Federal Court of Appeal | Cour d'appel fédérale

Date: 20200529

Docket: A-334-18

Citation: 2020 FCA 97

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

GUY LALIBERTÉ

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on December 5, 2019.

Judgment delivered at Ottawa, Ontario, on May 29, 2020.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The circumstances giving rise to this appeal are unusual and exotic, but the issues that arise in the appeal are not.

[2] The appellant, the founder and, at the relevant times, the controlling shareholder of a group of corporations that carried on business under the trademark "Cirque du Soleil", took a trip

to the International Space Station (ISS) in 2009. The trip was paid for by one of the corporations in the Cirque du Soleil group. The Minister of National Revenue assessed the appellant with a shareholder benefit equal to the cost of the space trip. The appellant appealed the assessment, arguing that the trip was a stunt-type promotional activity for the Cirque du Soleil group and for a charity he founded and thus did not give rise to a shareholder benefit. In the decision under appeal, reported at 2018 TCC 186, the Tax Court of Canada (*per* Boyle, J.) largely disagreed. The Tax Court allowed the appeal in part and ordered that the appellant be reassessed on the basis that he had received a shareholder benefit equal to 90% of the cost of his space trip.

[3] For the reasons that follow, I would dismiss the present appeal.

I. Background

[4] At this point, it is only necessary to briefly summarize the relevant factual background, given the extensive factual findings made by the Tax Court, which are discussed as part of the review of that Court's Reasons.

[5] By way of overview, the appellant founded Cirque du Soleil in 1984 and by the mid-2000s was widely known as its creator and visionary, with company operations spanning the globe. In addition to his work with the Cirque, the appellant had other passions, including a life-long dream to travel the world and to space. In 2005-2006, he entered into preliminary negotiations with Space Adventures, Ltd. to take a trip around the moon, but for various reasons ultimately declined the opportunity.

[6] In 2009, he and Space Adventures, Ltd. revived the idea of a space trip, this time to the ISS. In April 2009, the appellant, on behalf of himself and his family holding company, 2739-2224 Québec Inc. (the Family Holdco), signed an Orbital Space Flight Purchase Agreement with Space Adventures, Ltd. for a trip to the ISS.

[7] The endeavor ultimately became a reality, and the appellant spent twelve days in space and on the ISS in September and October 2009. While there, the appellant orchestrated a worldwide broadcast event called the "Poetic Social Mission – Moving Stars and Earth for Water". The broadcast was only a few hours long, but involved preparations undertaken by the appellant aboard the ISS during the preceding days. The Poetic Social Mission was intended to primarily benefit the One Drop Foundation, a clean water charity founded by the appellant and associated with him and Cirque du Soleil. The appellant took many pictures while at the ISS, which served both as souvenirs and for a book benefitting One Drop, and filmed a documentary about his space journey, which partially benefitted One Drop. He viewed the trip as promoting One Drop and the Cirque du Soleil, but also as the realization of a childhood fantasy.

[8] Unsurprisingly, the once-in-a-lifetime trip came with a once-in-a-lifetime price tag. The costs associated with the space flight totalled $41,816,954, of which $39,701,000 was paid to Space Adventures under the Orbital Space Flight Purchase Agreement and a further $2,115,954 was paid to Space Adventures for miscellaneous costs. The Family Holdco paid these costs as they were incurred. These are the costs that were at issue before the Tax Court and that are at issue in this appeal. The additional direct production and broadcast expenses paid for by one or more of the Cirque du Soleil companies and One Drop for the production of the Poetic Social

Mission, the book and the documentary are not at issue in this appeal and were not in issue before the Tax Court.

[9] Under a resolution dated December 27, 2009, the Family Holdco invoiced all but $4 million dollars of the cost of the appellant's space trip to one of the top operating companies in the Cirque du Soleil group, Créations Méandres Inc. (Créations Méandres). At the time, the Family Holdco was controlled by the appellant and a family trust; it, in turn, owned 100% of a company named Gestion Manuia Inc., which owned 80% of Cirque du Soleil Horizons Inc. The other 20% of the latter company was owned by an outside investor, DW CP Holdings (Dubai World). Cirque du Soleil Horizons Inc. owned 100% of Créations Méandres. Therefore, both the appellant's family companies and Dubai World were impacted by the costs incurred by Créations Méandres.

[10] Créations Méandres issued a promissory note to the Family Holdco for the invoiced amount for the trip, totalling $37,816,954. The promissory note was subsequently contributed back down the corporate chain and assigned to Créations Méandres, as contributed surplus. Once the note was contributed back to Créations Méandres, it was extinguished. Proceeding in this fashion shielded Créations Méandres and Dubai World from bearing any of the economic costs associated with the appellant's space trip.

[11] In terms of the tax actions taken in relation to the space trip, Créations Méandres did not claim any deductions for income tax purposes even though it had taken deductions for accounting purposes. The appellant included $4 million as a shareholder benefit in his 2009 tax

return. Despite including this amount in his tax return, the appellant contends that he did not receive a shareholder benefit. Rather, he maintains that the $4 million sum was chosen as the estimated value of avoiding a dispute with the tax authorities and the bad publicity that might have occurred if nothing had been reported as a taxable benefit.

[12] The Minister of National Revenue sent a Notice of Reassessment to the appellant on April 10, 2014, adding $37,816,954 to his 2009 income as a shareholder benefit. The appellant objected to the reassessment and a Notice of Confirmation was issued on January 13, 2015. The appellant filed a notice of appeal from the reassessment on April 9, 2015.

II. The Decision of the Tax Court of Canada

[13] The Tax Court issued its Judgment and Reasons on September 12, 2018 and found that the appellant had directly or indirectly received a shareholder benefit from the space trip. The Tax Court determined the value of the benefit to be 90% of the cost of the trip, or approximately $37.6 million, and referred the matter back to the Minister for reassessment on that basis.

[14] In reaching this decision, the Tax Court commenced its analysis by setting out an overview section, in which it summarized many of the facts, detailed above, and made some additional factual findings. The most important of these included the following.

[15] First, the Tax Court noted that Cirque du Soleil had not done any other major stunt-type marketing events and that its promotional activities were normally focussed on more traditional marketing for individual shows.

[16] Second, the Tax Court noted that the Chief Financial Officer of the Cirque testified, and a memo from Deloitte confirmed, that Créations Méandres' promissory note was contributed back to that company as capital so as to ensure that the end result for Dubai World was neutral and it did not have to bear 20% of the reimbursement for the appellant's trip. From the CFO's testimony, the Tax Court inferred that the CFO knew that Dubai World would not have otherwise approved the charge back to Créations Méandres.

[17] Third, although the appellant argued that the trip was intended in part to promote the 2009 launch of Cirque du Soleil in Russia, none of the costs of the trip were charged to the budget for the Russia show. In addition, the Tax Court noted that the Russian Cirque subsidiary had two arms length shareholders, owning 25% of the subsidiary, and that "[t]he capital contribution series of transactions involving the charge back of the cost of the trip to [Créations Méandres], combined with no allocation of the expense to the Russian subsidiary and reimbursement of any trip-related expenses it incurred, resulted in [the independent shareholders] not bearing any of the costs involved" (at para. 9).

[18] The Tax Court then set out the relevant provisions in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*ITA*) namely subsections 15(1) and 246(1). The Court next proceeded to its analysis, which it organized around several different topics.

[19] The Tax Court first examined the purpose of the space trip and concluded that "[t]he motivating, essential and overwhelmingly primary purpose of the travel was personal" (at para. 11). The Tax Court offered 27 reasons for this conclusion at paragraph 11 of its Reasons:

a) The appellant intended to take the trip personally and it was never a possibility that any other Cirque du Soleil official, entertainer or promoter would travel in his stead;

b) The appellant testified as to his interest in space travel, grounded in several childhood experiences;

c) There was no evidence that the Cirque would have considered sending anyone else to space or that it would have undertaken any comparable stunt to raise its brand awareness or to generate helpful media for its entry into the Russian market in the absence of the appellant having first decided to travel to space;

d) The cancellation insurance and the accidental death and dismemberment (AD&D) insurance policies for the trip were taken out and paid for by the Family Holdco. The Family Holdco was also the named beneficiary on the AD&D policy;

e) When the CFO signed the cheques to pay Space Adventures, it was his understanding that the appellant was going to take the trip even if there were no Poetic Social Mission;

f) The resolution of the Family Holdco authorizing the trip did not set out a purpose for the trip or tie the payment in any way to the business of Cirque du Soleil;

g) A reasonable inference from all of the evidence was that Cirque du Soleil would not have approved the trip expense when it was incurred and only did so two months after the trip had been taken "when it was presented with the somewhat unusual ability to agree to pay for the trip provided it was assured to receive its promissory note issued in payment back directly as a capital contribution" (at para. 11(g));

h) The Space Flight Agreement was between Space Adventures, the appellant and the Family Holdco. Even after revisions were made to the agreement to allow the appellant to promote Cirque du Soleil and One Drop, no Cirque company was made party to the Agreement;

i) The individual who negotiated the Space Flight Agreement on behalf of the appellant only represented the interests of the appellant and the Family Holdco;

j) The CFO did not suggest that any thought was given as to the value to Cirque du Soleil of the space trip before it was completed;

k) It was not clear that the live broadcast of the Poetic Social Mission could occur until shortly before the launch, when NASA agreed to allow the use of its equipment in the ISS and of an American satellite. The Tax Court found that this was consistent with the CFO's understanding that the appellant would have travelled in any event;

l) NASA would not allow any commercial promotion as part of the Poetic Social Mission broadcast or the related documentary. The Cirque logos were absent from both and Cirque du Soleil was only mentioned four times during the broadcast;

m) Materials sent to performers, celebrities and personalities to arrange the Poetic Social Mission did not describe the event as a promotion of Cirque du Soleil;

n) Both the Poetic Social Mission and the book of photographs were used to raise funds for One Drop. It was unclear how the book of photographs promoted Cirque du Soleil, and the book appeared to the Tax Court to rather be in the nature of personal as opposed to corporate social responsibility;

o) Cirque du Soleil did not do any analysis or investigation of the value to it of the anticipated media coverage, which the Tax Court found to be consistent with its inference that the companies were told, not asked, by the appellant that he was going to take the space trip;

p) Cirque's Russian Director testified she was informed of the Poetic Social Mission only after it had been planned and that it had not been part of that company's 2009 marketing plans;

q) Cirque du Soleil did not monitor or analyze whether hits on its websites increased during or shortly following the appellant's space trip;

r) Cirque du Soleil, Dubai World and the 25% shareholders in Cirque Russia did not bear any of the economic costs of the space trip;

s) Dubai World would not have agreed to bear its 20% share and the CFO of Cirque anticipated that;

t) Cirque Russia was reimbursed for the expenses it incurred with respect to the space trip;

u) While Créations Méandres recorded its reimbursement of the Family Holdco as an expense for accounting purposes, it was not charged to the marketing budget;

v) In the video, the appellant gave three reasons for his space trip, two personal and the other related to One Drop;

w) The appellant referred to himself as a "space tourist" fulfilling a personal dream in one of the media clips in the documentary;

x) The appellant said in the video that he knew he had the privilege of being able to pay for a trip for himself to the ISS, which the Tax Court found led to his giving evasive answers when questioned about the statement;

y) The appellant was "evasive and dodgy", when questioned about a 2005 memo from Deloitte regarding the earlier space flight opportunity and was "awkward in his evasiveness" when asked why he and the Family Holdco were contracting for a Cirque du Soleil business event (at para.11(y));

z) The appellant's description of himself as "'the person chosen by Cirque and One Drop to go there' was very far from a fair characterization of the evidence" as was his "later description that Cirque du Soleil had engaged and wanted to have this event happen 'where I happen to be the one who will be flying in order to promote Cirque'" (at para. 11(z)); and

aa) The appellant's testimony that he initially said no to the 2009 opportunity but later realized it might benefit Cirque du Soleil and One Drop seemed at odds with the appellant's later testimony that he had explored a possible trip around the moon in 2005 as a stunt-marketing event for Cirque du Soleil and One Drop. This inconsistency left the Tax Court concerned about the appellant's recollections of his purposes in both 2005 and 2009.

[20] After determining that the purpose of the space trip was overwhelmingly personal, the Tax Court moved to consider the circumstances surrounding the commitment made to take the trip. The Court found that the appellant made the decision to commit the Family Holdco to the

trip and that neither he nor the Family Holdco sought to obtain the approval of anyone else in the Cirque du Soleil group before doing so. The Tax Court premised this finding on the dates the decisions were made, the fact that the Orbital Space Flight Purchase Agreement defined the appellant as the Space Flight Participant, that only the appellant signed the Agreement on behalf of himself and the Family Holdco and on the testimony of the CFO and the Chief Executive Officer of Cirque du Soleil and of the appellant. From this testimony, the Court concluded that "Cirque du Soleil was not consulted about whether it wanted [the appellant] to take the trip, but only about how he and Cirque du Soleil could promote Cirque du Soleil and One Drop on his trip" (at para. 15).

[21] The Court then considered the promotional activities undertaken during the trip and concluded that genuine *bona fide* Cirque du Soleil business activities were undertaken by the appellant before and during the space trip and that Cirque du Soleil used the trip to promote itself and some of its activities, including its 25th anniversary, its opening in Russia and its support of One Drop. The Tax Court noted that "having decided to travel, [the appellant] genuinely intended that he would use his time on the trip to promote Cirque du Soleil, and himself as its most recognizable public representative, to enhance the value of his business while he was on his trip to space" (at para. 23).

[22] The Tax Court next noted that the additional direct production and broadcast expenses paid by one or more of the Cirque du Soleil companies and One Drop for the production of the Poetic Social Mission, the book and the documentary (i.e. the expenses that were not in issue)

had not been deducted for income tax purposes even though they appear to have been ones that could properly have been deducted.

[23] The Court concluded that a benefit was conferred on the appellant by the Family Holdco, "either providing the benefit directly when it signed the Space Flight Agreement and/or when it paid Space Adventures for the trip, and/or by allowing all or part of the benefit to be provided by […] Créations Méandres, when it reimbursed [the Family Holdco]" (at para. 26). The Tax Court further found that the benefit was conferred on the appellant because he was its controlling shareholder, noting that, in light of its finding that the trip's purpose was overwhelmingly personal and its reasons for such conclusion "there [was] little other possible characterization" (at para. 26).

[24] The Court then moved to consider how to apportion the cost of the trip between business and personal/shareholder benefit in light of its findings that, while primarily personal, the trip nonetheless had some business/promotional aspects. The Court noted that its task in carrying out the apportionment was a challenge, due to the paucity of evidence on the issue. It placed no weight on the evidence from a media monitoring report tendered by the appellant that valued the cost of buying the total media mentions in the form of advertising at $600 million. The Tax Court found that there were several defects in this evidence, notably, a lack of specificity in how the report was compiled, an overly-vague treatment as to how the dollar amount reflected the benefit to each of Cirque du Soleil, One Drop and the appellant and an absence of analysis explaining how media mentions translated directly to advertisement value or intangible value such as public perception.

[25] The Tax Court allocated 10% of the cost of the trip as business-related. It considered this to be reasonable as it was close to the direct incremental costs borne by Cirque du Soleil and One Drop in carrying out the Poetic Social Mission and related activities, and, in the absence of other relevant evidence, was selected as the basis for the apportionment. Accordingly, the Tax Court valued the shareholder benefit conferred on the appellant at approximately $37.6 million and the business portion at approximately $4.2 million.

[26] In concluding, the Tax Court drew an analogy with a trip taken by a shareholder in less exotic circumstances. The Tax Court stated as follows at paragraphs 56 and 57 of its Reasons:

> 56. While the facts of this case are novel in some respects, it raises the relatively common and legally straightforward issue of benefits conferred by a company on a shareholder. I have approached my decision in this case as I would have had it involved an owner-manager of a business who decided that he personally wanted to go on a cross-country trip, and then decided that, he would stop in to visit business clients and suppliers and potential clients and potential suppliers along the way. One would expect his incremental direct costs associated with his business promotion activities and sidetrips should be deductible, but that little, if any, of the trip itself would be. If he could have his company pay for his whole trip, even if it did not deduct the cost for tax purposes, it would allow him to pay for his trip in pre-tax dollars. The shareholder benefit provisions exist for just such reasons, and going offside can often result in double taxation once corrected.
>
> 57. Simply put, there is a difference between a business trip which involves or includes personal enjoyment aspects, and a personal trip with business aspects, even significant ones, tacked on. I have found that this space trip falls into the latter category, and the tax consequences to the business income are considered and determined accordingly.

III. The Issues

[27] The appellant submits that in deciding as it did, the Tax Court committed two errors of law: first, by misconstruing the test for the conferral of a benefit under subsections 15(1) and

246(1) of the *ITA* and, second, by imposing an incorrect burden of proof on the appellant to establish the quantum of benefit conferred.

[28] As concerns the first alleged error, the appellant contends that the Tax Court misconstrued the test for the conferral of a benefit in three ways: first, by substituting the unrelated test for deductible business expenses under paragraph 18(1)(*a*) of the *ITA*; second, by incorporating a criterion of "results of impoverishment" to the corporation instead of the criterion of "intent of impoverishment", which the appellant says is to be determined with reference to his intent, as the controlling shareholder of the Family Holdco, at the time the corporate expenditure was engaged; and, third, by concluding that the original personal motivations of the appellant irreversibly led to the conclusion that there had been corporate impoverishment, which the appellant says is not determinative of the inquiry under subsections 15(1) and 246(1) of the *ITA*.

[29] As concerns the second alleged error, the appellant contends that the Tax Court incorrectly placed the burden upon him to establish the quantum of benefit conferred. He more specifically submits that it is trite law that once a taxpayer rebuts the assumptions upon which the Minister's assessment was made, it falls on the Crown to establish facts sufficient to uphold the assessment. He says that he succeeded in demolishing the Minister's assumptions and, therefore, that it was incumbent on the Crown to prove the quantum of the benefit conferred. As the Crown called no evidence on the issue, the appellant contends that his appeal ought to have been allowed.

IV. Analysis

[30] In my view, none of the foregoing arguments has merit.

A. *The Alleged Errors in Interpreting Subsections 15(1) and 246(1) of the ITA*

[31] Turning first to the test to be applied under subsections 15(1) and 246(1) of the *ITA*, the subsections in force at the relevant time provided in material part as follows:

15 (1) Where at any time in a taxation year a benefit is conferred on a shareholder, or on a person in contemplation of the person becoming a shareholder, by a corporation otherwise than by […] the amount or value thereof shall, except to the extent that it is deemed by section 84 to be a dividend, be included in computing the income of the shareholder for the year.	15 (1) La valeur de l'avantage qu'une société confère, à un moment donné d'une année d'imposition, à un actionnaire ou à une personne en passe de le devenir est incluse dans le calcul du revenu de l'actionnaire pour l'année — sauf dans la mesure où cette valeur est réputée par l'article 84 constituer un dividende — si cet avantage est conféré autrement que […]
[…]	[…]
246 (1) Where at any time a person confers a benefit, either directly or indirectly, by any means whatever, on a taxpayer, the amount of the benefit shall, to the extent that it is not otherwise included in the taxpayer's income or taxable income earned in Canada under Part I and would be included in the taxpayer's income if the amount of the benefit were a payment made directly by the person to the taxpayer and if the taxpayer were resident in Canada, be	246 (1) La valeur de l'avantage qu'une personne confère à un moment donné, directement ou indirectement, de quelque manière que ce soit à un contribuable doit, dans la mesure où elle n'est pas par ailleurs incluse dans le calcul du revenu ou du revenu imposable gagné au Canada du contribuable en vertu de la partie I et dans la mesure où elle y serait incluse s'il s'agissait d'un paiement que cette personne avait fait directement au contribuable et si le contribuable résidait au Canada, être :
(*a*) included in computing the taxpayer's income or taxable income earned in Canada under Part I for the	*a*) soit incluse dans le calcul du revenu ou du revenu imposable gagné au Canada, selon le cas, du

taxation year that includes that time; […]	contribuable en vertu de la partie I pour l'année d'imposition qui comprend ce moment; […]

[32] In the present case, the Tax Court adopted the same analysis for both subsections 15(1) and 246(1) of the *ITA*, which the parties concur was the appropriate approach.

[33] The case law recognizes that the framework for analyzing whether a benefit has been conferred under subsection 15(1) of the *ITA* involves three steps: determining whether a benefit has been conferred on the shareholder *qua* shareholder; determining what precisely the benefit is; and determining the value of that benefit to the shareholder by asking what the shareholder would have had to pay for it had he or she not been a shareholder (see, for example, Vern Krishna, *The Fundamentals of Canadian Income Tax*, Vol. 2 (Toronto: Carswell, 2018), ch. 7 at s. 3 (electronic service); *Canada v. Fingold*, [1998] 1 F.C. 406, 219 N.R. 369 (leave to appeal refused, 227 N.R. 150 (*note*) 26 February 1998) (Fed. C.A.) at paras. 13-14 [*Fingold*]; *Pillsbury Canada Ltd v. Minister of National Revenue*, [1964] C.T.C. 294, [1965] 1 Ex. C.R. 676 (Can. Ex. Ct.) at paras. 18-22 [*Pillsbury*]; *Youngman v. Canada*, [1990] 2 C.T.C. 10, 109 N.R. 276 (Fed. C.A.) at paras. 18-19 [*Youngman*]; *Arpeg Holdings Ltd. v. Canada*, 2008 FCA 31, 372 N.R. 363 at para. 21).

[34] In the seminal case of *Pillsbury* (interpreting the predecessor to subsection 15(1), subsection 8(1)(*c*) of the *Income Tax Act*, R.S.C. 1952, c. 148), the Exchequer Court highlighted that the requisite inquiry is inherently factual. It noted at paragraph 20 that a benefit is not conferred where a corporation "enters into a bona fide transaction with a shareholder". However, transactions that are merely "devices or arrangements for conferring benefits or advantages on

shareholders *qua* shareholders" do qualify, and the distinction between the two is a factual determination (*Pillsbury* at para. 21). The Court in *Pillsbury* offered further guidance on the meaning of "confer", which highlights the factual nature of the analysis (at para. 22):

> […] There must be a "benefit or advantage" and that benefit or advantage must be "conferred" by a corporation on a "shareholder". The word "confer" means "grant" or "bestow". Even where a corporation has resolved formally to give a special privilege or status to shareholders, it is a question of fact whether the corporation's purpose was to confer a benefit or advantage on the shareholders or some purpose having to do with the corporation's business such as inducing the shareholders to patronize the corporation. If this be so, it must equally be a question of fact in each case where the Minister contends that what appears to be an ordinary business transaction between a corporation and a shareholder is not what it appears to be but is in reality a method, arrangement or device for conferring a benefit or advantage on the shareholder *qua* shareholder.

[35] This Court adopted the Exchequer Court's analysis in respect of subsection 15(1) of the *ITA* in several cases, including *Youngman*, *Fingold,* and *Chopp v. Canada,* [1998] 1 C.T.C. 407, 221 N.R. 185 (Fed. C.A.) [*Chopp*]. In *Youngman,* this Court also held that subsection 15(1) of the *ITA* does not apply if the taxpayer, were he or she not a shareholder, would have received the same benefit from the corporation in the same circumstances (at paragraph 18). Additionally, the benefit conferred must be real and not a "legal fiction" (*Colubriale v. Canada*, 2005 FCA 329, 2005 D.T.C. 5609 (Fr.) at para. 28 [*Colubriale*]); nor can it flow from a mistake that is not in conformity with a company's established practices (*Chopp* at para. 8).

[36] Often, as in the instant case, the analysis focusses on whether or not the transaction in question was made for a business or personal purpose. For example, in *Fingold*, this Court concluded that a condominium that was purchased for a shareholder and used by him both to occasionally entertain business clients and for personal use was not a *bona fide* business

transaction, as the purpose for the acquisition was overwhelmingly personal. This Court thus determined that the corporation had provided a benefit to him *qua* shareholder (at paras. 19-20).

[37] Here, there was more than an ample factual basis for the Tax Court to have reached a similar conclusion and to have determined that the appellant received a benefit *qua* shareholder. Central among the relevant facts in support of such a conclusion are the Tax Court's findings that the appellant would have travelled to the ISS, even if it had not been possible to conduct the live broadcast to promote the Cirque and One Drop; the fact that the Cirque corporations did not authorize the expenditure and were instead presented with a *fait accompli*, after the appellant had already committed to taking the trip; the way the transactions were structured so as to avoid outside shareholders bearing any of the economic costs associated with the appellant's trip to space; and the fact that Créations Méandres declined to deduct any portion of the trip costs as an expense for income tax purposes. Many of the additional factual findings of the Tax Court, detailed above, lend further support to the Tax Court's determination. Thus, if the Tax Court did not make one of the errors the appellant alleges, its determination that the appellant had received a shareholder benefit would be unassailable.

> (1) Did the Tax Court apply the test for deductible business expenses under paragraph 18(1)(*a*) of the *ITA* as opposed to the test under subsections 15(1) and 246(1) of the *ITA*?

[38] In terms of those alleged errors, the appellant first submits that the Tax Court erroneously applied the test for deductible business expenses under paragraph 18(1)(*a*) of the *ITA* as opposed to the applicable test under subsections 15(1) and 246(1) of the *ITA* and points to paragraphs 27,

56-57 of the Tax Court's Reasons where he alleges the Tax Court conflated the tests under these provisions.

[39] With respect, I disagree. While the Tax Court does use the words "business expense" and "non-deductible personal expense" in one of the foregoing paragraphs, a review of the entirety of its Reasons demonstrates that the Tax Court in fact applied the correct test and focussed on whether the appellant's space trip was a *bona fide* business transaction or a personal venture. That is precisely what *Pillsbury* and subsequent cases direct is the relevant question. Thus, the Tax Court did not erroneously apply the test for deductible business expenses under paragraph 18(1)(*a*) of the *ITA* as opposed to the test applicable under subsection 15(1) of the *ITA*.

[40] I would also note that, in assessing whether a benefit had been conferred, it was open to the Tax Court to consider as a relevant fact the income tax treatment afforded by Créations Méandres' to the space trip expense. While not determinative of whether the appellant received a shareholder benefit, Créations Méandres' decision to refrain from deducting the expense for tax purposes is relevant to the Court's assessment of whether the trip was a business transaction or personal in nature as it tends to show that the corporation did not consider the trip to have had a business purpose. Thus, while the issues of deductibility and shareholder benefit are distinct, they are to a certain extent inter-twined.

[41] I accordingly conclude that the Tax Court did not make the first of the errors alleged by the appellant.

(2) Did the Tax Court err in incorporating a criterion of "results of impoverishment" to the corporation instead of the criterion of "intent of impoverishment"?

[42] Moving on to the second way in which the appellant alleges that the Tax Court erred in interpreting subsection 15(1) of the *ITA*, the appellant asserts that the Tax Court erroneously focussed on whether the corporation was impoverished as opposed to considering whether there was an intent to impoverish it. The appellant more specifically contends that the test for conferral of a benefit involves asking whether the corporation intended to benefit the shareholder at the point the expenditure was engaged and does not focus solely on the result reached. The appellant adds that where, as here, a corporation is controlled by one person, the presence or absence of the requisite intent may be reasonably inferred from the intent of the controlling shareholder at the time the expense was engaged. According to the appellant, the Tax Court failed to recognize this essential aspect for conferral of a benefit and, had it done so, would have reached the opposite conclusion as it found that the appellant genuinely intended to benefit the Cirque du Soleil and One Drop.

[43] Once again, I disagree. Contrary to what the appellant submits, the findings of the Tax Court as regards his subjective intent are not determinative of the inquiry under subsection 15(1) of the *ITA*.

[44] While some of the case law does indeed recognize that corporate impoverishment occurs when a shareholder benefit is conferred (see, for example, *Del Grande v. R.*, [1993] 1 C.T.C. 2096, 93 D.T.C. 133 (T.C.C.) at para. 29 and *Colubriale* at para. 35), the cases do not universally equate such impoverishment with corporate intent and certainly not with a controlling

shareholder's subjective intent. The requisite inquiry is rather highly fact specific, and the factors that are given weight turn on the particular circumstances of each case. In some instances, this Court and the Tax Court have found that a shareholder benefit was conferred without any determination having been made as to the corporation's intent, as occurred, for example, in *Fingold*, *Pillsbury*, and *McHugh v. R.* (1994), [1995] 1 C.T.C. 2652, 95 D.T.C. 778 (T.C.C.). Conversely, corporate intent is sometimes a highly relevant consideration, as in cases where the alleged benefit resulted from a book-keeping error or other mistake, as occurred, for example, in *Robinson v. Minister of National Revenue*, [1993] 1 C.T.C. 2406, 93 D.T.C. 254 (T.C.C.) (aff'd [2000] 2 C.T.C. 236 (F.C.T.D.)).

[45] Moreover, even if intent to impoverish the corporation were required, such intent cannot be equated with a controlling shareholder's subjective intent and most especially not with an intent that was formulated after the corporate expenditure was engaged. In this regard, the precise finding made by the Tax Court is important: it found at paragraph 23 that "having decided to travel, [the appellant] genuinely intended that he would use his time on the trip to promote Cirque du Soleil, and himself as its most recognizable public representative, to enhance the value of his business while he was on his trip to space". The Tax Court thus held that the appellant's intent to benefit the Cirque was formulated *after* the commitment for the trip was made, which, in the circumstances, is irrelevant to what his intent or the intent of the Family Holdco was when the Orbital Space Flight Purchase Agreement was signed.

[46] I therefore conclude that the Tax Court did not err in its assessment of the relevance of the appellant's intent.

(3) Did The Tax Court err in concluding that the original personal motivations of the appellant irreversibly led to the conclusion that there had been corporate impoverishment?

[47] Nor did the Tax Court make the third error in applying subsection 15(1) of the *ITA* that the appellant raises. Contrary to what the appellant asserts, when the Reasons are read in their entirety, it is apparent that the Tax Court focussed on ascertaining the purpose of the trip by considering whether it was a *bona fide* business transaction or principally undertaken to the personal benefit of the appellant, which is precisely the inquiry the case law directs is required. In conducting this analysis, the Tax Court did not rely solely on the appellant's original personal motivations, but rather also on the myriad of other facts set out above to ascertain whether the space trip was a *bona fide* corporate transaction. The Tax Court therefore did not conclude that the original personal motivations of the appellant were determinative.

[48] Thus, the Tax Court did not err in its interpretation of subsection 15(1) of the *ITA*.

B. *The Alleged Error Regarding the Burden of Proof*

[49] I turn finally to the appellant's allegation that the Tax Court misapplied the burden of proof.

[50] As noted, the appellant submits that it is axiomatic in cases before the Tax Court that the onus shifts to the Crown to prove the facts sufficient to uphold the assessment where a taxpayer succeeds in establishing that the factual assumptions set out in the Minister's reply and upon which the Minister assessed are wrong. The case law describes such circumstance as one where

the taxpayer "demolishes" the Minister's assumptions. The appellant relies in particular on the following passage from *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, 213 N.R. 81 at paras. 92-94 (S.C.C), where Justice L'Heureux-Dubé said as follows regarding the onus in income tax cases:

> 92. It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco Ltd. v. Minister of National Revenue*, [1966] S.C.R. 95, and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance Co. v. Dalton Cartage Co*., [1982] 1 S.C.R. 164; *Pallan v. M.N.R.*, 90 D.T.C. 1102 (T.C.C.), at p. 1106. The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd. v. M.N.R.*, 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 D.T.C. 5359 (F.C.A.), at p. 5361). The initial burden is only to "demolish" the exact assumptions made by the Minister but no more: *First Fund Genesis Corp. v. The Queen*, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.
>
> 93. This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case: *Kamin v. M.N.R.*, 93 D.T.C. 62 (T.C.C.); *Goodwin v. M.N.R.*, 82 D.T.C. 1679 (T.R.B.). In the case at bar, the appellant adduced evidence which met not only a *prima facie* standard, but also, in my view, even a higher one. In my view, the appellant "demolished" the following assumptions as follows: (a) the assumption of "two businesses", by adducing clear evidence of only one business; (b) the assumption of "no income", by adducing clear evidence of income. The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions: see for example *MacIsaac v. M.N.R.*, 74 D.T.C. 6380 (F.C.A.), at p. 6381; *Zink v. M.N.R.*, 87 D.T.C. 652 (T.C.C.). As stated above, all of the appellant's evidence in the case at bar remained unchallenged and uncontradicted. Accordingly, in my view, the assumptions of "two businesses" and "no income" have been "demolished" by the appellant.
>
> 94. Where the Minister's assumptions have been "demolished" by the appellant, "the onus . . . shifts to the Minister to rebut the *prima facie* case" made out by the appellant and to prove the assumptions: *Magilb Development Corp. v. The Queen*, 87 D.T.C. 5012 (F.C.T.D.), at p. 5018. […]
>
> [Emphasis in original.]

[51] In the instant case, the appellant says that he succeeded in demolishing the factual assumptions of the Minister and that the onus therefore shifted to the Crown to lead sufficient evidence to establish the proportion of the space trip that was a personal as opposed to a business venture. As the Crown called no evidence on the point, the appellant contends that the Tax Court was obliged to allow his appeal.

[52] With respect, I disagree as the appellant did not succeed in demolishing the Minister's factual assumptions.

[53] The appellant points to the following as the assumptions of fact in the Crown's reply as being germane to his argument:

> 17.23 Holdco paid all of the Spaceflight Expenses totalling $41,816,954 on the appellant's behalf and for his personal benefit;
>
> […]
>
> 17.32 the appellant's Spaceflight was not undertaken to promote and/or market the reputation, image, names, trademarks, brand, and/or activities of the Cirque du Soleil Group, including Holdco and Créations;
>
> 17.33 the Spaceflight Expenses were not incurred for the purposes of earning business income from the Cirque du Soleil Group's operations and/or for any *bona fide* business purpose;
>
> […]
>
> 17.37 in 2009, there was a transfer of wealth between Holdco and the appellant in the amount of approximately $41.8 million which benefited the appellant personally, qua shareholder, and impoverished Holdco and/or its subsidiaries.

[54] Contrary to what the appellant claims, the appellant did not succeed in demolishing the foregoing assumptions. To demolish them, it is my view that he would have been required to

show that the space trip was a *bona fide* business venture in its entirety. He failed to do so and, indeed, the Tax Court found the opposite, holding that the "the motivating, essential and overwhelmingly primary purpose of the travel was personal" (at para. 11).

[55] I accordingly find that the Tax Court did not misapply the burden of proof in the instant case.

[56] I also note that it was open to the Tax Court to determine the value of the shareholder benefit received by the appellant based on all the evidence tendered, including the Crown's cross-examination of the appellant's witnesses. On this point, this case is somewhat similar to *Youngman*. There, the appellant argued that he had succeeded in demolishing the assumptions of fact contained in the Minister's Reply and asserted that his appeal therefore had to be allowed. This Court disagreed. In the result, it largely agreed with the Minister's valuation, subject to an adjustment in favour of the taxpayer to account for an interest-free loan he had made to the company. Accordingly, this Court adopted the same approach to valuation taken by the Tax Court in the instant case and calculated the value of the shareholder benefit at the end of the case based upon all the evidence tendered.

V. Proposed Disposition

[57] In light of the foregoing, I would propose to dismiss this appeal, with costs, fixed in the all-inclusive agreed-upon amount of $4,200.00.

"Mary J.L. Gleason"
J.A.

"I agree.
Johanne Gauthier J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	GAUTHIER J.A. DE MONTIGNY J.A.
DATED:	MAY 29, 2020

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