application of a different method.

[62] The Tax Court judge also relied on the decision of the Supreme Court in *Friedberg*, a case involving the tax treatment of gold futures, specifically whether trading losses could be recognized in the year of realization (Mr. Friedberg's position), or whether income from that source had to be accrued over the years during which the gold futures were held by Mr. Friedberg (Crown's position). In a judgment delivered from the bench, the Supreme Court dismissed the Crown's appeal, and confirmed Mr. Friedberg's entitlement to report his losses in the year of disposition.

[63] Iacobucci J., writing for the Court, noted that even though the method proposed by the Crown may better describe Mr. Friedberg's income position "for some purposes", the method used by Mr. Friedberg was the one to be applied for tax purposes (*Friedberg*, para. 4). The Tax Court judge read *Friedberg* as supporting his conclusion that mark to market accounting,

although appropriate for financial statement purposes, must give way to the principle of realization when comes time to determine a taxpayer's income under the Act (Reasons, paras. 108 to 110 and 114).

[64] Again, this reading would be in direct contradiction with *Canadian General Electric*. Recognizing that the matter is not free from doubt, the better view is that in holding that the Crown "ha[d] not demonstrated that there [was] any error in adopting [the realization method]" (*Friedberg*, para. 4), the Court was leaving open the possibility that the loss could also be accrued in line with what had been said in the two prior Federal Court decisions which were confirmed (Federal Court, Appeal Division, 92 DTC 6031, p. 6036; Federal Court, Trial Division, 89 DTC 5115, p. 5122). Given that no reference was made to *Canadian General Electric*, it would be inappropriate to read *Friedberg* as overturning the long standing rule established in that case.

[65] In further support for his conclusion, the Tax Court judge read the decision of the Supreme Court in *Friesen* as standing for the proposition that realization is "a general principle of taxation" which applies unless "the Act provides [for] an exception" (Reasons, para. 104). I respectfully disagree.

[66] *Friesen* dealt with the narrow question whether a taxpayer who was engaged in a "business" only by reason of the extended definition of that term – i.e.: "business" includes an adventure in the nature of trade (subsection 248(1)) – could consider the land, which he had bought for resale, as inventory so as to benefit from the write-down in value which

subsection 10(1) authorizes. In a split decision, the Court – Major J. writing for the majority – held that a taxpayer engaged in an adventure in the nature of trade was in the same position as a regular land trader and that Mr. Friesen could therefore avail himself of the write-down. Although the reasons acknowledge that generally neither profits nor losses are recognized until realized (*Friesen*, paras. 56 and 57), and that realization plays a fundamental role under the Act (*idem*, paras. 105 to 109), nothing in the reasons of the majority or the minority indicates that this principle cannot be departed from where appropriate, in order to provide an accurate picture of income. On this point, it is useful to recall that Iacobucci J., who authored the dissenting reasons in *Friesen*, wrote the unanimous reasons in *Canderel* and *Ikea* which reject realization as an overarching principle.

[67] There is therefore no authority for the Tax Court judge's proposition that the principle of realization applies to the exclusion of mark to market accounting unless the Act provides otherwise.

[68] Because mark to market accounting cannot be excluded as a competing method the question to be answered, when regard is had to the framework of analysis set out at paragraph 53 of *Canderel*, is whether the appellant has discharged the onus of showing that mark to market accounting provides an accurate picture of its income for the year.

[69] The Tax Court judge made no findings in this regard. Although he asserts on a number of occasions that the goal in determining profit and loss for financial/accounting purposes and for income tax purposes are not necessarily the same (Reasons, paras. 65 and 108 to 110), he does

not indicate what differences were at play, if any, nor the impact which they would have had on the accuracy of the income computed by the appellant for tax purposes.

[70] Absent some such indication, there is no basis on which to hold that mark to market accounting does not procure an accurate picture of the appellant's income under the Act. As was stated in *Canderel*, "the goal of the legal test of 'profit' should be to determine which method of accounting best depicts the reality of the financial situation of the … taxpayer" (*Canderel*, para. 44). This coincides with the goal which mark to market accounting seeks to achieve on the facts of this case i.e.: recognizing income or losses based on the amount which can be realized by dealers in derivatives at the balance sheet by *inter alia* entering into an offsetting contract (Appeal Book, Vol. 12, pp. 2419, 2420, 2448 and 2449; Vol. 17, pp. 3376 and 3377). As it is otherwise undisputed that this method is consistent with well accepted business principles, GAAP and international accounting, I am satisfied that the appellant has made a *prima facie* demonstration that mark to market accounting provides an accurate reflection of its income.

[71] The remaining question is whether the Crown has discharged the onus of showing that realization procures a <u>better</u> picture of the appellant's income under the Act (*Canderel*, para. 53 at point 6). Because the Crown's position throughout has been that mark to market accounting is not an authorized method, no attempt was made to make this demonstration. Indeed, the Crown's accounting expert expressed the opposite view (Expert Report of Patricia L. O'Malley, Appeal Book, Vol. 12, p. 2,410, para. 94). Given the findings made by the Tax Court judge as to the broad recognition of mark to market accounting for purposes of computing income from dealing in foreign exchange options, and the uncontested evidence that banks, financial institutions and

mutual funds which engage in this activity report their income on this basis with the CRA's approval, it seems clear that mark to market provides a picture of the appellant's income which is as accurate – and as acceptable from the perspective of the tax collector – as that which the principle of realization would provide.

[72] Adhering to the framework of analysis set out in *Canderel*, I conclude that there was no basis on which the Tax Court judge could reject the appellant's use of mark to market accounting in computing income from its dealings in foreign exchange options.

- *Reliability of the appellant's values*

[73] The Tax Court judge went on to explain that even if mark to market accounting was authorized, he was not convinced that the values used by the appellant were reliable (Reasons, para. 116). He drew no definite conclusion on this point as evidenced by the judgment that he gave (see para. 30, above). It is nevertheless useful to comment on this point given the information that has since been brought to our attention by the appellant.

[74] The Tax Court judge was concerned that the bank counterparties to the contracts held by the appellant at the close of its 1998 taxation year would not "necessarily" have used a model of valuation which relies on the same inputs (Reasons, para. 116). He was taken aback by evidence tendered by the respondent's expert (Professor Klein) showing that two options written by the appellant with identical terms were ascribed by distinct bank counterparties values which were more than 20 percent apart (*idem*, paras. 48 and 116).

[75] The appellant recognizes that such a difference would shake one's confidence. However, it submits that this discrepancy is due to a clerical error made in preparing its own expert report. The following extracts quoted from the memorandum of the appellant (references omitted) provide the explanation:

> 40. Mr. Klein testified, with reference to his report, that identical contracts dated May 13, 1998 for a call option sold by Kruger of $10 million USD at a strike price of $1.46 to mature in one year were valued by the Bank of Nova Scotia ("BNS") at $797,736 and by JP Morgan ("JPM") at $612,200. Reproduced in his report was the JPM communication to Kruger of the value of that contract at 486,900 USD which, at the prevailing rate of exchange on December 31, 1998 of 1.530[5] CAD, yielded a Canadian dollar value of $745,200, not $612,200. The difference, therefore, between the JPM option contract relative to the BNS option contract is, therefore, not $185,536 but rather $52,536, and therefore not a difference of 26.3% but rather 6.8% …
>
> 41. Mr. Klein further testified, with reference to his report, that identical contracts again dated May 13, 1998 for a put option sold by Kruger of $10 million USD to mature May 13, 1999, at a strike price of $1.40, again with both JPM and BNS as purchasers, were valued by the BNS at $8,173 and by JPM at ($113,257). The JP Morgan communication of value to Kruger sets the value of that contract at 7,900 USD which, translated to CAD at the prevailing rate at December 31, 1998, yields the amount of $12,090, and not ($113,257). …
>
> 42. The remaining differences in values given to four other option contracts with identical terms by two different banks set out in Mr. Klein's report at page 2386 are: -0.3%, 1.2%, -4.2% and 5.1% …

[76] The Crown does not challenge the above demonstration otherwise than by asserting that it is not supported by the evidence (Memorandum of the respondent, para. 6). However, all the figures referred to in the above quoted passage can be found in the record and when the prevailing rate of exchange is applied (1.5305 CAD; Appeal Book, Vol. 12, p. 2,387), it can readily be seen that the wrong rate was applied and that the variations are within the narrow range described.

[77] I do not believe that the Tax Court judge would have been troubled by the values submitted by the bank counterparties if he had been appraised of the actual figures. I should add that this no longer seems controversial as the Minister has since recognized that the appellant's values were reliable (see para. 31, above).

- *Inventory treatment*

[78] The appellant contends in the alternative that its foreign exchange options qualify as inventory and that the recorded loss must, on that account, be recognized pursuant to subsection 10(1) of the Act and section 1801 of the ITR. This is a different means of obtaining the result which the appellant is entitled to pursuant to section 9. However, because inventory treatment is mandatory, the reasons which I have given for allowing the loss cannot stand if the appellant correctly asserts that its options are inventory. I therefore feel compelled to address the issue.

[79] Subsection 10(1) of the Act, by the use of the word "shall", requires a taxpayer who carries on a business to value inventory on hand at the end of a taxation year at the lower of cost or fair market value. The result is that when the fair market value of inventory has fallen below cost at the end of a given taxation year, the fall in value is recognized in that year. Section 1801 of the ITR when applied to the circumstances of the appellant provides for the same treatment. The Tax Court judge addressed the inventory issue on the basis, since confirmed, that the values provided by the bank counterparties reflect the fair market value of the outstanding options at year end.

[80] The question whether some or all of the appellant's options qualify turns on the defined meaning of the word "inventory" in subsection 248(1), as informed by the case law. Based on this definition "inventory" means "a description of property the cost or value of which is relevant in computing … income from a business …". Before applying this definition, the Tax Court judge had to identify its correct meaning.

[81] The Tax Court judge held that the options purchased by the appellant form part of inventory but that those written by the appellant do not. He reached this conclusion on the basis that the purchased options confer a right, and therefore constitute "property" capable of forming part of the appellant's "inventory" (see subsection 248(1) as to both definitions), but that the written options give rise to a liability, with the result that they cannot constitute "property" nor for that reason, "inventory".

[82] The result which flows from this reasoning is that the income derived from the options purchased by the appellant must be computed by marking them to market at year end, whereas the income derived from the options which it wrote must be recognized in the following year upon these options being transferred or expiring.

[83] Both parties take issue with this approach arguing that it cannot provide an accurate picture of the appellant's income. They contend that in order to provide an accurate picture of the appellant's income, all the options must be treated the same way, the appellant arguing that both its written and purchased options are inventory and the Crown asserting that neither qualifies. In my view, the position advocated by the Crown is the correct one.

[84] As was found by the Tax Court judge, there is no doubt that the Act departs from GAAP in allowing intangible property to be treated as inventory (*M.N.R. v. Curlett*, [1967] S.C.R. 280; *Dobieco v. M.N.R.*, [1966] S.C.R. 95; *CDSL Canada Limited et al. v. The Queen*, 2008 FCA 400, paras. 24 and 27 to 30; see also subsection 10(5) of the Act which explicitly recognizes that the work in progress of a professional is "for greater certainty" inventory). There is equally no doubt that the Tax Court judge properly held that because the written options only embody a liability, they are not "property" and therefore cannot form part of "inventory" (Reasons, paras. 130 and 131; see also the comment made by Rand J. in *Tip Top Tailors Limited v. M.N.R.*, [1957] S.C.R. 703, p. 714).

[85] The broader issue which the Crown invites the Court to address is whether "inventory", as defined in subsection 248(1), extends to property that is not held for sale. The Tax Court judge held that this is not a required qualification (Reasons, para. 124):

> There is no requirement that property must be held for sale to qualify as inventory. However, the cost or value of the property must be relevant in computing a taxpayer's income from a business. If property that is a foreign exchange option contract is so relevant, then it so qualifies.

[86] The evidence is clear that none of the options to which the appellant was a party at the close of its 1998 taxation year were held for sale. The Tax Court judge found that the appellant was in the business of "speculating on foreign currency options" (Reasons, para. 38), which would bring it to hold these options to maturity in some cases, with or without closing the position, and sell them in others, depending on the anticipated direction of the underlying currencies. While the appellant was in the business of making money with options, it was not in the business of purchasing options for resale nor was it holding its options for sale. The precise

evidence on point is that all the options on hand at the close of the 1998 taxation year were rolled over to 1999 in the expectation that the Canadian dollar would firm up (*idem*, paras. 29 to 33).

[87] Although the definition of "inventory" in subsection 248(1) does not spell out the requirement that qualifying property be "held for sale", this condition must be read into the definition when regard is had to *Friesen*, the last pronouncement of the Supreme Court on the subject.

[88] As noted, *Friesen* turned on whether the lower of cost or market rule embodied in subsection 10(1) of the Act extended to the owner of vacant land who was in business only by reason of being engaged in an adventure in the nature of trade. The write-down was claimed in taxation years preceding the year of the sale, at a time when the land produced no income. The argument against the extension of this rule to Mr. Friesen's land was that even if the land in question was inventory in the year of disposition, it did not qualify in the year in which the write-down was taken because its cost or value was not relevant in computing Mr. Friesen's business income for that year (*Friesen*, para. 23).

[89] The majority disposed of this argument as follows (*Friesen*, para. 24):

> In my opinion, the interpretation urged by the respondent runs contrary to the natural meaning of the words used in the definition of inventory in s. 248(1) and to common sense. The plain meaning of the definition in s. 248(1) is that an item of property need only be relevant to business income in a single year to qualify as inventory: "relevant in computing a taxpayer's income from a business for a taxation year" [emphasis in original]. In this respect the definition of "inventory" in the [Act] is consistent with the ordinary meaning of the word. In the normal sense, inventory is property which a business holds for sale and this term applies to that property both in the year of sale and in years where the property remains as yet unsold by a business. [My emphasis]

[90] This passage reflects the *ratio decidendi* of the decision. The rule stated is that in order for Mr. Friesen's property to come within the definition, it had to meet two qualifications: first its cost or value had to be relevant in computing business income for a year – not necessarily the year of the write-down – and second, the land had to be held for sale. Had this last condition not been present during the year of the write-down, Mr. Friesen's land would not have qualified. The reasons cannot be read otherwise and this is how they have been applied (*C.A.E.*, paras. 108 to 110).

[91] It follows that although the requirement that qualifying property be "held for sale" is not spelled out in express terms, it nevertheless forms part of the defined meaning of "inventory" as this definition must be read in a manner that is "consistent with the ordinary meaning of the word" (*Friesen*, paras. 24 and 33).

[92] Notably, the minority expressed no disagreement with the majority's conclusion that Mr. Friesen's land had to be held for sale in order to qualify. If anything, the minority would have read in the further requirement that qualifying property be "stock in trade" (*Friesen*, paras. 110, 122 and 133 at point 2).

[93] Although the Act was amended shortly after *Friesen* was rendered to prevent the application of the inventory write-down rule to inventory held by a business that is an adventure in the nature of trade (see subsections 10(1) and (1.01)), Parliament left the defined meaning of the word "inventory", as construed in that case, untouched. As a result, qualifying property must both impact on the computation of income and be held for sale.

[94] Giving effect to this meaning, the foreign exchange options purchased by the appellant during its 1998 taxation year and rolled over to 1999 do not qualify as inventory as they were not held for sale.

- *More than two classes of property under the Act?*

[95] It necessarily follows that the purchased options are a type of property that is neither capital property nor inventory.

[96] This creates a bit of a difficulty because after having explained why Mr. Friesen's land was inventory and setting out the above interpretation (*Friesen*, paras. 20 to 24), the majority went on to address "other considerations" which supported its reading of the definition (*idem*, para. 25). Amongst those, was the fact that the meaning which it adopted had the advantage of fitting Mr. Friesen's land into inventory, one of the two known categories of property under the Act. In the words of the majority, "[t]he Act … creates a simple system which recognizes only two broad categories of property" (*idem*, para. 28).

[97] The appellant seizes on this passage to argue that because its foreign exchange option contracts are not capital property, they must be inventory.

[98] As the reasons show, this cannot be the case as it would entail giving the word "inventory" a meaning which *Friesen* itself excludes.

[99] In context, it appears that the majority was simply asserting that because the Act only regulates two classes of property, fitting Mr. Friesen's land into one of these classes was preferable to fitting it within an unknown class as the respondent would have it (*Friesen*, para. 32). In *C.A.E.*, this Court said much the same thing when it held that courts should not resort to new categories of property where the existing framework allows for a proper application of the Act (*C.A.E.*, paras. 84 and 102).

[100] The present case is different because the purchased options cannot be fitted within either of the two categories of property on which the Act is premised. At the same time, they cannot be ignored because they have an impact on the computation of the appellant's income under the Act. The reluctance of the courts to recognize categories of property beyond inventory and capital property must give way where, as here, it becomes necessary to do so in order to apply the Act.

[101] As noted earlier, the purchased options are property under the Act but they are neither capital property nor inventory. In contrast, the written options escape all three labels since they only embody the obligation to deliver funds in the future. Yet, the evolving value of both instruments is relevant in determining the appellant's income under the Act. In short, although the Act is premised on the existence of two broad classes of property, it imposes no limit on the types of property or indeed liabilities that can impact on the computation of income and which must be recognized for that purpose since the goal pursuant to section 9 of the Act is to provide an accurate picture of that income (*Canderel*, para. 53).

DISPOSITION

[102] For the above reasons, I would allow the appeals, and giving the judgment which ought to have been given, I would refer the reassessment back to the Minister for reconsideration and reassessment on the basis that the appellant is entitled to compute the income derived from its foreign exchange option contracts in accordance with the mark to market method of accounting, that is in conformity with its tax return position but without deferring or amortizing any portion of the premiums paid or received during the 1998 taxation year. Given this result, I would award costs in favour of the appellant both before this Court and the Tax Court of Canada.

"Marc Noël"

Chief Justice

"I agree.
A.F. Scott J.A."

"I agree.
Yves de Montigny J.A."

Annex I

Relevant Legislative Provisions

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), as applicable in 1998	***Loi de l'impôt sur le revenu***, L.R.C. 1985, c. 1 (5e supp.), telle qu'applicable en 1998
Income	**Revenu**
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.	**9.** (1) Sous réserve des autres dispositions de la présente partie, le revenu qu'un contribuable tire d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.
Loss	**Perte**
(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.	(2) Sous réserve de l'article 31, la perte subie par un contribuable au cours d'une année d'imposition relativement à une entreprise ou à un bien est le montant de sa perte subie au cours de l'année relativement à cette entreprise ou à ce bien, calculée par l'application, avec les adaptations nécessaires, des dispositions de la présente loi afférentes au calcul du revenu tiré de cette entreprise ou de ce bien.
Valuation of inventory	**Évaluation des biens figurant à l'inventaire**
10. (1) For the purpose of computing a taxpayer's income for a taxation year from a business that is not an adventure or concern in the nature of trade, property described in an inventory shall be valued at the end of the year at the cost at which the taxpayer acquired the property or its fair market value at the end of the year, whichever is lower, or in a prescribed manner.	**10.** (1) Pour le calcul du revenu d'un contribuable pour une année d'imposition tiré d'une entreprise qui n'est pas un projet comportant un risque ou une affaire de caractère commercial, les biens figurant à l'inventaire sont évalués á la fin de l'année soit à leur coût d'acquisition pour le contribuable ou, si elle est inférieure, à leur juste valeur marchande à la fin de l'année, soit

selon les modalités réglementaires.

Adventure in the nature of trade

(1.01) For the purpose of computing a taxpayer's income from a business that is an adventure or concern in the nature of trade, property described in an inventory shall be valued at the cost at which the taxpayer acquired the property.

Projet comportant un risque

(1.01) Pour le calcul du revenu d'un contribuable tiré d'une entreprise qui est un projet comportant un risque ou une affaire de caractère commercial, les biens figurant à l'inventaire sont évalués à leur coût d'acquisition pour le contribuable.

Inventory

(5) Without restricting the generality of this section,

(*a*) property (other than capital property) of a taxpayer that is advertising or packaging material, parts or supplies or work in progress of a business that is a profession is, for greater certainty, inventory of the taxpayer;

…

Biens à porter à l'inventaire

(5) Sans préjudice de la portée générale du présent article :

a) il demeure entendu que les biens (autres que les immobilisations) d'un contribuable qui sont des travaux en cours d'une entreprise qui est une profession libérale, du matériel de publicité ou d'emballage, des pièces ou des fournitures doivent figurer parmi les éléments portés à son inventaire;

[…]

Definitions

142.2 (1) In this section and sections 142.3 to 142.6,

…

mark-to-market property of a taxpayer for a taxation year means property held by the taxpayer in the year that is

(*a*) a share,

Définitions

142.2 (1) Les définitions qui suivent s'appliquent au présent article et aux articles 142.3 à 142.6.

[…]

bien évalué à la valeur du marché L'un des biens suivants détenus par un contribuable au cours d'une année d'imposition :

a) une action, sauf une action d'une société dans laquelle le contribuable a une participation notable au cours de l'année;

(*b*) where the taxpayer is not an investment dealer, a specified debt obligation that

(i) was carried at fair market value in the taxpayer's financial statements

(A) for the year, where the taxpayer held the obligation at the end of the year, and

(B) for each preceding taxation year that ended after the taxpayer acquired the obligation, or

(ii) was acquired and disposed of in the year, where it is reasonable to expect that the obligation would have been carried in the taxpayer's financial statements for the year at fair market value if the taxpayer had not disposed of the obligation,

other than a specified debt obligation of the taxpayer that was (or would have been) carried at fair market value

(iii) solely because its fair market value was less than its cost to the taxpayer, or

(iv) because of a default of the debtor, and

(*c*) where the taxpayer is an investment dealer, a specified debt obligation,

but does not included

b) dans le cas où le contribuable n'est pas un courtier en valeurs mobilières, un titre de créance déterminé qui, selon le cas :

(i) était comptabilisé à sa juste valeur marchande dans les états financiers du contribuable visant les années suivantes :

(A) l'année en question, dans le cas où le contribuable détenait le titre à la fin de l'année,

(B) chacune des années d'imposition précédentes qui a pris fin après que le contribuable a acquis le titre,

(ii) a été acquis et a fait l'objet d'une disposition au cours de l'année, dans le cas où il aurait vraisemblablement été comptabilisé à sa juste valeur marchande dans les états financiers du contribuable pour l'année si celui-ci n'en avait pas disposé,

ne sont pas visés par le présent alinéa les titres de créance déterminés du contribuable qui sont comptabilisés à leur juste valeur marchande, ou l'auraient été, du seul fait que leur juste valeur marchande est inférieure à leur coût pour le contribuable ou en raison d'un manquement du débiteur;

(*c*) dans le cas où le contribuable est un courtier en valeurs mobilières, un titre de créance déterminé.

Un bien visé pas règlement n'est pas

	un bien évalué à la valeur du marché.
(*d*) a share of a corporation in which the taxpayer has a significant interest at any time in the year, nor	
(*e*) a prescribed property;	
…	[…]
Definitions	**Définitions**
248. (1) In this Act,	**248.** (1) Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
inventory means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year or would have been so relevant if the income from the business had not been computed in accordance with the cash method and, with respect to a farming business, includes all of the livestock held in the course of carrying on the business;	***inventaire*** Description des biens dont le prix ou la valeur entre dans le calcul du revenu qu'un contribuable tire d'une entreprise pour une année d'imposition ou serait ainsi entré si le revenu tiré de l'entreprise n'avait pas été calculé selon la méthode de comptabilité de caisse. S'il s'agit d'une entreprise agricole, le bétail détenu dans le cadre de l'exploitation de l'entreprise doit figurer dans cette description de biens
…	[…]
property means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes	***Biens*** Biens de toute nature, meubles ou immeubles, corporels ou incorporels, y compris, sans préjudice de la portée générale de ce qui précède :
(*a*) a right of any kind whatever, a share or a chose in action,	*a*) les droits de quelque nature qu'ils soient, les actions ou parts;
…	[…]
Income Tax Regulations, C.R.C., c. 945, as applicable in 1998	***Règlement de l'impôt sur le revenu***, C.R.C., c. 945, tel qu'applicable en 1998

Valuation

1801. Except as provided by section 1802, for the purpose of computing the income of a taxpayer from a business, all the property described in all the inventories of the business may be valued at its fair market value.

Évaluation

1801. Sous réserve de l'article 1802 et pour le calcul du revenu d'un contribuable tiré d'une entreprise, tous les biens figurant à l'inventaire de l'entreprise peuvent être évalués à leur juste valeur marchande.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-296-15 and A-195-16

(APPEAL FROM AN AMENDED JUDGMENT OF THE HONOURABLE MR. JUSTICE GERALD RIP OF THE TAX COURT OF CANADA DATED JUNE 10, 2015, DOCKET NUMBER 2003-3262(IT)G.)

STYLE OF CAUSE:	KRUGER INCORPORATED v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	APRIL 13, 2016
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	SCOTT J.A. DE MONTIGNY J.A.
DATED:	JUNE 22, 2016

APPEARANCES:

Louis Tassé Roger Taylor Rachel Robert	FOR THE APPELLANT
Josée Tremblay Josh Kumar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

EY LAW LLP Montréal, Quebec	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT