Docket: 2020-2397(IT)G

BETWEEN:

0808414 B.C. LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on April 8, 9, 10, and 11, 2024, at Toronto, Ontario

Before: The Honourable Justice David E. Spiro

Appearances:

Counsel for the Appellant:	Clifford Rand, Josh Kumar, and Monica Carinci
Counsel for the Respondent:	Lindsay Tohn and Linsey Rains

JUDGMENT

The appeal of the reassessment of February 3, 2017 made by the Minister of National Revenue under the *Income Tax Act* for the Appellant's taxation year ended September 30, 2012 is dismissed with costs.

The parties shall have 30 days from the date of Judgment to reach an agreement on costs, failing which the Respondent shall then have 30 days to serve and file written submissions on costs of 15 pages or less. The Appellant shall then have 30 days to serve and file written submissions of 15 pages or less. The Respondent may serve and file a response of 10 pages or less within 15 days of service of those submissions.

If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, the Respondent is entitled to costs as set out in the Tariff.

Signed at Toronto, Ontario, this 24th day of July 2024.

"David E. Spiro"

Spiro J.

Citation: 2024 TCC 99
Date: 20240724
Docket: 2020-2397(IT)G

BETWEEN:

0808414 B.C. LTD.,

Appellant,

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HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Spiro J.

[1] On the sale of depreciable property to a non-arm's length purchaser as part of the sale of a business as a going concern, may the proceeds of disposition of that property exceed the fair market value of the business as a whole? That, in a nutshell, is the central question of law presented by this appeal. In light of how the capital cost allowance ("CCA") system in the *Income Tax Act* (the "Act") works, the answer is affirmative and the appeal must be dismissed.

Overview of the Capital Cost Allowance System

[2] Professor Vern Krishna provides an excellent overview of the CCA system in his textbook *Fundamentals of Canadian Income Tax*, vol. 1, *Personal Tax*, 2nd ed. Toronto: Thomson Reuters, 2019. I have reproduced excerpts from his textbook (from page 468 to page 486) without footnotes but with emphasis added:

> **III. — Tax Depreciation**
>
> In computing income from a business or property, a taxpayer may deduct 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 the Regulations. Thus, a taxpayer cannot deduct depreciation calculated for financial statement purposes, but may deduct capital cost allowance (tax depreciation), according to prescribed rules.

The basic concept underlying the capital cost allowance system is that it is a deduction from income, which approximately allocates the cost of capital assets over their useful lives. Thus, in one sense, the CCA system is nothing more than a surrogate depreciation system at pre-determined rates in the measurement of net income.

However, the CCA system is more than just a surrogate for accounting depreciation. Finance also uses it to stimulate investment for reasons of social, economic and political policy through accelerated deductions and, in other circumstances, to discourage particular types of investment by denying or restricting the allowance on those investments.

…

A. — Structure

The CCA system operates on a pool basis, with separate classes or "pools" for the various types of depreciable property acquired by a taxpayer. Thus, it does not depend upon identification of each individual asset. All assets of a similar type are placed in a "class" and treated accordingly as a group. For example, most buildings made of brick acquired after 1987 are included in Class 1, and most automobiles are included in Class 10 or 10.1.

Generally, tangible capital property not specifically described in another class is included in Class 8, which acts as a residual class. However, while all assets of a similar type are grouped together into one pool, where the taxpayer has more than one business, each separate business of a taxpayer can maintain its own set of pools.

The classes are established under the regulations. For most classes, a set rate of CCA is specified (for example, 4 per cent for Class 1, 20 per cent for Class 8, 30 per cent for Classes 10 and 10.1). These rates are applied to the balance of the class on a declining-balance basis.

As a general principle, CCA rates are set to reflect, as closely as possible, the useful life of assets and, in this sense, accurately measure net income. However, because the rates are the same for all taxpayers, CCA does not offer the same flexibility and accuracy as accounting amortization. The government also uses CCA rates to implement other socio-economic and political policies and remain competitive with the United States.

…

C. — Classification

We start by answering three basic questions in respect of the capital cost allowance system:

1. Is the property depreciable capital property?

2. To which class of assets does the property belong?

3. What is the rate of depreciation applicable to the particular class?

CCA allows a taxpayer to deduct the cost of depreciable assets over a period of time at a prescribed rate. The rates, which are the same for all taxpayers with similar assets performing similar activities, generally allow for generous write-offs. The deduction for tax purposes in the early years of an asset's life usually exceeds the comparable depreciation for accounting and financial statement purposes. Thus, in part at least, the capital cost allowance system compensates taxpayers for the effects of inflation on asset replacement costs. The system also permits tax deferral because of the difference between tax and accounting depreciation.

…

E. — General Structure

The CCA system operates as follows:

- A taxpayer can deduct CCA within the terms of the Act and the Regulations.

- The Regulations group eligible assets into prescribed classes (pools) that have approximately similar lives.

- The balance in each class at any point in time is its undepreciated capital cost (UCC).

- The UCC of a class increases with acquisitions in that class.

- Each class is subject to a *maximum* percentage rate of capital cost allowance.

- The balance of each class is reduced by dispositions of property from the pool.

- The UCC of each class is reduced by the deduction of CCA claimed from that class.

- A taxpayer may deduct a portion or all of the prescribed CCA for the class, or forgo the claim in a particular year and postpone amortization of the pool to later years.

- CCA can be claimed only when assets are available for use.

- The diminishing balance, rather than the straight line, method is used in computing the annual allowance for most classes of assets.

- Each year, the rate specified for the class is applied to the UCC remaining in the class after deduction of CCA amounts previously allowed to the pool.

- CCA is claimed as of the end of the year.

- Any CCA claimed is deducted from the UCC at the end of the year.

- The diminishing-balance, rather than the straight-line, method is normally used in computing the annual CCA.

- If the taxpayer does not acquire new assets of the class and claims CCA, the UCC will diminish from year to year.

- Hence, the class balance remaining to be depreciated diminishes until the taxpayer acquires new assets of the class.

For most depreciable property, the amount of CCA that a taxpayer may claim in the year the property is acquired is limited to one-half of the amount that would otherwise be calculated by applying the maximum percentage rate of CCA prescribed for the particular class to which the property belongs. This rule, which is commonly referred to as the half-year rule, was modified in November 2018 in respect of certain assets in order to make Canada more competitive with the United States. The new rules allow taxpayers to accelerate their claims for CCA and, hence, lower the effective rate of tax in the year of acquisition.

- Proceeds from the disposition of an asset reduces the balance of the class, but only up to a maximum equal to the capital cost of the asset.

- ***On disposal of assets of a class, CCA previously taken on the class is "recaptured" to the extent that the proceeds of disposition exceed the UCC of the group of assets in the particular pool***.

- The UCC of a class can never be a negative amount. If the proceeds from a disposition of assets exceed the UCC of the class and reduce it below zero, the excess amount is immediately recaptured into income.

- Where the proceeds of disposition of an asset exceed its original capital cost, the excess amount is a capital gain.

- Upon disposal of *all* the assets in a particular class, any remaining balance of UCC for the class is deductible in the year as a "terminal loss".

- There can be no capital loss on the disposition of depreciable property.

Example

Assume that a taxpayer acquires a capital asset (Class 8), which he depreciates at 20 per cent. He then disposes of the asset at the following alternative amounts as in Cases A, B and C.

	A	**B**	**C**
Capital cost	$10,000	$10,000	$10,000
CCA claimed	2,000	2,000	2,000
UCC	$8,000	$8,000	$8,000
Then:			
POD	$11,000	$9,000	$6,000
Recapture of CCA	$2,000	$1,000	—
Capital gain	$1,000	—	—
Terminal loss			$2,000

As the above example shows, the CCA system is designed to "recapture" an excess of $2,000 tax depreciation claimed in prior years. Similarly, it permits a loss of $2,000 for any shortfall in amounts claimed in prior years provided that there are no remaining assets in the class. Any proceeds of disposition above the original capital cost of $10,000 is a capital gain.

a) — Depreciable Property

Capital cost allowance is claimable only on depreciable property of a prescribed class. "Depreciable property" is defined as "property acquired by the taxpayer in respect of which the taxpayer has been allowed, or ... [is] entitled to, 'capital cost allowance'." This circular definition is not very helpful. However, the Act specifically excludes certain properties from the prescribed classes. For example, the following properties are *not* eligible for capital cost allowance:

- Property, the cost of which is *deductible* as an ordinary expense.

- Property that is "described in" or is part of, the taxpayer's inventory.

- Property not acquired for the purpose of gaining or producing income.
- Property for which the taxpayer is entitled to a deduction for scientific research.
- Property that is a yacht, camp, lodge, golf course, or facility if any part of the maintenance costs are not deductible because of subparagraph 18(1)(1)(i).
- Certain works of art created by non-residents.
- Land.
- Animals, trees and plants, radium, intangible assets, rights of way.
- Property situated outside of Canada that belongs to a non-resident.

b) — Classes

The rules in respect of CCA are in Parts XI (sections 1100-1107) and XVII of the Regulations. A taxpayer may claim capital cost allowance on depreciable property of a prescribed class. Schedule II describes the principal classes of property.

The system attempts to place similar properties in the same class and, therefore, subject them to the same rate of allowance. For example, all of a taxpayer's automobiles costing $30,000 (prescribed amount since 2013) or less would be in Class 10, and the capital cost allowance claimed at the rate applicable to that class. Similarly, all passenger vehicles costing more than $30,000 each are grouped in Class 10.1. The prescribed amounts are supposed to be adjusted periodically.

…

e) —Undepreciated Capital Cost

The starting point in calculating capital cost allowance (CCA) is to determine the capital cost of each depreciable property. The Regulations group depreciable properties into classes with similar life expectations. When we deduct CCA from the capital cost of property, the residue is the “undepreciated capital cost” (“UCC”) of the property. Thus, UCC represents the as yet undepreciated cost of the class of assets. In accounting terms, this is equivalent to the net book value of an asset.

A taxpayer's “undepreciated capital cost” of a class of depreciable property is determined by adding the following:

- The capital cost [of] depreciable property of the class;

- Government assistance repaid by the taxpayer subsequent to the disposition of property in respect of the acquisition of which he or she received assistance;
- Any amount recaptured in respect of the class; and
- Repayment of contributions and allowances the taxpayer received and that were previously deducted from the capital cost of that class;
- Next, one deducts the aggregate of:
- The total capital cost allowance and terminal losses that the taxpayer has claimed for property of the class;
- The proceeds of disposition of any property of the class disposed of (the deduction not to exceed the capital cost of the property); and
- Government assistance received, or that the taxpayer is entitled to receive, as well as investment tax credits claimed, subsequent to the disposition by the taxpayer of the property to which such assistance or tax credit related.

For most purposes of calculating CCA in a year that the taxpayer acquires an asset, only one-half of the net additions to the class is generally added to the UCC balance. The remaining one-half is added to the UCC after calculating CCA for the year of acquisition. The effect of this rule is that CCA on a newly acquired asset is that CCA was claimable at only one-half of the normal rate in the year of acquisition. However, in November 2018, Finance announced waiver of this rule in respect of certain assets in order to make Canada more competitive with the United States (discussed below).

The UCC of a class can never be a negative amount. If the amount of the inclusions in a class is less than the amount of the deductions in the class, the negative balance becomes income for the year and is then added back into the calculation of UCC of that class, which, in effect, increases the UCC balance back to zero.

f) — Adjustments on Disposition of Assets

i) — General Comment

The theory underlying the CCA system is that the cost of depreciable property can be written off over its useful life by applying pre-determined rates of depreciation. Subsequent events may show, however, that a taxpayer claimed insufficient or excessive capital cost allowance over a period of time. This may occur where the taxpayer voluntarily claims less than the maximum CCA allowable, or where the maximum rate applicable to a class of assets is either too

restrictive or too generous. Thus, the UCC of depreciable property may be higher or lower than its fair market value at a later date.

ii) — Terminal Losses

Where a taxpayer disposes of the property of a class for less than its UCC, he or she suffers a shortfall in the depreciation claimed on the particular class. In these circumstances, the taxpayer is entitled to recoup the amount of the shortfall through a claim for a "terminal loss".

However, a taxpayer can claim a terminal loss only if he or she disposes of all the property of a class and owns no property of the class at the end of the taxation year. Where a taxpayer is eligible for a terminal loss, he or she must claim the loss in the year, or lose it forever. Thus, unlike a claim for CCA, the claim for a terminal loss is not flexible.

…

iv) — Recapture

Just as a taxpayer may claim too little capital cost allowance on a class of assets, it is also possible that the taxpayer may have been allowed too much capital cost allowance. This may occur, for example, where the rate for a particular class of assets is deliberately set high in order to encourage economic activity in a particular sector. Thus, ***a sale of the assets of a class at fair market value may show that the assets were "over-depreciated" in the past. The Act "recaptures" any over-depreciated amount into income.***

1) — Negative Balance

As noted earlier, the undepreciated capital cost of a class of assets is calculated by adding certain amounts and deducting others. Where a class has a negative balance *at the end of the year*, the amount of the balance is recaptured into income for that year. Any amount recaptured into income is then added back to the UCC of the class. This brings the asset balance of that particular class back to nil.

In theory, recapture of capital cost allowance represents an adjustment for excessive claims of depreciation in earlier fiscal periods. In most cases, however, one can reduce the amount of CCA subject to recapture in any taxation year by acquiring additional property of the same class during the taxation year. Thus, it is usually possible to manipulate the amount of recapture recognized in a particular year by timing new acquisitions of depreciable capital assets. However, this does not apply to cases where similar properties must be segregated — for example, rental properties in Classes 31 or 32 that have a cost of $50,000 or more.

2) — Limited to Capital Cost

> ***Recapture of CCA is a clawback previously claimed of excessive depreciation. Thus, the Act limits recapture to the capital cost of the particular depreciable property in the class.*** Proceeds of disposition in excess of the capital cost of an asset do *not* give rise to recapture of CCA. Rather, the excess of proceeds of disposition over the capital cost of an asset is a capital gain. The distinction is important because recapture of CCA is fully taxable as income, whereas only one-half of capital gains are taxable.

The Facts

[3] Before the hearing commenced, the parties filed a Partial Agreed Statement of Facts (the "PASF") which set out the facts necessary to decide the central question of law at issue in this appeal (references to supporting documents have been omitted):

> **The appellant**
>
> 1. The appellant is a Canadian resident incorporated in 2007.
>
> 2. In the period in issue, the appellant was known as Post Foods Canada Corp.
>
> 3. The appellant carried on the business of manufacturing, marketing and distributing ready-to-eat cereal products under the brand name "Post" from its premises situated in Niagara Falls, Ontario (the **"Business"**).
>
> 4. The appellant was an indirect wholly-owned subsidiary of Ralcorp Holdings, Inc. (**"Ralcorp"**), a publicly traded corporation in the United States.
>
> **0923537 B.C. Limited**
>
> 5. 0923537 B.C. Limited, also known as Post Foods Canada Inc. (**"PFCI"**), was incorporated on October 25, 2011.
>
> 6. PFCI was a wholly-owned subsidiary of Post Holdings Inc. (**"PHI"**), a U.S. corporation that was a wholly-owned subsidiary of Ralcorp.
>
> **Asset Purchase Agreement**
>
> 7. On February 2, 2012, Ralcorp, PHI, and Post Foods, LLC entered into a Separation and Distribution Agreement to spin off Ralcorp's Post cereal businesses into a separate business owned by Post Holdings, Inc. (**"PHI"**).
>
> 8. On February 3, 2012, the appellant and PFCI entered into an Asset Purchase Agreement (the **"Agreement"**).

9. As part of the Agreement, the appellant and PFCI agreed to transfer the appellant's employees in the Post cereal business to the employment of PFCI.

10. On February 3, 2012, the appellant and PFCI entered into a Pension and Benefits Plans Assignment and Assumption Agreement.

11. On February 3, 2012, the appellant and PFCI entered into a Bill of Sale.

12. On February 3, 2012, the appellant and Post Foods, LLC entered into a Trademark Assignment Agreement.

Appellant's capital cost allowance and recapture

13. As part of the Agreement, the appellant sold assets, including its machinery and equipment (**Machinery and Equipment**), to PFCI.

14. The Machinery and Equipment was Class 29 depreciable property of the appellant.

15. On its T2 income tax return for the taxation year ending September 30, 2012, the appellant reported the following amounts in respect of its Class 29 property on its Schedule 8 Capital Cost Allowance:

1 **Class Number**	**2** **Undepreciated capital cost at beginning of the year**	**3** **Cost of acquisitio n during the year**	**5** **Proceeds of disposition during the year**	**6** **Undepreciate d capital cost**	**10** **Recapture of CCA**
29	$1,379,349	--	$20,282,656	($18,903,307)	($18,903,307)
29	$1,874,335	--	$27,561,185	($25,686,850)	($25,686,850)
29	--	$479,796	$479,796	--	
Total	**$3,253,684**	**$479,796**	**$48,323,637**	**$44,590,157**	**$44,590,157**

The reassessment

16. The Minister of National Revenue (the **"Minister"**) assumed that the fair market value of the Machinery and Equipment was $56,490,221.

17. The Minister reassessed the appellant's taxation year ending September 30, 2012 to increase its proceeds of disposition on the Class 29 Machinery and Equipment from $48,323,637 to $56,490,221, increasing the appellant's recapture income in respect of the Class 29 property by $8,166,584.

18. The appellant and PFCI did not deal at arm's length on February 3, 2012.

19. The current exchange rate used by the appellant and PFCI and accepted by the Minister was $1.00 USD to $1.017 CAD.

20. The appellant agrees for the purpose of this appeal that the fair market value of the Machinery and Equipment, had it been sold on its own and not as part of the sale of a business as a going concern, was $56,490,221.

21. The respondent agrees for the purpose of this appeal that the amount of pension and post-retirement obligations in issue is $8,166,584.

[4] The Appellant called Mr. Scott Davidson of Kroll Canada to offer his opinion, as a valuation expert, on the fair market value of the business as a going concern on the date of disposition. Following a *voir dire*, I decided to hear Mr. Davidson's expert opinion evidence as it was too early at that point to decide whether to accept or reject the Appellant's theory of the case. At that time, Mr. Davidson's opinion evidence was potentially relevant. Now that the central question of law has been decided in favour of the Crown, Mr. Davidson's expert opinion evidence is inadmissible as it fails the threshold test of logical relevance.[1]

[5] In addition, the Appellant called Mr. Bruno Sorbilli, Vice-President of Finance for Post Foods Canada Inc. and Mr. Frank Cianchetti, Director of Corporate Tax for Conagra Foods Canada Inc. Neither had any first-hand knowledge of the relevant transactions or events. Certain documents offered as evidence during their testimony were marked for identification but were not admitted as evidence at trial. As the Appellant's filing position – and the basis for that filing position – was abundantly clear, no further evidence dealing with either point would have been relevant.[2] The Crown did not call any evidence.

<u>Positions of the Parties</u>

[6] Both parties agree on the proceeds of disposition, and consequential recapture, on the sale of depreciable property on its own to a non-arm's length purchaser. In that case, it is common ground that the proceeds of disposition of the depreciable property would be an amount equal to the fair market value of that property in light of paragraph 69(1)(b) of the Act:

69(1) Except as expressly otherwise provided in this Act,

…

(b) where a taxpayer has disposed of anything

> (i) to a person with whom the taxpayer was not dealing at arm's length for no proceeds or for proceeds less than the fair market value thereof at the time the taxpayer so disposed of it,
>
> …
>
> the taxpayer shall be deemed to have received proceeds of disposition therefor equal to that fair market value;

[7] Returning to the facts, if the only asset the Appellant had sold to the non-arm's length purchaser was machinery and equipment with a fair market value of $56,490,221, everyone agrees that the proceeds of disposition of that property would have been $56,490,221.

<u>The Appellant's Position</u>

[8] However, the Appellant says that because the Appellant sold the depreciable property to the non-arm's length purchaser as part of a sale of a business as a going concern, the Appellant was required to:

(a) ascertain the fair market value of the business as a going concern; and

(b) allocate, on a reasonable basis, the fair market value of that business among all of the property sold.[3]

[9] The Appellant pleaded that this two-step process is required by paragraph 69(1)(b) of the Act which deems proceeds of disposition of "anything" sold to a non-arm's length purchaser to be its fair market value.[4] The Appellant contends that the word "anything" in paragraph 69(1)(b) of the Act is broad enough to include a business sold as a going concern and, in particular, the Appellant argues that on the facts of this appeal "the thing disposed of [by the Appellant] was the business as a going concern rather than each separate asset of the business."[5]

[10] As the Appellant's pension obligations, amounting to $8,166,584, were transferred to the non-arm's length purchaser as part of the same transaction, the Appellant says that the proceeds of disposition of the machinery and equipment were depressed by $8,166,584 to $48,323,637. Indeed, that was the Appellant's filing position. But how do transferred pension obligations depress the fair market value of individual assets such as machinery and equipment? The Appellant argued that the transferred pension obligations:

> … depress the value of the business and depress, therefore, because there's no other way to depress the value of the business than to depress all of its assets, all of the net assets of the business, all of the individual assets get depressed along with it.[6]

[11] The Appellant submitted that the reassessment is incorrect as it rests on the assumption that the machinery and equipment had a fair market value exceeding the fair market value of the business as a whole – a result that paragraph 69(1)(b) of the Act does not allow.[7]

The Crown's Position

[12] The central assumption of fact made by the Minister of National Revenue (the "Minister") in reassessing is pleaded at paragraph 14(j)(iii) of the Reply to the Amended Notice of Appeal, namely, that the fair market value of the machinery and equipment sold by the Appellant to the non-arm's length purchaser was $56,490,221 on the date of disposition.

[13] The Crown argues that the Act does not distinguish between the sale of depreciable property on its own to a non-arm's length purchaser and the sale of depreciable property to a non-arm's length purchaser as part of the sale of a business as a going concern.

[14] The Crown contends that under paragraph 69(1)(b), as applied to the CCA provisions of the Act, the proceeds of disposition of the machinery and equipment are an amount equal to the fair market value of that machinery and equipment on the date of disposition, namely, $56,490,221. That is precisely how the Minister reassessed the Appellant for its taxation year ended September 30, 2012 – by adding $8,166,584 to the Appellant's reported proceeds of disposition of machinery and equipment of $48,323,637 resulting in reassessed proceeds of disposition of the machinery and equipment of $56,490,221.

Analysis

[15] When interpreting the word "anything" in paragraph 69(1)(b) of the Act one must do so using a harmonious textual, contextual, and purposive analysis.[8] Paragraph 69(1)(b) of the Act provides:

> 69(1) Except as expressly otherwise provided in this Act,
>
> …

> (b) where a taxpayer has disposed of anything
>
> (i) to a person with whom the taxpayer was not dealing at arm's length for no proceeds or for proceeds less than the fair market value thereof at the time the taxpayer so disposed of it,
>
> …
>
> the taxpayer shall be deemed to have received proceeds of disposition therefor equal to that fair market value;

Textual Analysis

[16] Paragraph 69(1)(b) of the Act uses the word "anything" which, in the Appellant's submission, is broad enough to include a business as a going concern. The Appellant is correct if one has regard only to the text of paragraph 69(1)(b) and if one ends the analysis there.

[17] But one cannot end the analysis there. No text in the Act reflects an intention by Parliament to require taxpayers to use different methods for computing proceeds of disposition of depreciable property depending on whether the depreciable property was sold on its own to a non-arm's length purchaser or as part of the sale of a business as a going concern. Had Parliament intended to draw such a distinction, that distinction would have appeared in the text of the Act.

[18] The Appellant repeats one phrase time and again: the sale of a business as a "going concern". That phrase appears four times in the Appellant's Amended Notice of Appeal[9] and ten times in the Appellant's written submissions.[10] Yet the phrase "going concern" is found nowhere in the text of the Act.

[19] In particular, the sale of a business as a "going concern" is not referred to in the CCA provisions of the Act. Those provisions do, however, repeatedly refer to the "depreciable property" of a taxpayer. The following excerpts from subsection 13(1) (dealing with recapture) and subsection 13(21) (setting out the components of undepreciated capital cost) illustrate the point:

> **Recaptured depreciation**
>
> 13(1) … a taxpayer's depreciable property of a particular prescribed class ...
>
> …

Definitions

13(21) In this section,

…

undepreciated capital cost to a taxpayer of depreciable property of a prescribed class as of any time means the amount determined by the formula …

(A + B + C + D + D.1) - (E + E.1 + F + G + H + I + J + K)

where

A

… the capital cost to the taxpayer of a depreciable property of the class …

…

C

… a depreciable property of the class subsequent to the disposition thereof by the taxpayer …

…

E.1

… the undepreciated capital cost to the taxpayer of depreciable property of that class …

…

I

… a depreciable property of the class of the taxpayer …

J

… a depreciable property of the class of the taxpayer subsequent to the disposition of that property by the taxpayer … and

K

… the undepreciated capital cost of depreciable property of the class …

[20] A close reading of the text of the Act – and what is not in the text of the Act – supports the Crown's position that the fair market value of a business as a going concern plays no role in determining the proceeds of disposition, or consequential recapture, of depreciable property under the Act.

Contextual Analysis

[21] Paragraph 69(1)(b) of the Act does play a leading role in the analysis, but not in the way the Appellant submits. When applied in the context of the CCA provisions of the Act, the word "anything" in paragraph 69(1)(b) must mean "depreciable property" as one can see from the textual analysis above.

[22] A contextual application of paragraph 69(1)(b) to the CCA provisions of the Act supports the Crown's position that the proceeds of disposition of the machinery and equipment sold by the Appellant to the non-arm's length purchaser must be an amount equal to its fair market value, namely, $56,490,221.

Purposive Analysis

[23] The Federal Court of Appeal has described paragraph 69(1)(a) of the Act[11] as an anti-avoidance rule intended "to discourage non-arm's length parties from dealing with each other at prices other than fair market value."[12] From the seller's perspective, the same can be said about paragraph 69(1)(b) of the Act. No one has seriously suggested that the purpose – or one of the purposes – of paragraph 69(1)(b) is to limit the proceeds of disposition of depreciable property, on a non-arm's length disposition of a business as a going concern, to the fair market value of the business as a whole.[13]

[24] So what *is* the purpose of the CCA system? As the Federal Court of Appeal observed in *Water's Edge Village Estates (Phase II) Ltd. v Canada*, 2002 FCA 291 (*per* Noël J.A.), it:

> [41] … is intended to recognize over time costs incurred to acquire capital assets actually used to earn income within the meaning of paragraph 18(1)(a) and (b), and … the "recapture" and "terminal loss" provisions are intended to adjust the aggregate deduction so recognized when subsequent events demonstrate that the asset has been over or under-depreciated. …

[25] In light of that purpose, why would the amount of recapture on the disposition of over-depreciated property depend on whether it was sold on its own or as part of the sale of a business as a going concern?

[26] None of the decisions cited to me by the Appellant suggest that Parliament intended one amount of recapture to apply when depreciable property is sold on its own and another amount when the same property is sold as part of the sale of a business as a going concern. In effect, the Appellant is asking this Court to amend the CCA provisions of the Act, which this Court cannot do. As Justice Biringer of the Federal Court of Appeal recently noted:

> It is not for this Court to make new tax policy or amend existing tax legislation: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 41; *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 at para. 96.[14]

Conclusion

[27] Notwithstanding Mr. Rand's able argument, the Appellant has failed to demolish the central assumption of fact made by the Minister in reassessing, namely, that the fair market value of the machinery and equipment sold by the Appellant was $56,490,221. As that was the fair market value of the machinery and equipment at the date of its disposition, the proceeds of disposition of that depreciable property to the Appellant were $56,490,221 under paragraph 69(1)(b) and the CCA provisions of the Act.

[28] I conclude by returning to the central question of law posed at the outset. On the sale of depreciable property to a non-arm's length purchaser as part of the sale of a business as a going concern, the proceeds of disposition of that property *may* exceed the fair market value of the business as a going concern because the fair market value of that business as a going concern plays no role under the Act in determining the proceeds of disposition, or consequential recapture, of depreciable property sold to a non-arm's length purchaser. The appeal will, therefore, be dismissed with costs.

Signed at Toronto, Ontario, this 24th day of July 2024.

"David E. Spiro"

Spiro J.

CITATION:	2024 TCC 99
COURT FILE NO.:	2020-2397(IT)G
STYLE OF CAUSE:	0808414 B.C. LTD. AND HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 8, 9, 10, and 11, 2024
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Spiro
DATE OF JUDGMENT:	July 24, 2024

APPEARANCES:

Counsel for the Appellant:	Clifford Rand, Josh Kumar, and Monica Carinci
Counsel for the Respondent:	Lindsay Tohn and Linsey Rains

COUNSEL OF RECORD:

For the Appellant:

Name:	Clifford Rand, Josh Kumar, and Monica Carinci
Firm:	Aird & Berlis LLP Toronto, Ontario
For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada

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[1] Logical relevance is the first of four "*Mohan* factors" to be considered in determining the admissibility of expert opinion evidence. The other factors are: necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert.
[2] The Appellant's filing position was obviously based on the theory that the proceeds of disposition of the machinery and equipment were not $56,490,221 because the transferred pension obligations depressed the fair market value of that machinery and equipment by $8,166,584 to $48,323,637.
[3] In making this argument, the Appellant enlisted the aid of section 68 of the Act. For example, at paragraph 21 of its Written Representations, the Appellant argued that section 68 "contemplates a two-step process for determining the proceeds of disposition of an asset where more than one asset is disposed of in the same transaction, which was the case when the appellant's business was sold." The Appellant's unpleaded section 68 argument must be rejected for two reasons. First, an appellant intending to rely on a statutory provision as part of its case must plead it. Section 48 of the *Tax Court of Canada Rules (General Procedure)* and section (e) of Form 21(1)(a) require that a Notice of Appeal refer to the statutory provisions relied on by the appellant. Second, even if the Appellant had pleaded section 68, that provision has no application on the facts of this appeal. Section 68 does not deal with the amount of proceeds of disposition, or consequential recapture, on the sale of depreciable property to a non-arm's length purchaser. The only provisions that deal with the amount of proceeds of disposition, and consequential recapture, on the sale of depreciable property to a non-arm's length purchaser are paragraph 69(1)(b) and the CCA provisions of the Act.
[4] Paragraph 13 of the Amended Notice of Appeal.
[5] Paragraph 19 of the Writtten Representations of the Appellant.
[6] Transcript, April 11, 2024, page 48, lines 18-25.
[7] Paragraph 19 of the Amended Notice of Appeal.
[8] *Canada v Loblaw Financial Holdings Inc.*, 2021 SCC 51 at paragraph 41 as cited in *Canadian Western Trust Company v Canada*, 2024 FCA 108 at paragraph 8.
[9] The phrase "going concern" is used at paragraphs 10, 11, 17, and 18 of the Amended Notice of Appeal.
[10] The phrase "going concern" is used at paragraphs 1, 10, 13, 19, 24, 29 (twice), 30, and 46 (twice) of the Written Representations of the Appellant.
[11] Paragraph 69(1)(a) of the Act provides:

> Except as expressly otherwise provided in this Act,
>
> (a) where a taxpayer has acquired anything from a person with whom the taxpayer was not dealing at arm's length at an amount in excess of the fair market value thereof at the time the taxpayer so acquired it, the taxpayer shall be deemed to have acquired it at that fair market value; …

[12] *Brown v Canada*, 2003 FCA 192 at paragraph 14.
[13] The Appellant makes such a suggestion in the concluding words of paragraph 19 of its Amended Notice of Appeal.
[14] *Canadian Western Trust Company v Canada*, 2024 FCA 108 at paragraph 13.