Federal Court of Appeal  Cour d'appel fédérale

Date: 20130417

Docket: A-299-11

Citation: 2013 FCA 92

CORAM: **NOËL J.A.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

C.A.E. INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, on January 17, 2013.

Judgment delivered at Ottawa, Ontario, on April 17, 2013.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal and a cross appeal from a decision of Justice Jorré of the Tax Court of Canada (the Tax Court judge) allowing in part the appeal of C.A.E. Inc. (the appellant or CAE) from assessments made for the 2000, 2001 and 2002 taxation years.

[2] The dispute concerns the tax treatment resulting from the use and sale of aircraft cabin simulators in the course of the appellant's business. In issue in the appeal is the tax treatment of

the amounts that the appellant received from the sale of four of these simulators. The Tax Court judge held that these amounts were income but that the appellant was nevertheless entitled to capital cost allowance in respect of two of these simulators for the years preceding the year of their sale, given that they were used to earn income. He also confirmed that the appellant was entitled to capital cost allowances for three other simulators because they had been used in the same manner. In total, there are seven simulators at issue.

[3] In support of its appeal, CAE argues that the gain from the sale of the simulators is capital in nature and that the Tax Court judge could not have come to the opposite conclusion if he had given due consideration to the fact that these sales were part of a financing operation. The respondent for its part submits in its cross-appeal that the simulators that gave rise to the capital cost allowance claimed were not depreciable property, since all of them were held for sale.

[4] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal except for two of the five simulators affected by that aspect of the Tax Court judge's decision.

STATUTORY PROVISIONS

[5] The provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), and the *Income Tax Regulations*, C.R.C., c. 945 (the Regulations), to which I refer in this analysis are reproduced in an appendix to these reasons.

FACTS

[6] The appellant's fiscal year ends on March 31, which means that the taxation years at issue begin on April 1 of the preceding calendar year, and end on March 31, 2000, 2001 and 2002, respectively (see the definition of "taxation year" at paragraph 249(1)(*a*) of the Act).

[7] The appellant's business involves the manufacture of simulators, principally for sale. It also offers its simulators on short- or long-term lease and uses them in its flight training services business (Reasons, para. 16).

[8] Since the costs of building simulators are very high and simulators are specific to aircraft type, the appellant does not build a simulator without having a purchaser or an "anchor tenant" to justify the investment required to build that simulator (Reasons, para. 18).

[9] The dispute in this case arises from the multiple uses to which the appellant put its simulators during the period at issue. The Tax Court judge provides a detailed description of the facts pertaining to each of the simulators in question. A brief review of these facts is therefore helpful.

- *Canadair Regional CL-65 and Airbus A330/A340 (Air Canada) simulators*

[10] The facts surrounding the use of the simulator for Canadair Regional Jet CL-65 aircraft and of the Airbus A330/A340 simulator (Air Canada) (the CRJ CL-65 and Airbus A330/A340

(Air Canada) simulators) are essentially the same (Reasons, paras. 19 to 36 and 148 to 152). These two simulators were offered to Air Canada on a long-term lease beginning July 1998 and were sold to Bank of America Canada Leasing VIII Company (Bank of America) as part of a financing operation in the year 2000. Bank of America then leased them back to the appellant for a term of twenty years (Reasons, para. 26). The appellant, in turn, leased them to Air Canada on terms more or less identical to those of the first lease between it and Air Canada (Reasons, note 91). The lease contracts included an option to purchase worded as follows:

> Air Canada shall have the right to purchase the Equipment upon giving CAE three (3) months prior written notice and upon mutually acceptable terms and conditions.

[11] The proceeds of the sale of the CRJ CL-65 and Airbus A330/A340 (Air Canada) simulators to Bank of America exceeded their book value by nearly $15 million, which amount was treated as a capital gain by the appellant. Capital cost allowances had been claimed for the preceding years. Although these years are not at issue, the question of whether the appellant was entitled to these deductions is relevant for the purposes of computing the capital cost allowance claimed for the 2000 taxation year (Reasons, note 92).

- *Airbus A320 and A330/A340 (Toronto) simulators*

[12] An A320 simulator and another A330/A340 simulator were built for the appellant's flight training centre in Toronto (the Airbus A320 and A330/340 (Toronto) simulators) (Reasons, para. 37). Two airlines had contracted to use these simulators for several years (Reasons, para. 40). Sale and leaseback agreements identical to those signed with Bank of America were

signed when these simulators became operational during the 2002 taxation year except for the lease period which was extended by one year. Only the tax qualification of the proceeds of these sales is at issue (Reasons, para. 45).

- *Airbus A320 simulator*

[13] A second A320 simulator was built under an agreement with Airbus Industries (the Airbus A320 simulator). The simulator was to be built and installed at Airbus' facilities in Toulouse and was to be operational by mid-1998 (Reasons, para. 46). The agreement provided that after an initial period, Airbus had the option to either lease the simulator or purchase it. Fixed prices were provided for in each case (Reasons, para. 47). The option to lease was exercised, and the simulator was later sold to Khalifa Airways, in 2003 (Reasons, para. 50). The only issue regarding this simulator is whether the appellant was entitled to capital cost allowance for the three taxation years at issue (Reasons, para. 161).

- *Airbus A320 (US Airways) simulator*

[14] A third A320 simulator was manufactured for US Airways (the Airbus A320 (US Airways) simulator). This order was cancelled in June 2000, but the appellant decided to finish construction anyway. The simulator became operational in 2000 (Reasons, para. 52) and was used by the appellant for training from the fall of 2000 to December 2001 (Reasons, para. 169). In August 2001, it was leased to an airline for a period of five years and was to commence service on June 30, 2002 (Reasons, para. 55). The simulator was later sold by the appellant to its

subsidiary, which operated a flight training centre in Denver, Colorado (Reasons, paras. 59 and 60). Only the appellant's entitlement to a capital cost allowance for the 2002 taxation year is at issue (Reasons, para. 168).

- *Boeing 747-400 simulator*

[15] Finally, the appellant acquired a Boeing 747-400 simulator in 1997 with a view to selling or leasing it to United Airlines (the Boeing 747-400 simulator). In 1999, United Airlines signed an agreement to use this simulator to train its pilots. The agreement included a firm purchase option which was never exercised. This option was in effect during the 2000 and 2001 taxation years. A little more than two years later, United Airlines terminated the agreement, and the simulator was transferred to the appellant's training centre in Toronto (Reasons, para. 65). The Tax Court judge states that the dispute concerns the capital cost allowance claimed for the two years during which the simulator was leased to United, that is, the 2000 and 2001 taxation years. (The respondent conceded that the appellant was entitled to a capital cost allowance for the 2002 taxation year, when the simulator was being used at the appellant's training centre in Toronto (Reasons, para. 164).)

- *Assessments*

[16] The assessments under appeal were issued by the Minister of National Revenue (the Minister) on the assumption that the four simulators sold by the appellant during the period at issue (that is, the CRJ CL-65 and Airbus A330/A340 (Air Canada) simulators and the Airbus

A320 and A330/A340 (Toronto) simulators) were sold in the course of its trading operations and that, therefore, the increased value realized from these sales was income. Profits totalling $27 million were thus added to the appellant's income.

[17] These assessments negated the position taken by the appellant in its tax returns, according to which the gains realized were capital in nature. The Minister also assumed that the five simulators concerned in the cross-appeal (the CRJ CL-65 and Airbus A330/A340 (Air Canada), Airbus A320, Airbus A320 (US Airways) and Boeing 747-400 simulators) had been held for sale during the years for which capital cost allowance was claimed, and that the appellant was, therefore, not entitled to that deduction.

DECISION OF THE TAX COURT JUDGE

[18] The Tax Court judge agreed with the respondent on the first issue and with the appellant on the second.

[19] He begins his analysis by identifying the nature of the appellant's business. In his view, the appellant makes money from the simulators it builds in three ways: by selling them, leasing them out or using them to provide training services (Reasons, para. 16). Although the appellant's business comprises these three aspects, the Tax Court judge notes that it operated a single business, that of making money, in one way or another, from the simulators it builds (Reasons, paras. 67 to 71).

[20] The Tax Court judge first addresses the issue of whether the four simulators that were sold gave rise to income or a capital gain. He observes that a simulator built for the purpose of selling it produces income when sold (Reasons, para. 81). But what if the manufacturer of the simulators leases them out or uses them to earn income for several years before selling them (Reasons, para. 82)? After expressing surprise that this question has not come up more often, he pursues his analysis (Reasons, para. 85).

[21] The Tax Court judge first identifies the approach established by the case law for determining the tax qualification of a transaction (*Friesen v. Canada*, [1995] 3 S.C.R. 103 (*Friesen*); *Gloucester Railway Carriage and Wagon Co. Ltd. v. Commissioners of Inland Revenue, House of Lords*, [1925] A.C. 469 (*Gloucester*); *Anderson Logging Co. v. The King*, [1925] S.C.R. 45 (*Anderson*)). There is no doubt that the sale of the simulators would have given rise to income if they had been sold to an airline rather than to a financial institution (Reasons, paras. 88 to 100).

[22] Does the fact that the sales were made as part of a financing operation change the result (Reasons, para. 101)? The Tax Court judge explains that although financial institutions are not customers of the appellant, the appellant, in "monetizing" the simulators' value, recovered the capital invested and realized an increase in value *(i.e.*, its profit) in the same way as if it had sold the simulators to an airline (Reasons, paras. 102 to 107). In the Tax Court judge's view, the fact that the purpose of these sales was financing does not change the nature of the gain made; it is income (Reasons, para. 108).

[23] The Tax Court judge then turns to the issue of the capital cost allowance. He begins by stating that although paragraph 1102(1)(*b*) of the Regulations provides that any property that is described in a taxpayer's inventory is not depreciable property, nothing "requires that depreciable property be property that gives rise to a capital gain at the time of its sale" (Reasons, para. 118). In his view, the sale of depreciable property may give rise to income or a capital gain, depending on the circumstances (Reasons, para. 122).

[24] Although the Supreme Court in *Friesen* says otherwise (*Friesen*, para. 28), the Tax Court judge explains that this case is not authoritative, since it rules out, in his view, the possibility that property that is inventory during the year of its sale could be treated differently in another year (Reasons, paras. 135 *in fine*). More specifically, that decision (Reasons, para. 137):

> . . . implies that the approach that I have just described is impossible, because a simulator would have to be either inventory or capital property. Moreover, the nature of the property could not change from one year to another, thus if the sale of the simulators generated income, that would mean they were inventory, which, under the Regulations, is not depreciable [reference omitted].

[25] Relying on this finding, the Tax Court judge concludes as follows (Reasons, para. 145):

> . . . I am not bound by the assertion that all assets are either inventory or property giving rise to a capital gain and that the category cannot change from one year to another.

[26] Having established that the nature of property may change with its use, the Tax Court judge then returns to the approach proposed and explains that the tax character of the simulators must be analyzed each year, since this characterization may evolve from year to year (Reasons,

para. 132). Adopting this approach, he reviews the circumstances surrounding the use of the five simulators for which capital cost allowance was claimed (Reasons, paras. 132 and 133).

[27] Having conducted the analysis, the Tax Court judge concludes that the CRJ CL-65 and Airbus A330/A340 (Air Canada) simulators were used to earn rental income during the years preceding their sale when they were being leased to Air Canada on a long-term basis. According to his analysis, these simulators were used to generate rental income and only later became inventory, at the earliest, at the beginning of the taxation year in which they were sold (Reasons, paras. 148 to 152).

[28] The same conclusion is reached for the Airbus A320 simulator, which was used to earn rental income during the three years at issue. According to the Tax Court judge, it was not until the simulator was sold to Khalifa Airways in 2003 that it changed vocation and became inventory (Reasons, paras. 153 to 161).

[29] As for the Boeing 747-400 simulator, the Tax Court judge concludes that the appellant was entitled to capital cost allowance, noting that the simulator could not have been sold before United terminated the lease and that it had been used to generate rental income during the years for which the deduction was claimed (Reasons, paras. 165 to 167).

[30] Finally, the Airbus A320 (US Airways) simulator was used to generate income from services until December 2001 at least (Reasons, para. 169). It was subsequently leased for a five-year term beginning in June 2002. Although the appellant could have terminated this contract

earlier, nothing suggested that the lease would be shortened. The Tax Court judge concludes that this simulator was used to generate rental income during the 2002 taxation year and that the appellant, therefore, was entitled to the capital cost allowance claimed (Reasons, paras. 170 to 173).

[31] The Tax Court judge also briefly addresses the impact which the purchase options granted by the appellant with respect to four of these five simulators could have had on the entitlement to capital cost allowance. First, he concludes that the options granted to Air Canada (CRJ CL-65 and Airbus A330/A340 (Air Canada) simulators) were not firm options. In his view, "it is always possible for an owner and lessee to agree to the sale of property that is being leased" (Reasons, para. 150).

[32] As for the options granted to United Airlines (Boeing 747-400 simulator) and Airbus (Airbus A320 simulator), the Tax Court judge held that they did not have to be taken into account, since it was unlikely that they would have been exercised (Reasons, para. 163, and Confidential Reasons, paras. 155 and 156).

PARTIES' POSITIONS

- *The appeal*

[33] CAE submits that the Tax Court judge erred in law in concluding that the sale-and-leaseback arrangements gave rise to income. The Tax Court judge, having found that the

contracts setting up the financing arrangement were to be considered as a whole (Reasons, para. 24), should have noted that these sales did not take place in the ordinary course of business Appellant's Memorandum, para. 11).

[34] According to the appellant, the Tax Court judge did not consider the fact that it could never have made a profit from these sale-and-leaseback arrangements, since the leasing costs which it agrees to pay always exceed the proceeds from the disposition of the simulators to the financial institutions (Appellant's Memorandum, para. 12).

[35] The Tax Court judge also failed to consider the fact that, in the course of these transactions, the appellant did not dispose of its investment in the simulators with a view to profit, but in order to secure financing (Appellant's Memorandum, para. 18b). Indeed, the financial statements do not recognize the so-called "profit" made on the "sale" aspect of the arrangement but rather serves to reduce the costs incurred on the "lease" aspect of the arrangement (Appellant's Memorandum, para. 8h)).

[36] The appellant submits that if the Tax Court judge had considered these factors, he would have been unable to conclude that these sales were akin to sales made to an airline in the normal course of business.

[37] In response, the respondent submits that the Tax Court judge correctly concluded that the increased value realized by the sale-and-leasebacks is income. In the respondent's view, the fact that the simulators were sold for financing reasons does not trump the established principles used

in order to determine the tax qualification of the proceeds. In this respect, the purpose of the sale or the identity of the buyer does not affect the tax treatment in any way (Respondent's memorandum, para. 5). According to the respondent, the appellant's arguments on this point are not based on any recognized principle and run counter to settled case law (*ibidem*).

[38] The respondent adds that the appellant's primary vocation is the sale of simulators, since this activity generates nearly all (*i.e.*, 98%) of its revenue. The fact that the appellant felt the need to diversify its activities to generate revenue by other means does not in any way alter the fact that it still intends to sell the simulators that it builds (Respondent's Memorandum, para. 6). According to the respondent, the simulators built by the appellant are property held for sale from the moment when they are manufactured and remain so until they are sold, without exception.

[39] The Tax Court judge was therefore correct in holding that the profit made from selling the simulators is business income.

- *Cross-appeal*

[40] The respondent first submits that the Tax Court judge, having held that the simulators were part of the inventory when sold, was bound to conclude they were inventory and thus non-depreciable property in the years preceding the sale. According to the respondent, *Friesen* establishes the principle that property that is inventory when sold must be treated the same way in the years preceding the sale (Respondent's Memorandum, para. 70).

[41] The respondent submits that the Tax Court judge erred in not applying the Supreme Court's decision in *Friesen* on the basis that it was wrongly decided, and in concluding that depreciable property is neither inventory nor capital property. According to the respondent, this creates a third category of property which is not recognized by the Act (Respondent's Memorandum, para. 74).

[42] According to the respondent, property may be treated differently from one year to the next if, and only if, there has been a change in use. Inventory may indeed become capital property under the Act (or vice versa), but this change must be clearly demonstrated before effect can be given to it (Respondent's Memorandum, paras. 90 and 91).

[43] The Tax Court judge therefore erred in concluding that the appellant was entitled to the capital cost allowance claimed.

- *Additional submissions*

[44] Before the hearing, the Court issued a direction asking the parties to state their respective position on the possible application of subsection 45(1) of the Act, in light of the change in use identified by the Tax Court judge in respect of some of the simulators (Reasons, paras. 148 to 152).

[45] In response, the appellant took the position that if these simulators ceased being depreciable property and became inventory, as the Tax Court judge found, there was a change in

use, and subsection 45(1) as well as subsection 13(7) apply (Appellant's Written Submissions, para. 6). Under these provisions, a disposition of the simulators is deemed to have occurred before their sale to the financial institutions for proceeds equal to their fair market value, that is, the price obtained from the financial institutions, and their cost is adjusted accordingly. It follows that even if the Tax Court judge properly held that the sale of these simulators was on account of income, no income was derived as the simulators were sold for an amount equal to their cost (*ibidem*).

[46] The respondent, meanwhile, took the initial position that the change identified by the Tax Court judge was not clear enough to amount to a change in use (Respondent's Memorandum, paras. 90 and 91). In response to the direction, the respondent took the alternative position that subsection 45(1) – and presumably subsection 13(7) which is similarly worded – cannot apply, since there is no change in use when depreciable property becomes inventory (Respondent's Written Submissions, para. 2).

[47] More specifically, the respondent argues that since the simulators are used to earn income in both cases, there is no change in use (Respondent's Written Submissions, paras. 4 to 6).

ANALYSIS AND DECISION

- *Standard of review*

[48] The standard of review applicable to a question pertaining to the interpretation of a provision of the Act or the identification of a legal rule derived from the case law is correctness. However, this Court may not interfere with a finding of fact or a conclusion of mixed fact and law in the absence of a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

- *The appeal*

[49] The Tax Court judge concluded that the sale of the four simulators gave rise to income. In arriving at this conclusion, he adopted the approach set out in *Gloucester*, as it was applied by the Exchequer Court in *Canadian Kodak Sales Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, 54 D.T.C. 1194. This approach was also applied by the Supreme Court in *Anderson* (pp. 48 and 49) and has never been called into question.

[50] *Gloucester* is of special interest because that case, like the present one, concerns a business that produced property (railway cars) for both lease and sale. After operating under this business model for several years, Gloucester decided to end its leasing activities and sell all of the railway cars it was using for this purpose. These sales generated sums exceeding the book value of the railway cars. Litigation arose surrounding the tax qualification of this increased

value. The Courts held throughout that it was income. The House of Lords (Lord Dunedin) eventually brought the debate to an end (*Gloucester*, p. 474):

> . . . A wagon is none the less sold as an incident of the business of buying and selling because in the meantime before sold it has been utilized by being hired out. There is no similarity whatever between these wagons and plant in the proper sense, e.g. machinery, or between them and investments the sale of which plant or investments at a price greater than that at which they had been acquired would be a capital increment and not an item of income. I think that the appeal fails.

[51] The appellant does not take issue with this line of authority. It also recognizes that the Tax Court judge was correct in concluding that, if the sales had been made to an airline, the resulting gains would have constituted income. However, the issue is whether the fact that the sales were made to financial institutions, as part of a financing arrangement, changes this outcome.

[52] In order to properly address this question, it is useful to have in mind the nature of the appellant's business. According to the Tax Court judge, the business carried on by the appellant is that of exploiting the simulators it builds with a view to profit, which it does in three ways: by selling them, leasing them out or using them to sell training services (Reasons, paras. 16, 68, 71 and 127). This finding has not been challenged on appeal.

[53] It is also useful to consider the use that was made of the simulators in issue before the sale-leaseback arrangements were entered into. The Tax Court judge concluded that the CRJ CL-65 and Airbus A330/A340 (Air Canada) simulators were used to earn rental or service income (Reasons, paras. 20 and 25). The Airbus A320 and A330/A340 (Toronto) simulators had yet to

be used when the financing took place. However, the evidence reveals that they were built to be used in the appellant's leasing activities, since they were both subject to pre-negotiated long-term leasing contracts for minimum periods extending from three to six years (Reasons, paras. 37 to 41).

[54] Against this background, what, if anything, turns on the fact that the simulators were sold in order to secure financing?

[55] I begin by noting that it is the nature of the property sold that determines the resulting tax treatment (*Friesen*, para. 28). Thus, if the simulators were, in the hands of the appellant, property held for sale – more precisely inventory – when the sale-and-leaseback transactions took place, the increase in value realized is income, regardless of the fact that the sale was made as part of a financing arrangement.

[56] That being said, the fact that the sales were made for financing purposes and that the simulators were, and remained available, for use by the appellant after the financing are factors that are helpful in identifying the tax character of the simulators at the time they were sold.

[57] In this regard, I first observe that consistent with the business plan, the simulators kept the same vocation in the appellant's leasing line of business before, during and after their sale to the financial institutions. On the operational levels, nothing changed.

[58] Second, the sale-and-leaseback agreements were not entered into in the normal course of the appellant's trading activities. Hence, the fact that the sales generated proceeds exceeding the cost of the simulators does not necessarily lead to the conclusion that the increased value is income.

[59] Third, the Tax Court judge recognized that the sale-and-leaseback components of the contracts had to be considered as a whole (Reasons, para. 24). He therefore had to consider the fact that, from this perspective, the sales could not be justified from a business standpoint. Indeed, when regard is had to the rents that the appellant undertook to pay under the sale-and-leaseback contracts, the sales were not profitable (Appeal Record, Vol. 7, pp. 2183, lines 14 to 25; pp. 2189, lines 1 to 6). It is only when one takes into account the income that will be generated by ongoing use of the simulators over the duration of the lease, that the sale-and-leaseback transactions make business sense (Appeal Record, Vol. 7, pp. 2189, lines 13 to 15; pp. 2236, lines 18 to 24; Vol. 2, pp. 574 and 575).

[60] This explains the accounting treatment according to which the increase in value realized in the initial year of the sale-and-leaseback contracts is not recorded as a profit but instead serves to reduce rental expense over the term of the contract. The annual report for 2003 contains the following explanation (Appeal Record, Vol.3, pp. 1025):

> … The difference between the proceeds received and CAE's cost to manufacture, approximately the margin CAE would record if it had a competed [Full Flight Simulator] sale to a third party, is recorded under long-term liabilities and recognized into earnings as applicable. This amount after deducting the guaranteed residual value where appropriate, is then amortized over the term of the sale and leaseback transaction as a reduction of rental expense. At the end of the term of the sale and leaseback transaction the guaranteed residual value will

> be taken into income should no reduction occur in the value of the underlying simulator.

[61] Going back to the reasons of the Tax Court judge, the essence of the conclusion that he reached is that in "monetizing" the value of the simulators the appellant did not do anything different than when it sells a simulator to an airline in the normal course, *i.e.* it realized "its profit" (Reasons, para. 107).

[62] In my respectful view, the analysis must be more focussed. The Tax Court judge could not have came to this conclusion if he had conducted his analysis from the perspective of the appellant's business. What the appellant was seeking was a way to "monetize" the simulators in order to finance its ongoing operations while ensuring that the simulators remained at its disposal for their continued use over the long term. The fact that the sale-and-leaseback arrangements could only make business sense in that perspective is significant in my view.

[63] The situation is similar to the one that was before Judge Jackett – then President of the Exchequer Court – in *Allarco Developments Ltd. v. Minister of National Revenue*, 70 D.T.C. 6274 (*Allarco*). That decision merits a closer look.

[64] Allarco was in the real estate business. It bought some properties for resale and others for long-term exploitation. One of its trading projects ran afoul of a zoning by-law. Allarco resolved the problem by persuading the City of Edmonton to transfer a downtown property (the Bellamy Hill site) to it in exchange for a portion of the lands affected by the rezoning. Allarco's plan was

to build a large hotel complex on the Bellamy Hill site and operate it over the long term. Before proceeding it had to obtain the required financing.

[65] An insurance company (Great-West Life) agreed to finance the project on condition that Allarco transfer ownership of the Bellamy Hill site to it for $1,000,000 and agree to operate the hotel complex as a tenant under a 99-year lease. This sale allowed Allarco to make a profit of $699,900, which the Minister promptly assessed as income. Allarco took issue with the Minister's assessment.

[66] After noting that Allarco's business had a dual purpose, Judge Jackett disposed of the issue as follows (*Allarco*, p. 6277):

> … I find, on the evidence, that the appellant acquired the Bellamy Hill site for the exclusive purpose of creating thereon an income producing asset, that it carried out that purpose and that the sale to Great West Life was an integral part of the financing arrangement that was worked out for it by Great West to fit in with Great West's preferred method of financing such an operation. Looked at another way, the acquisition from the City and the re-sale to Great West were only part of a series of transactions whereby the appellant acquired an income producing asset consisting of a 99-year lease of a garage and a hotel. These transactions were clearly not transactions in the course of carrying on the trading activities of the appellant. …

[67] The Tax Court judge appeared to be of the view that this reasoning had been rejected by the Supreme Court in the appeal that followed (Reasons, note 72), but such is not the case. The decision of the Supreme Court (*Canada (Minister of National Revenue) v. Allarco Developments Ltd.*, [1974] S.C.R. 730 (*Allarco*, S.C.)) was rendered on a different basis, namely, that the gain

generated by the prior land exchange with the City was on account of income (*Allarco*, S.C., p. 736).

[68] Judge Jackett declined to consider this issue, citing a lack of evidence (*Allarco*, p. 6277, right-hand column). The Supreme Court (Justice Martland writing for the majority) considered that there was sufficient evidence to decide this issue and held that the prior land exchange had given rise to proceed equal to the value of the land given in exchange, that is, $1,000,000 (*Allarco*, S.C., p. 741). That was the context in which Justice Martland stated that the financing subsequently obtained had no effect on this result (*ibidem*).

[69] Judge Jackett's approach to the issue which he addressed was not rejected by the Supreme Court and is, in my opinion, the correct one. As he suggests, the analysis must be conducted from the perspective of the business concerned. In the present case, the leasing component of the sale-and-leaseback arrangements extended over a period of twenty and twenty-one years and allowed the appellant to carry on its leasing/service activities throughout this period. The fact that sale-and-leaseback arrangements make no business sense unless the rental/service fees that the appellant planned to collect are taken into account shows that the transactions were concluded on the basis of the ongoing operation of the simulators over the life of the lease. Had the Tax Court judge considered the issue from this perspective, as he should have, he would have been bound to conclude that the sale-and-leaseback contracts were for the appellant long-term assets capable of allowing it to generate rental/service income for some twenty years. It follows that the sale-and-leaseback transactions were not part of the appellant's trading operations.

[70] I therefore come to the conclusion that the resulting gain was on account of capital.

- *Cross-appeal*

[71] After a lengthy analysis, the Tax Court judge concluded that the appellant was entitled to the capital cost allowance claimed. In his view, this entitlement is based on the appellant's use of its simulators in any given year (Reasons, para. 132):

> In such a situation, since the Act applies on a year-by-year basis, I do not see how the issue of the simulators' nature can be resolved other than by an examination of their current use in each taxation year and all the indicia in each taxation year. This characterization can change from year to year.

[72] This is the right approach (see for example, *Good Equipment Ltd. v. Canada*, 2008 TCC 28, [2008] T.C.J. No. 15, at paragraphs 8 to 11 (*Good Equipment*)), but I must comment on the difficulties which the Tax Court judge believed that he had to overcome in order to give effect to it.

[73] These difficulties arose for two reasons. First, the Tax Court judge agreed with the respondent's reading of the decision of the Supreme Court in *Friesen* and her submission that this decision stands for the proposition that property that is inventory in the year of its sale cannot be treated differently in prior years.

[74] Moreover, the Tax Court judge does not seem to have been made aware of the fact that the Act already contains a mechanism that recognizes and accounts for changes in use that are

made of income producing assets in the course carrying on business. In particular, subsection 45(1) – which appears under Subdivision C “Taxable Capital Gains and Allowable Capital Losses” – provides that property which begins or ceases to be used to produce income is deemed to have been disposed of at its fair market value and reacquired at that same price at the time of the change in use. Subsection 13(7) of the Act has the same effect with respect to capital property that is depreciable, for the purposes of the capital cost allowance system.

[75] It is without making any reference to these provisions and with a view of giving effect to the changes in use that he identified that the Tax Court judge felt the need to decree the existence of a new class of property and hold that the Supreme Court’s decision in *Friesen* was no longer good law (Reasons, paras. 137, 138, 144 and 145). In my view, the reasoning of the Tax Court judge in this regard is flawed and there was no need to go there in order to recognize the changing use of the simulators.

[76] Contrary to what he states, I do not agree that the Act contemplates that property can at once be depreciable property and inventory (Reasons, para. 122). This conclusion disregards paragraph 1102(1)(*b*) of the Regulations, which excludes from the classes of property with respect to which depreciation may be claimed, property that is “described in the taxpayer’s inventory”. Nor do I agree with the Tax Court Judge’s suggestion that, under the Act, the sale of “depreciable property” can give rise to a capital gain or to income, depending on the circumstances (Reasons, paras. 122 and 147). Depreciable property is by definition capital property (subsection 54(*a*)), and the disposition of capital property for proceeds which exceeds its cost can only give rise to a capital gain.

[77] As the Supreme Court explains in *Friesen*, there are only two classes of property under the Act, namely capital property, the disposition of which gives rise to a capital gain, and property held for sale – *i.e.* inventory – which when sold gives rise to income (*Friesen*, para. 28):

> The second problem with the interpretation proposed by the respondent is that it is inconsistent with the basic division in the Act between business income and capital gain. As discussed above, subdivision b of Division B of the Act deals with business and property income and subdivision c of Division B deals with capital gains. The Act defines two types of property, one of which applies to each of these sources of revenue. Capital property (as defined in s. 54(*b*)) creates a capital gain or loss upon disposition. Inventory is property the cost or value of which is relevant to the computation of business income. The Act thus creates a simple system which recognizes only two broad categories of property. The characterization of an item of property as inventory or capital property is based primarily on the type of income that the property will produce.
>
> [Emphasis added]

[78] According to the Tax Court judge, the definition of "capital property" in section 54 of the Act precludes this interpretation: "The fact that paragraph (*b*) of the definition of the term 'capital property' in section 54 excludes 'depreciable property' does not mean that, under the Act, the sale of depreciable property necessarily gives rise to a capital gain" (Reasons, para. 122). If such were the case, it would have been unnecessary to refer to "depreciable property" in either paragraph (*a*) or paragraph (*b*) (Reasons, note 79).

[79] With respect, that Parliament felt the need to specify in section 54 that the class of property consisting of "capital property" ("immobilisations" in the French version) includes "any depreciable property" (54(*a*)) as well as property other than depreciable property the disposition of which gives rise to a capital gain (or loss) (54(*b*)), is due to the fact that all capital property is

subject to the capital gains system but only depreciable property is subject to the capital gains system as well as the capital cost allowance system. One of the consequences is that a capital loss cannot be claimed in respect of depreciable property since such a loss is accounted for under the capital cost allowance system. This explains why section 54 is drafted as it is.

[80] Turning to the decision of the Supreme Court in *Friesen*, the statement at paragraph 24 to the effect that property held in inventory when sold has the same character in the preceding years does not have the effect that the Tax Court judge attributes to it (Reasons, para. 137, second sentence, and paras. 138 and 145 *in fine*).

[81] The issue in *Friesen* was whether the taxpayer was entitled to claim a loss resulting from an inventory write down pursuant to subsection 10(1) of the Act. The property in issue was land acquired in the course of an "adventure in the nature of trade" and held for a few years without any indication of there having been a change in its use. One of the arguments advanced by the Crown was that, in order to succeed, the taxpayer had to show that the vacant land was inventory not only in the year of sale but throughout the years during which it was held (*Friesen*, para. 23).

[82] Justice Major, writing on behalf of the majority, rejected this argument (*Friesen*, para. 24):

> . . . 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.
>
> [Emphasis added]

[83] It is clear that Justice Major was not thereby alluding to a situation where there is a change in use and above all, was not ruling out the possibility that property held in inventory in a given year might be used for another purpose in a preceding year and be treated differently under the Act. Indeed, Justice Major expressly recognizes that subsections 13(7) and 45(1) must be applied when the conditions precedent for their application are present (*Friesen*, para. 32).

[84] It is apparent that the Tax Court judge wanted to give effect to the change in use which he found had taken place when some of the simulators ceased to be used to earn income and were transferred to inventory during the year when they were sold. However, there was no need to create a new class of property or repudiate *Friesen* in order to take into account the changing use of the simulators.

- *Would subsections 13(7) and 45(1) have applied?*

[85] As can be seen, my disagreement with the reasoning of the Tax Court judge is based on the premise that subsections 13(7) and 45(1) would have allowed him to give effect to the change in use which he identified. The respondent however maintained that these provisions could not apply. This would have the effect of leaving the problem which the Tax Court judge struggled to resolve without an answer.

[86] Before addressing the issue, it useful to point out that if the proceeds from the sale of the simulators had been properly characterized as income, as the Tax Court judge found, subsections 13(7) and/or 45(1) would have had the effect of erasing at least 15 of the 27 millions assessed

against the appellant, *i.e.* the profit which according to the Tax Court judge was realized from the sale of simulators CRJ CL-65 and Airbus A330/A340 (Air Canada) (see paras. 11 and 45, above).

[87] The respondent's initial position, as set out at paragraphs 89 to 91 of her memorandum was that the Act deals with changes in use, but that the change identified by the Tax Court judge was not sufficiently clear to give effect to it. I need only say in this respect that assuming that he correctly held that the simulators were depreciable property and that they ceased being used in that capacity when they were transferred to inventory, the change could not have been made any clearer (Reasons, paras. 148 to 152).

[88] Later, in response to the Court's direction, the respondent took the position that these provisions cannot apply because depreciable property that is transferred to inventory continues to be used to earn income (by its sale), with the result that there is no change in use within the meaning of these provisions.

[89] This reasoning is set out in detail at paragraph 11 of Interpretation Bulletin IT-218R, which deals with real estate, as follows:.

> 11. … The Department considers that the changes in use as described by subsections 13(7) and 45(1) do not include a transfer of property from one income-earning function to another such function of the same taxpayer. Accordingly, it is the Department's position that subsections 13(7) and 45(1) do not apply where real estate that is used by its owner for the purpose of gaining or producing income from a business or property (e.g., an office building or rental property) is converted by its owner to inventory. The use (by sale) of inventory is still an income-earning function. The same rationale will apply when inventory is converted to capital property provided the property is, immediately after

> conversion, used by its owner for the purpose of gaining or producing income from a business or property. …

[90] According to this construction of the word "use", property that is held in inventory and is extracted therefrom for the purpose of being used to earn income (or vice versa) could never be subject to subsections 13(7) or 45(1). Only capital property that is not used to earn income – *i.e.* "personal use property" as defined in section 54 – would come within these provisions.

[91] These provisions are capable of being read differently. Income producing property that ceases to be used for that purpose and is transferred to inventory remains in use in the course of business in that it continues to have a function that is essential, but it is not a use that generates income. The definition of "inventory" – "a description of property the cost or value of which is relevant in computing . . . income" (subsection 248(1)) – describes a pure state of affairs. Holding property in inventory does not, in and of itself, generate any income.

[92] This is how Chief Justice Bowman read the word "use" for purposes applying subsection 45(1) in *Roos v. The Queen*, 94 D.T.C. 1094 (*Roos*), where he held that a piece of land that was held in inventory was subject to a deemed disposition pursuant to that provision when the appellant took it off the market and began using it to earn income.

[93] Justice Major also appears to have read the word "use" the same way in *Friesen* since as noted earlier, his comments with respect to the application of subsections 13(7) and 45(1) were made in the course of a discussion pertaining to land held in inventory.

[94] This interpretation allows for the application of subsections 13(7) and 45(1) in cases where income producing assets are transferred to inventory (or vice versa). However, it would prevent their application when personal use property is transferred to inventory (or vice versa), if it was held to be the only valid construction.

[95] In my view, a reading which reconciles the construction on which the Minister relies and the one given by Chief Justice Bowman and allows for the application of subsections 13(7) and 45(1) with respect to both personal use and income producing property, is in order. The purpose of these provisions is to recognize changes in the use of property which have the effect of altering the applicable tax regime, with the view of allowing for a fair and equitable transition based on set valuations, while preserving the integrity of the tax system.

[96] Keeping this objective in mind there is no reason why the legislator could have intended to limit the application of subsections 13(7) and 45(1), and the word “use” must be construed in a manner which achieves this end by giving it the meaning proposed by the Minister with respect to changes involving personal use property, and the meaning adopted by Chief Justice Bowman in other cases.

[97] This approach is justified, if one considers the fundamentally different context in which the question arises, depending on whether the property in question is personal use property or not. In the case of personal use property, the question is dichotomic: is the property in question used to earn income or for personal use? In this context, a construction of the word “use” which recognizes that property held in inventory is property that is used to earn income is necessarily

warranted since the property in issue must fit within one of these two categories, and by definition property held in inventory is not “personal use property” (reference is made to the definition in section 54).

[98] The question which arises in the context of a change of use which does not involve personal use property presents itself differently. In such a case, the two types of property which are used in the course of business must be considered with the view to determine if property held in inventory, in contrast with income producing property such as depreciable property, is used to earn income. In this context the answer turns on the precise use that is envisaged under the statutory scheme in each case, and a construction of the word “use” which takes into account the function filled by property held in inventory pursuant to subsection 248(1), is warranted. This function is not an income producing function.

[99] This distinct approach depending on the nature of the property in issue is based on a textual and contextual reading of the relevant provisions and achieves the intended result by recognizing changes in the use of property to and from inventory, be it personal use property or not.

[100] Absent this interpretation, Counsel for the respondent was unable to identify the method or the values according to which the transition from income-producing capital property to inventory (and vice versa) could take place under the Act. In this respect, I am aware of Interpretation Bulletin IT-102R2 entitled “Conversion of property […] from or to inventory” which appears to deal with this type of change. Paragraph 8 states:

> 8. Where capital property is converted to inventory, the action of conversion does not constitute a disposition within the meaning of paragraphs 13(21)(*c*) and 54(*c*). It is, however, recognized that the ultimate disposition of a property that was so converted may give rise to a gain or loss on capital account, a gain or loss on income account or a gain or loss that is partly capital and partly income. Accordingly, with respect to capital property that has been converted to inventory, taxpayers may calculate capital gains or losses, if any, on the basis that a notional disposition of such property occurred on the date of conversion. The amount of such a notionally determined capital gain or loss in respect of a property will be the difference between its adjusted cost base, as defined in paragraph 54(*a*), (subject to the ITAR rules for property held on December 31, 1971) and its fair market value on the date of conversion. These notionally determined capital gains or losses will be considered to give rise to taxable capital gains or allowable capital losses for the taxation year during which the actual disposition of the relevant property occurs and will be required to be so reported in that same year. The amount of any income gain or loss arising on actual disposition of the converted property will be determined in accordance with generally accepted accounting principles on the basis that its initial inventory value is its fair market value on the date of conversion.
>
> [Emphasis added]

Paragraph 15 of IT-218R provides for the identical treatment with respect to real estate that is used to earn income at the time its transfer to inventory.

[101] Aside from the year in which these gains or losses are to be reported (*i.e.* the year of the sale rather than the year of the change of use), this reflects a plain application of subsections 13(7) and/or 45(1) which, in the present matter, would have led to a result identical to that set out at paragraph 45 of these reasons. Even though these Bulletins state that this policy is not based on subsections 13(7) and 45(1), there is no statutory authority which allows for such a result other than these provisions. The legislator cannot have intended this transition to take place without legal sanction.

[102] The solution to the thorny issue with which the Tax Court judge struggled must be found in the Act, and that is where the Tax Court Judge tried to find it. Had I not been able to conclude that subsections 13(7) and 45(1) allowed him to give effect to the change in use which he identified, I would have assessed the novel reasoning which he advanced in a completely different light because absent these provisions, it is difficult to see how he could have given effect to this change otherwise than the way he did.

- *Entitlement to the capital cost allowance*

[103] The respondent, in framing its cross-appeal, does not challenge the Tax Court judge's conclusion that the five simulators with respect to which capital cost allowance was claimed were used to earn income during each of the relevant years. However, the respondent submits that these simulators were nevertheless held for sale and therefore part of the appellant's inventory. She adds that this conclusion is inevitable in the case of the CRJ CL-65 and Airbus A330/A340 (Air Canada) and Boeing 747-400 simulators because they were subject to purchase options—in favour of Air Canada in the former cases and in favour of United Airlines in the latter. The respondent makes the same argument in respect of the Airbus A320 simulator for the 2001 and 2002 taxation years, given the option in favour of Airbus that was in effect during those years.

[104] Before addressing these arguments, it is helpful to review the statutory conditions for entitlement to a capital cost allowance. If at the end of the taxpayer's taxation year the taxpayer holds property (paragraph 1100(1)(*a*) of the Regulations) which is part of a prescribed class and

was used in the course of that year to earn income, the taxpayer is entitled to a capital cost allowance for that year (reference is made to the definition of “depreciable property” in subsection 13(21), read together with paragraph 20(1)(*a*) of the Act). However, property that is described in the taxpayer’s inventory is excluded from the definition of “depreciable property” (paragraph 1102(1)(*b*) of the Regulations). It follows that property held for sale is not depreciable property, even if it is used in the meantime to earn income.

[105] In the present case, the Tax Court judge concluded that the Airbus A320 (US Airways) simulator was subject to a lease that prevented selling the simulator to another airline (Reasons, paras. 170 and 171). He came to the same conclusion for the CRJ CL-65 and Airbus A330/A340 (Air Canada) and Boeing 747-400 simulators, stating that they could not be sold to “another” airline, apart from Air Canada and United Airlines, the option holders (Reasons, paras. 151 and 165).

[106] Regarding the Airbus A320 simulator, the Tax Court judge noted that it could not be sold to anyone, including Airbus, in 1998 and 1999 (Reasons, para. 155). However, that situation changed during the 2001 taxation year, when Airbus was given the option of buying or leasing the simulator at a fixed price (Reasons, para. 47). The option to purchase was also capable of being exercised during the 2002 taxation year.

[107] According to the Tax Court judge, the options granted to Air Canada were not real options (the wording is set out at para. 10 above). However, the option granted to United Airlines was a real option as it could be exercised for a preset price. Nevertheless, the Tax Court judge

refused to take it into account, on the ground that "[n]othing in the evidence points to circumstances that made it probable that United would exercise its option in the short term" (Reasons, para. 163). He drew a similar conclusion regarding the option granted to Airbus, which began in 2001 and remained in effect in 2002 (Confidential Reasons, paras. 155 and 156).

[108] I cannot agree with the Tax Court judge's reasons for disregarding the impact of these options. Property put up for sale in the course of a business carried on for that purpose is no less for sale because circumstances make a sale unlikely. What matters for our purposes is that the appellant was bound to sell the simulators for the asking price.

[109] The options granted to Air Canada did not have this effect, since they at most constituted an invitation to negotiate. Even if Air Canada had exercised the options, the appellant had no objection to sell and remained free to continue using the simulators for its own purposes. In these circumstances, it was open to the Tax Court judge to conclude that these simulators were not held for sale.

[110] The options granted to United Airlines and Airbus were different since they were firm. These options were also different from the one in issue in *Good Equipment* since they were exercisable during the years with respect to which capital lost allowance was claimed rather than only at the expiration of the lease (*Good Equipment*, para. 11). It follows that in the event that these options were exercised, the appellant had no choice but to cease using the simulators and sell. Given this, the appellant cannot maintain that these simulators were not being held for sale

and therefore part of its inventory. In my view, the Tax Court judge failed to have regard to the evidence in drawing the opposite conclusion and allowing the claimed deductions.

[111] Finally, the fact that these simulators were at the same time used to earn income does not alter this result. The legislator – more precisely the Governor-in-Council – has put its mind to the question whether property held in inventory can be depreciated when also used to earn income and has excluded such property from the classes of property with respect to which depreciation may be claimed (see paragraph 1102(1)(*b*) of the Regulations).

[112] It follows that when regard is had to the outstanding options, the appellant was not entitled to the claimed depreciation in respect of the Boeing 747-400 simulator for the 2000 and 2001 taxation years and the Airbus A320 simulator for the 2001 and 2002 taxation years.

DISPOSITION

[113] For these reasons, I would allow the appeal in whole and the cross-appeal in part and, giving the judgment that the Tax Court judge ought to have given, I would refer the assessments issued with respect to the 2000, 2001 and 2002 taxation years back to the Minister for reconsideration and reassessment on the basis that the four simulators sold by the appellant were, at the time of their sale, capital property and that the appellant was entitled to the capital cost allowance claimed except in respect of the Boeing 747-400 simulator for the 2000 and 2001

taxation years and the Airbus A320 simulator for the 2001 and 2002 taxation years. Since this outcome is for the most part favourable to the appellant, I would grant costs in its favour.

"Marc Noël"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Robert M. Mainville J.A."

APPENDIX

A) ***INCOME TAX ACT***

Rules applicable

13. (7) Subject to subsection 70(13), for the purposes of paragraphs 8(1)(*j*) and 8(1)(*p*), this section, section 20 and any regulations made for the purpose of paragraph 20(1)(*a*),

> (*a*) where a taxpayer, having acquired property for the purpose of gaining or producing income, has begun at a later time to use it for some other purpose, the taxpayer shall be deemed to have disposed of it at that later time for proceeds of disposition equal to its fair market value at that time and to have reacquired it immediately thereafter at a cost equal to that fair market value;
>
> …

Règles applicables

13. (7) Sous réserve du paragraphe 70(13), les règles suivantes s'appliquent dans le cadre des alinéas 8(1)*j*) et *p*), du présent article, de l'article 20 et des dispositions réglementaires prises pour l'application de l'alinéa 20(1)*a*):

> *a*) le contribuable ayant acquis un bien en vue d'en tirer un revenu et qui commence, à un moment postérieur, à l'utiliser à une autre fin est réputé en avoir disposé à ce moment postérieur pour un produit de disposition égal à sa juste valeur marchande à ce même moment et l'avoir acquis de nouveau immédiatement après à un coût égal à cette juste valeur marchande;
>
> […]

"depreciable property"

13. (21) "depreciable property" of a taxpayer as of any time in a taxation year means property acquired by the taxpayer in respect of which the taxpayer has been allowed, or would, if the taxpayer owned the property at the end of the year and this Act were read without reference to subsection 13(26), be entitled to, a deduction

« bien amortissable »

13. (21) « bien amortissable » À un moment donné d'une année d'imposition, bien qu'un contribuable acquiert et pour lequel il obtient une déduction, en vertu de l'alinéa 20(1)*a*), dans le calcul de son revenu pour cette année ou pour une année d'imposition antérieure ou pour lequel il aurait droit à une telle déduction

under paragraph 20(1)(*a*) in computing income for that year or a preceding taxation year;

compte non tenu du paragraphe (26) et s'il était propriétaire du bien à la fin de l'année.

Deductions permitted in computing income from business or property

20. (1) Notwithstanding paragraphs 18(1)(*a*), 18(1)(*b*) and 18(1)(*h*), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto

Marginal note: Capital cost of property

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

…

Déductions admises dans le calcul du revenu tiré d'une entreprise ou d'un bien

20. (1) Malgré les alinéas 18(1)*a*), *b*) et *h*), sont déductibles dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition celles des sommes suivantes qui se rapportent entièrement à cette source de revenus ou la partie des sommes suivantes qu'il est raisonnable de considérer comme s'y rapportant :

Note marginale :Coût en capital des biens

a) la partie du coût en capital des biens supporté par le contribuable ou le montant au titre de ce coût ainsi supporté que le règlement autorise;

[…]

Property with more than one use

45. (1) For the purposes of this subdivision the following rules apply:

(*a*) where a taxpayer,

(i) having acquired property for some other purpose, has commenced at a later time to use it for the purpose of

Bien affecté à plus d'un usage

45. (1) Les règles suivantes s'appliquent dans le cadre de la présente sous-section :

a) un contribuable :

(i) soit qui a acquis un bien à une autre fin et qui commence, à un moment

gaining or producing income, or

(ii) having acquired property for the purpose of gaining or producing income, has commenced at a later time to use it for some other purpose,

the taxpayer shall be deemed to have

(iii) disposed of it at that later time for proceeds equal to its fair market value at that later time, and

(iv) immediately thereafter reacquired it at a cost equal to that fair market value;

…

postérieur, à l'utiliser en vue de gagner un revenu,

(ii) soit qui a acquis un bien en vue de gagner un revenu et qui commence, à un moment postérieur, à l'utiliser à une autre fin,

est réputé :

(iii) avoir disposé de ce bien à ce moment postérieur pour un produit égal à sa juste valeur marchande à ce moment,

(iv) avoir, aussitôt après, acquis ce bien de nouveau à un coût égal à cette juste valeur marchande;

[…]

Definitions

54. In this subdivision,

"personal-use property"

"personal-use property" of a taxpayer includes

(*a*) property owned by the taxpayer that is used primarily for the personal use or enjoyment of the taxpayer or for the personal use or enjoyment of one or more individuals each of whom is

Définitions

54. Les définitions qui suivent s'appliquent à la présente sous-section.

« biens à usage personnel »

« biens à usage personnel » Sont compris parmi les biens à usage personnel :

a) les biens qui appartiennent au contribuable et qui sont affectés principalement à l'usage ou à l'agrément personnels du contribuable ou à l'usage ou à

(i) the taxpayer,

(ii) a person related to the taxpayer, or

(iii) where the taxpayer is a trust, a beneficiary under the trust or any person related to the beneficiary,

(*b*) any debt owing to the taxpayer in respect of the disposition of property that was the taxpayer's personal-use property, and

(*c*) any property of the taxpayer that is an option to acquire property that would, if the taxpayer acquired it, be personal-use property of the taxpayer,

and "personal-use property" of a partnership includes any partnership property that is used primarily for the personal use or enjoyment of any member of the partnership or for the personal use or enjoyment of one or more individuals each of whom is a member of the partnership or a person related to such a member;

l'agrément personnels d'une ou plusieurs personnes qui sont :

(i) le contribuable,

(ii) une personne liée au contribuable,

(iii) lorsque le contribuable est une fiducie, un bénéficiaire de cette fiducie ou toute personne liée au bénéficiaire;

b) toute créance du contribuable relative à la disposition de biens qui étaient réservés à son usage personnel;

c) tout bien du contribuable qui consiste en une option relative à l'acquisition de biens qui seraient, si le contribuable les acquérait, des biens réservés à son usage personnel.

Dans le cas d'une société de personnes, le terme vise également les biens de la société de personnes qui sont affectés principalement à l'usage ou à l'agrément personnels d'un ou plusieurs associés de la société de personnes ou d'une personne liée à cet associé.

"capital property"

"capital property" of a taxpayer means

« immobilisations »

« immobilisations » S'agissant des immobilisations d'un contribuable :

(*a*) any depreciable property of the taxpayer, and

(*b*) any property (other than depreciable property), any gain or loss from the disposition of which would, if the property were disposed of, be a capital gain or a capital loss, as the case may be, of the taxpayer;

a) tous biens amortissables du contribuable;

b) tous biens (autres que des biens amortissables) dont la disposition se traduirait pour le contribuable par un gain ou une perte en capital.

248(1) "inventory"

"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;

248(1) « inventaire »

« 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.

Sens d'« année d'imposition »

249. (1) Pour l'application de la présente loi, l'année d'imposition est :

a) dans le cas d'une société ou d'une société de personnes résidant au Canada, l'exercice;

[…]

Definition of "taxation year"

249. (1) For the purpose of this Act, a "taxation year" is

(*a*) in the case of a corporation or Canadian resident partnership, a fiscal period, and

…

B) INCOME TAX REGULATIONS

1100. (1) For the purposes of paragraphs 8(1)(*j*) and (*p*) and 20(1)(*a*) of the Act, the following deductions are allowed in computing a taxpayer's income for each taxation year:

(*a*) subject to subsection (2), such amount as the taxpayer may claim in respect of property of each of the following classes in Schedule II not exceeding in respect of property

(i) of Class 1, 4 per cent,

…

of the undepreciated capital cost to the taxpayer as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

1100. (1) Pour l'application des alinéas 8(1)*j*) et *p*) et de l'alinéa 20(1)*a*) de la Loi, un contribuable peut déduire dans le calcul de son revenu pour chaque année d'imposition des montants correspondant :

a) sous réserve du paragraphe (2), au montant qu'il peut réclamer à l'égard de biens de chacune des catégories suivantes de l'annexe II, sans dépasser, à l'égard des biens

(i) de la catégorie 1, 4 pout cent,

[…]

de la fraction non amortie du coût en capital, pour lui, des biens de la catégorie, à la fin de l'année d'imposition (avant toute déduction en vertu du présent paragraphe pour l'année d'imposition);

1102. (1) The classes of property described in this Part and in Schedule II shall be deemed not to include property

…

(*b*) that is described in the taxpayer's inventory;

1102. (1) Les catégories de biens décrits dans la présente partie et dans l'annexe II sont censées ne pas comprendre les biens.

[…]

b) qui figurant à l'inventaire du contribuable;

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-299-11
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE JORRÉ OF THE TAX COURT OF CANADA DATED AUGUST, 12, 2011, DOCKET NO. 2008-1944(IT)G	
STYLE OF CAUSE:	C.A.E. Inc. v. Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 17, 2012
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	PELLETIER J.A. MAINVILLE J.A.
DATED:	April 17, 2013

APPEARANCES:

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Michel Lamarre	FOR THE RESPONDENT

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