Federal Court of Appeal

Cour d'appel fédérale

Date: 20130618

Docket: A-47-12

Citation: 2013 FCA 160

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

BETWEEN:

FLSMIDTH LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on May 30, 2013.

Judgment delivered at Ottawa, Ontario, June 18, 2013.

REASONS FOR JUDGMENT BY: NOËL J.A.

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

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Paris J. of the Tax Court of Canada (the Tax Court judge) dismissing the appeal by FLSmidth Ltd. (the appellant) from an assessment issued with respect to its 2002 taxation year.

[2] The dispute turns on the application of subsection 20(12) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) and whether pursuant to this provision GL&V/Dorr-Oliver Canada

Inc. (Dorr-Oliver), a predecessor corporation of the appellant, was entitled to deduct its share of U.S. income tax paid by a limited partnership of which it was a member.

[3] Subsection 20(12) provides:

20. (12) In computing a taxpayer's income for a taxation year from a business or property, there may be deducted such amount as the taxpayer claims not exceeding the non-business income tax paid by the taxpayer for the year to the government of a country other than Canada (within the meaning assigned by subsection 126(7) read without reference to paragraphs (*c*) and (*e*) of the definition "non-business-income tax" in that subsection) in respect of that income, other than any such tax, or part thereof, that can reasonably be regarded as having been paid by a corporation in respect of income from a share of the capital stock of a foreign affiliate of the corporation.	**20.** (12) Est déductible dans le calcul du revenu d'un contribuable pour une année d'imposition tiré d'une entreprise ou d'un bien le montant que le contribuable demande, ne dépassant pas l'impôt sur le revenu ne provenant pas d'une entreprise (au sens de la définition de « impôt sur le revenu ne provenant pas d'une entreprise » au paragraphe 126(7), compte non tenu des alinéas *c*) et *e*) de celle-ci) qu'il a payé pour l'année à un pays étranger au titre de ce revenu, à l'exception de tout ou partie d'un tel impôt qu'il est raisonnable de considérer comme payé par une société à l'égard du revenu tiré d'une action du capital-actions d'une société étrangère affiliée de la société.

It is common ground that the amount sought to be deducted does not exceed the non-business income tax paid to the U.S. government. The controversy surrounds the requirement that the U.S. tax sought to be deducted be "in respect of that income" (first condition) but not be reasonably regarded as having been paid "in respect of income from a share of the capital stock of a foreign affiliate" (second condition).

[4] The Tax Court judge found that the income being computed by Dorr-Oliver was income from property and that the U.S. tax sought to be deducted was a tax paid "in respect of that income" (reasons, paras. 45 and 46). Accordingly, the first condition had been met. However, he went on to

hold that the income tax sought to be deducted could also be regarded as having been paid "in respect of income from a share of the capital stock of a foreign affiliate", with the result that the second condition which is framed in the negative had not been met (reasons, para. 58).

[5] In support of its appeal, the appellant takes the position that the Tax Court judge correctly held that it met the first condition but erred in finding that it did not meet the second. For the reasons which follow, I am of the view that the appeal cannot succeed.

THE FACTS

[6] The matter proceeded before the Tax Court judge on the basis of a detailed statement of facts to which the parties agreed prior to trial. The following summary suffices for present purposes.

[7] Dorr-Oliver is a wholly owned subsidiary of Groupe Laperrière Verrault (GL&V). The issue arises in the context of the use by GL&V of a cross-border structure – referred to in the tax community as a "tower structure" – in order to fund the acquisition of U.S. businesses in a tax efficient manner (reasons, para. 7).

[8] This tax efficiency is achieved by the use of "hybrid entities" – *i.e.* entities which are treated differently under U.S. and Canadian tax laws. The limited partnership of which GL&V was a member (the GL&V limited partnership) was such an entity in that it was treated as a U.S. resident corporation for U.S. tax purposes, but as a flow through pursuant to the relevant provisions of the Act (sections 97 *et seq.* of the Act) (reasons, para. 10).

[9] Also included in the structure are a Nova Scotia unlimited liability company (NSULC), the shares of which were held by the GL&V limited partnership; and a U.S. limited liability company (LLC), the shares of which were held by NSULC. Both NSULC and LLC are disregarded entities under U.S. tax law – *i.e.* their existence is ignored for U.S. tax purposes – but are treated as existing entities under the Act (*ibidem*).

[10] The financing operation took place as follows (reasons, para. 11):

> - the [GL&V] limited partnership subscribed for shares of NSULC using, in part, borrowed funds;
>
> - NSULC used the funds from the subscriptions made by the [GL&V] limited partnership to subscribe for shares of LLC;
>
> - LLC used the proceeds from the subscriptions to make interest - bearing loans (the "LLC loans") to GL&V Holdings ("Holdings"), a U.S. subsidiary of GL&V, and
>
> - Holdings used the proceeds of the LLC loans to provide capital and loans to indirectly wholly-owned subsidiaries of GL&V to purchase U.S. companies.

[11] Because NSULC and LLC were disregarded entities for U.S. tax purposes and because the GL&V limited partnership is treated as a U.S. corporation, the result under U.S. tax law was as follows (reasons, para. 15):

> - the [GL&V] limited partnership made the LLC loans to Holdings directly,
>
> - the interest earned on those loans was earned directly by the [GL&V] limited partnership, and the LLC dividends and the NSULC dividends were disregarded, and
>
> - the interest paid by the [GL&V] limited partnership on the money used to acquire the NSULC shares and ultimately fund the LLC loans was incurred to earn the interest income on the LLC loans.

the GL&V limited partnership deducted the interest on the money it borrowed to purchase the NSULC shares and paid tax on the interest paid to it by Holdings.

[12] For Canadian tax purposes, the results were as follows (reasons, para. 16):

> - LLC was treated as a foreign affiliate of NSULC, and the interest income earned by LLC from Holdings was recharacterized as active business income and was included in LLC's exempt surplus (by paragraph 95(2)(*a*) of the Act and section 5907 of the *Income Tax Regulations*, C.R.C. c. 945 (the Regulations)).
>
> - The LLC dividends paid to NSULC were paid out of LLC's exempt surplus. Since the dividends were paid out of exempt surplus, NSULC was able to deduct the amount of those dividends in computing its taxable income pursuant to paragraph 113(1)(*a*) of the Act and did not pay tax on them.
>
> - The [GL&V] limited partnership included the NSULC dividends in its income and deducted the interest paid on the money it borrowed to subscribe for the NSULC shares. It also deducted the U.S. tax it paid during the year, which is the deduction that is disputed in this case.
>
> - Dorr-Oliver included its share of the [GL&V] limited partnership's income in computing its income. The amount included in income by Dorr-Oliver was net of its proportionate share of disputed deduction taken by the [GL&V] limited partnership under subsection 20(12).
>
> - In computing its taxable income, Dorr-Oliver deducted its share of the NSULC dividends received by the [GL&V] limited partnership under subsection 112(1). Therefore, Dorr-Oliver did not pay any tax on its proportionate share of the NSULC dividends.
>
> - LLC was a foreign affiliate of Dorr-Oliver [by reason of subsection 93.1(1) of the Act which deems Dorr-Oliver to own a proportionate share of the NSULC shares owned by the [GL&V] limited partnership].

[13] The Canadian tax exempt treatment of the dividend in the hands of Dorr-Oliver is the result of the tax regime applicable to foreign affiliates. Specifically, paragraph 95(2)(*a*) of the Act applied to recharacterize the interest income earned by LLC into active business income which was then

included in LLC's earnings and exempt surplus pursuant to section 5907 of the Regulations; the LLC dividends were then paid to NSULC out of its exempt surplus which NSULC then deducted pursuant to paragraph 113(1)(*a*) of the Act; thereafter Dorr-Oliver deducted its proportionate share of the dividend received by the GL&V limited partnership pursuant to subsection 112(1) of the Act (Agreed Statement of Fact, paras. 25 to 27 and 37).

[14] This treatment effectively recognizes that the income generated in the U.S. by the foreign affiliate (*i.e.* LLC) would have been taxed by that country according to its own law at rates which reasonably compare to those applicable in Canada.

[15] In its tax return for the 2002 taxation year, Dorr-Oliver claimed pursuant to subsection 20(12) its proportionate share of the U.S. tax paid by the GL&V limited partnership. The deduction was denied and the appeal to the Tax Court ensued.

DECISION OF THE TAX COURT JUDGE

[16] The Tax Court judge identified the issue before him by reference to two questions, the first being aimed at the first condition and the second being aimed at the second condition (reasons, para. 5):

> - Was the U.S. tax paid by the GL&V limited partnership in respect of a property source of income under the Act? and if so;
>
> - Can Dorr-Oliver's share of the U.S. tax paid by the GL&V limited partnership be reasonably regarded as having been paid in respect of income from a share of the capital stock of a foreign affiliate, *i.e.* LLC?

[17] Addressing the first question, the Tax Court judge found that subsection 20(12) requires that the foreign tax be paid in respect of income from a particular business or property and that the tax is only deductible in respect of that source (reasons, paras. 30 to 35). In this case, the requirement that the tax be paid "in respect of that income" must be read as a requirement that the U.S. tax be paid "in respect of" the dividend income from NSULC since this was the GL&V limited partnership's only source of income (reasons, para. 36).

[18] In so holding, the Tax Court judge rejected the respondent's contention that the words "tax paid … in respect of that income" be read as "tax paid … on that income", as being too narrow (reasons, para. 38). As asserted by the appellant, it is sufficient that the payment of the tax "be connected with or related to that income" (reasons, paras. 39 to 45). In this case, the dividend income received by the GL&V limited partnership from NSULC was so connected or related because the indirect source of the dividend income was the interest income received by LLC from Holdings and the payment of the tax reduced the amount that could be paid by NSULC to the GL&V limited partnership as dividends (reasons, para. 47).

[19] The Tax Court judge found a further and distinct connection in that "if the appellant had not owned the NSULC shares, it would not have had to pay U.S. tax" (reasons, para. 46).

[20] He therefore found that the first condition had been met.

[21] Turning to the second condition the Tax Court judge, relying on the same logic, went on to find that the U.S. tax paid was also "related to or connected with" the dividend income received by

NSULC from LLC, a Dorr-Oliver foreign affiliate, since both were part of the flow of funds that originated with Holdings and ended up with the GL&V limited partnership, with the result that the second condition had not been met (reasons, para. 58).

[22] He then addressed the appellant's contention that the words "can reasonably be regarded" which appear before the phrase "in respect of" in the second condition could alter this result. After reviewing the relevant case law dealing with the meaning that is to be given to these words, he went on to hold that they could not (reasons, paras. 60 to 65).

[23] The Tax Court judge therefore confirmed that the claimed deduction had been properly denied because the second condition had not been met.

[24] According to the Tax Court judge, this result accords with the purpose of subsection 20(12), which is to provide relief from foreign taxes paid in respect of income that is included in a taxpayer's income in Canada. In the present case, subsection 113(1) of the Act provided relief from double taxation on dividends received from a foreign affiliate. It is reasonable to conclude that no further deduction under subsection 20(12) was intended (reasons, paras. 66 to 69).

[25] Finally, the Tax Court judge held that this result is not inconsistent with paragraphs XXIV (2) and (3) of the *Canada-United States Income Tax Convention Act*, 1984, S.C. 1984 c. 20, as it does not subject the income earned by the GL&V limited partnership to double taxation (reasons, paras. 77 to 82).

<u>POSITION OF THE PARTIES ON APPEAL</u>

[26] Only the second condition is put in issue by the appellant in this appeal (memorandum of the appellant, paras. 11 and 12). The appellant does not take issue with the broad construction of the phrase "in respect of" which the Tax Court judge adopted nor does it propose that this phrase, which appears twice in the same provision, should be construed differently depending on the condition being applied. Rather, it submits that the words "can reasonably be regarded" which qualify the second condition but not the first should have led the Tax Court judge to a different conclusion.

[27] According to the appellant the Tax Court judge misconstrued these words when he held that the second condition had not been met. When using these words, the legislator does not contemplate that actual transactions be ignored (memorandum of the appellant, paras. 22 to 29). Relying on the decision of the Supreme Court in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, the appellant submits that it was not open to the Tax Court judge to "recharacterize" the transaction in the manner that he did (memorandum of the appellant, paras. 51 to 55).

[28] The appellant argues in the alternative that the Tax Court judge failed to consider the word "corporation" in subsection 20(12) which also forms part of the second condition. The second condition is met when the foreign tax cannot "reasonably be regarded as having been paid by <u>a corporation</u> in respect of income from a share of the capital stock of a foreign affiliate of the <u>corporation</u>" (emphasis by the appellant). Since the GL&V limited partnership is the entity that paid the U.S. tax and since it is not a corporation, it was not open to the Tax Court judge to hold that the second condition had not been met (memorandum of the appellant, paras. 30 to 35).

[29] The appellant adds that the tracing approach used by the Tax Court judge to hold that the U.S. tax is related to or connected with the dividend income from LLC gives rise to arbitrariness and anomalous results (memorandum of the appellant, paras. 63 to 72).

[30] The Tax Court judge further erred when he held that the deduction with respect to dividends on a share of a foreign affiliate provided for in subsection 113(1) was intended to deal fully with relief from foreign taxes and that no further deduction was contemplated by subsection 20(12) (memorandum of the appellant, paras. 36 to 50).

[31] The respondent for its part took the position before the Tax Court judge that the phrase "in respect of" as it is used in subsection 20(12) should be given a narrow meaning. It now accepts that the phrase can be given a broad meaning and supports the conclusion reached by the Tax Court judge on this point (memorandum of the respondent, paras. 40 to 49).

[32] In the alternative, it maintains that the U.S. tax for which the appellant claims a deduction was not paid "in respect of" the source of income from which the deduction is claimed. It adds that whether the phrase "in respect of" is given the narrow meaning which it advocates in the alternative or the broad meaning proposed by the appellant, the result is the same. Specifically, if a narrow meaning is given, the appellant fails on the first condition and if a broad meaning is given, the appellant fails on the second condition. Either way the appeal is doomed to fail (memorandum of the respondent, paras. 57 to 65).

ANALYSIS AND DECISION

[33] The appellant does not take issue with the construction given by the Tax Court judge to the phrase "in respect of" as it twice appears in subsection 20(12). The focus of the appeal is on the words "can reasonably be regarded" which qualify the second condition. According to the appellant, the Tax Court judge failed to give effect to these words in holding that the second condition had not been met (memorandum of the appellant, paras. 11 and 22 to 28). According to the appellant (memorandum of the appellant, para. 29):

> Had the [Tax Court judge] carefully reviewed the meaning and function of the expression "can reasonably be regarded" …, <u>he would not have expanded their scope to such an extent that now allow the consideration of other taxpayer's income irrespective of legal substance. There is simply no reason to believe that the expression "can reasonably be regarded" acquires a distinct meaning in subsection 20(12) or that, absent specific wording, Parliament authorized a tracing approach.</u> …
>
> [My emphasis]

[34] The difficulty with this argument is that the Tax Court judge's conclusion on the second condition is not based on an expanded view of the words "can reasonably be regarded" (reasons, para. 65):

> … I conclude that … the U.S. tax … were paid <u>in respect of</u> income from the shares of LLC and that the tax could <u>therefore</u> reasonably be regarded as having been so paid.
>
> [My emphasis]

[35] It can be seen that this conclusion rests entirely on the broad meaning which the Tax Court judge gave to the phrase "in respect of". This should be obvious given the fact that he construed the

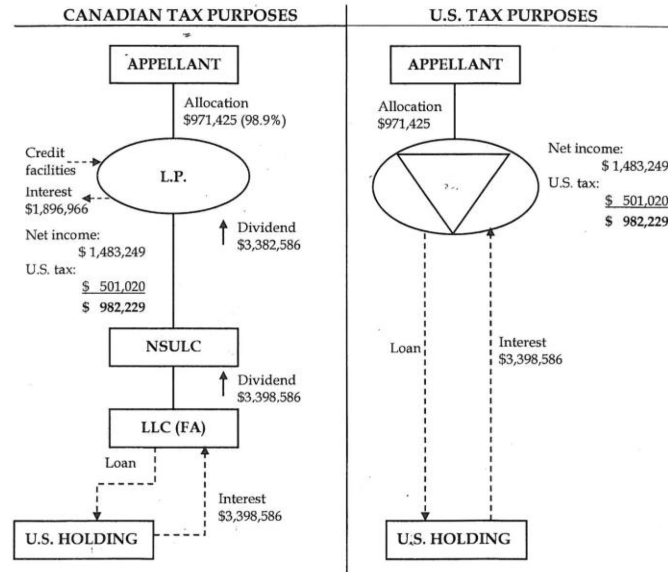
phrase the exact same way in dealing with the first condition even though it does not embody the words “can reasonably be regarded”. As with the first condition, the Tax Court judge was satisfied that the tax sought to be deducted was “related to or connected with” the dividend income received by NSULC from LLC since both were part of the flow of funds that originated with Holdings and ended up with the GL&V limited partnership (reasons, paras. 46 and 58). Hence the U.S. tax was connected or related to both the NSULC shares and the LLC shares.

[36] As the respondent has pointed out in her memorandum, the phrase “in respect of” can be interpreted in a broad or restrictive manner, but either way the appellant would fail to meet one of the two conditions set out in subsection 20(12) given that the first condition is framed in the affirmative and the second in the negative, *i.e.* as an exclusion.

[37] Seemingly mindful of this predicament, counsel for the appellant took a different tack during the hearing of the appeal. He focused on the assertion by the Tax Court judge that the U.S. tax affected the flow of funds from LLC to NSULC (reasons, para. 58) and argued, by reference to the following chart, that he erred when he found that the U.S. tax reduced the amount that could be paid by LLC to NSULC (*ibidem*):

FIGURE 1

FLSMIDTH



[38] I agree that the finding that the U.S. tax reduced the amount that could be paid by LLC to NSULC was made in error since this dividend was paid before the U.S. tax was paid (Agreed Statement of Fact, para. 24(b)). However, the Tax court judge made the same observation in his assessment of the first condition when he said that the U.S. tax "reduced the amount available to NSULC that could be paid out to the limited partnership as dividends" (reasons, para. 46). This statement would also seem to be an error since the dividend from NSULC to the GL&V limited partnership was also paid before the payment of the U.S. tax (Agreed Statement of Fact, para. 24(c)).

[39] The result of these errors, if material, would be that the appellant meets the second condition, but not the first.

[40] It is apparent that in raising this error, the appellant asks this Court to accept as correct the argument which it advanced before the Tax Court judge on the first condition as this is the only basis on which the treatment of the LLC and the NSULC dividend can be distinguished and the two conditions can be met.

[41] The argument made with respect to the first condition before the Tax Court judge is that while the "economic profit" from the NSULC dividend was reduced by the U.S. tax, the "economic profit" from the LLC dividend was not (appendix A to the appellant's memorandum, paras. 1 to 7). The essence of this argument is that (*idem*, para. 2):

> ... The concept of income, ultimately a legal determination refers to an economic reality based on a net accretion (or gain) from a source. If taxes reduce the economic profit from that source, it is reasonable to conclude that those taxes are paid "in respect of" income from that source.
>
> [My emphasis]

[42] The notion that a dividend can be viewed as a "profit" from a share is foreign to the Act. A dividend is included in income, not on the basis of a computation of profit from property in accordance with the relevant accounting principles and statutory rules (subsection 9(1)), but by reason of the specific inclusion provided by subdivisions b and i – *Income or Loss from a Business or Property* and *Shareholders of Non Resident Corporations* – specifically paragraphs 12(1)(*j*), (*k*) and subsection 90(1). In this case, it is the whole of the dividend that was included in income in accordance with these provisions before being deducted pursuant to subsection 112(1), and the use made of that income after it has been so included does not have the effect of reducing it.

[43] In any event, insofar as the appellant's argument is based on the premise that the NSULC dividend was used to pay the U.S. tax, the record falls short of establishing that this is in fact what took place. While the Agreed Statement of Facts states that the NSULC dividend was "used … to make the interest payments of U.S. $1,189,766 …" (paragraph 24(d)); it is silent as to the origin of the funds used to pay the U.S tax (para. 31). The GL&V limited partnership had funds available through credit facilities (paragraph 21(*a*)) and based on the return of income filed for the year in issue, there was income from at least one other source (Income Tax Return, appeal book, pp. 69 to 76, part 1, line 1).

[44] Finally, as counsel for the appellant himself recognized in the context of the present appeal (memorandum of the appellant, para. 74):

> …, the U.S. Taxes would have been paid by the Partnership even without any payment of dividends by LLC. The mere payment of interest by U.S. Holdings to LLC triggers U.S. Taxes in the Partnership irrespective of the payment of dividends by LLC to NSULC thereafter. This indicates how disconnected the U.S. Taxes are from those dividends. … How can one reasonably consider that the U.S. Taxes were paid in respect of income from a share of LLC when such tax would have been paid by the Partnership even if LLC had not declared any dividends? There is no relationship between the U.S. Taxes and the income from shares of LLC unless one arbitrarily selects the LLC Dividends in the chain of payments made in the corporate group.
>
> [Emphasis by the appellant]

Even though this statement was made with respect to the LLC dividend, it applies with equal force to the NSULC dividend.

[45] All this to say that whether the Tax Court judge correctly construed the words "in respect of" or whether a narrower meaning was warranted, the appeal cannot succeed.

[46] In the alternative, the appellant made the argument that the Tax Court judge erred in finding that the second condition had not been met because the U.S. tax was paid by the GL&V limited partnership and not by a corporation as the second condition contemplates. The appellant points out that, although the argument was made before the Tax Court judge, he did not address it.

[47] This argument only arises if the Tax Court judge correctly held that the first condition was met. Assuming for present purposes that it was, I do not believe that this argument can succeed.

[48] This issue was considered by Webb J. (as he then was) in *4145356 Canada Limited v. The Queen*, 2011 TCC 220 (*4145356 Canada*), in the context of subsection 126(2) of the Act. As here, the payment of U.S. taxes had in fact been made by a Canadian partnership which was considered as a separate person under the U.S. law. Webb J., relying on the relevant provisions of the Act relating to partnership, held that the U.S. taxes could nevertheless be said to have been paid by the partners (*4145356 Canada*, paras. 35 and 70).

[49] I believe that this is the correct approach. Despite the fact that the amount paid is tax levied under U.S. law, the issue must be addressed by reference to the Act. Giving effect to the relevant provisions of the Act, the issue is whether the U.S. tax can be said to have been paid by the partner, in this case Dorr-Oliver. A partnership pays no tax under the Act. Although income is computed at the partnership level as though it was a person, the resulting income is allocated to the partners and the tax is paid by the partners on their proportionate share of the income. It follows in my view that the U.S. tax can be said to have been paid by a corporation and can therefore "reasonably be regarded" as having been paid by a corporation as contemplated by subsection 20(12).

[50] After concluding that the second condition had not been met and that the deduction claimed under subsection 20(12) could therefore not be allowed (reasons, para. 65), the Tax Court judge went on to express the view that Parliament intended to exclude the application of subsection 20(12) in all cases where the foreign affiliate regime is in play and the subsection 113(1) deduction is available (reasons, para. 68).

[51] As the appellant submits, it is not clear that the foreign affiliate regime always provides for a comprehensive solution to foreign tax paid on dividends from a foreign affiliate. Subsection 20(12) is a provision of general application which on its face applies to all taxpayers and there are no words in the foreign affiliate provisions which expressly exclude the application of 20(12). It follows that if there is such exclusion, it is only by implication.

[52] As was said by the Supreme Court in *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 S.C.R. 217 in disposing of an appeal from a judgment rendered on the basis that provisions of the Act had been similarly excluded (paras. 15 and 16):

> 15 …, arguments based on implied meaning must be viewed with caution. As Professor Sullivan notes:
>
> > While reliance on implied exclusion for this purpose [determining if a provision is exhaustive] can be helpful, it can also be misleading. What the courts are looking for is evidence that a particular provision is meant to be an exhaustive statement of the law concerning a matter. To show that the provision expressly or specifically addresses the matter is not enough. [Footnote deleted; p. 266.]
>
> 16 It is well known that the modern approach to interpretation applies to taxation statutes no less than it does to other statutes, that is, "the words of an Act are to be

read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715, 2006 SCC 20, at para. 21; E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). However, because of the degree of precision and detailed characteristics of many tax provisions, an emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11; *Placer Dome*, at para. 23. As McLachlin J. (as she then was) stated for the Court in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, at para. 43:

> The [Act] is a complex statute through which Parliament seeks to balance a myriad of principles. This Court has consistently held that courts must therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention: *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, at para. 41, per Iacobucci J.; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 112, per Iacobucci J.; *Antosko, supra*, at p. 328, per Iacobucci J. Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act.

[53] While the Tax Court judge could take comfort from the relief provided by the foreign affiliate regime on the facts of this case, I would not go so far as to say that subsection 113(1) excludes the subsection 20(12) deduction in all cases in which it applies.

[54] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I agree.
Johanne Trudel J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-47-12

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE B. PARIS OF THE TAX COURT OF CANADA DATED JANUARY 3, 2012, DOCKET NUMBER 2008-2967(IT)G.

STYLE OF CAUSE:	FLSMIDTH LTD. and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 30, 2013
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Trudel J.A. Mainville J.A.
DATED:	June 18, 2013

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