Docket: 2019-2929(IT)G

BETWEEN:

JACQUES MARTINEAU,

Appellant,

and

HIS MAJESTY THE KING,

Respondent/Applicant.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on
October 6, 2022, at Montreal, Quebec

Before: The Honourable Madam Justice Gabrielle St-Hilaire

Appearances:

Counsel for the Appellant:	Yves St-Cyr
Counsel for the Respondent/Applicant:	Marie-France Camiré Simon Vincent

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ORDER

UPON the motion filed by the respondent on June 10, 2022, seeking:

1. The striking out of allegations in paragraphs 1(f), 1(g), 12, 22, 23, 33, 37, 38, 39, 41, 45, 50, 55, 60, 61, 63, 64, 67, 70, 71, 74 , 77, 78, 79, 80, 81 and 83 to 90 of the appellant's Amended Answer, pursuant to sections 50, 51 and 53 of the *Tax Court of Canada Rules (General Procedure)*; and
2. The costs of this motion;

AND after hearing the submissions of the parties;

THE COURT ORDERS AS FOLLOWS:

The motion is allowed, with costs, in accordance with the attached Reasons for Order;

Paragraphs 1(f), 1(g), 12, 22, 23, 33, 37, 38, 39, 41, 45, 50, 55, 60, 61, 63, 64, 67, 70, 71, 74(a), 74(c), 74(d), 77, 78, 79, 80, 81 and 86 to 90 of the Amended Answer are struck out, without leave to amend; and

Paragraphs 83, 84 and 85 of the Amended Answer are not struck out.

Signed at Ottawa, Canada, this 3rd day of March 2023.

"Gabrielle St-Hilaire"

St-Hilaire J.

Translation certified true
on this 8th day of August 2025

Margarita Gorbounova, Senior Jurilinguist

Citation: 2023 TCC 25
Date: 20230303
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REASONS FOR ORDER

St-Hilaire J.

I. Introduction

[1] The respondent brought a motion under sections 50, 51 and 53 of the *Tax Court of Canada Rules (General Procedure)* ("Rules") to strike out certain paragraphs of the Amended Answer filed by Jacques Martineau (the "appellant") on May 6, 2022.

[2] On January 24, 2017, the Minister of National Revenue ("Minister") reassessed the appellant under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("ITA"), in respect of his 2007 taxation year. In this reassessment, the Minister included in computing the appellant's income dividends that were apparently received or were deemed to have been received following transactions involving a corporation in which the appellant held 100% of the shares and a trust of which his spouse was the sole beneficiary in a context where the appellant and his spouse became non-residents. Essentially, the trial judge will decide whether the relevant provisions of the ITA require the appellant to include almost $13 million in dividends in his income.

[3] In this case, before the examination for discovery, the parties filed the following pleadings:

(i) The appellant filed a Notice of Appeal on July 31, 2019;
(ii) The respondent filed a Reply to the Notice of Appeal on March 13, 2020;
(iii) The appellant filed an Answer on April 27, 2020.

[4] The parties held examinations for discovery on October 20 and 21, 2021. Following these examinations for discovery, with the consent of the appellant, the respondent filed an Amended Reply to the Notice of Appeal on April 8, 2022.

[5] In April 2022, the respondent consented to an extension of time for the appellant to file an Amended Answer, specifying that he reserved the right to challenge it if necessary since he had not read it. The Court made an order for the extension of time, and the appellant filed his Amended Answer on May 6, 2022 (see Appendix 1, Amended Answer).

[6] Several of the new paragraphs included in the Amended Answer are the subject of this motion to strike.

[7] It seems important to me to specify from the outset that the respondent stated that the purpose of his motion to strike was not to prevent the appellant from making new allegations. Rather, he was of the view that the vehicle chosen, namely, the Amended Answer, was not the appropriate vehicle. He submits that the appellant should have amended his Notice of Appeal, which would have enabled the respondent to respond to the new allegations.

II. Rules of procedure and legal principles applicable to striking out

[8] As mentioned above, the respondent based his motion to strike on sections 50, 51 and 53 of the Rules.

Section 50 of the Rules

[9] Subsection 50(1) sets out the requirements for an answer, specifically, with respect to the facts alleged in the Reply to the Notice of Appeal. Section 50 of the Rules reads as follows:

> 50 (1) Every answer shall state,
>
> (a) the new facts raised in the reply that are admitted,
>
> (b) the new facts raised in the reply that are denied,

> (c) the new facts raised in the reply of which the appellant has no knowledge and puts in issue,
>
> (d) any facts material to the facts pleaded in the reply which have not already been pleaded in the notice of appeal,
>
> (e) any further statutory provisions relied on, and
>
> (f) any other reasons the appellant intends to rely on.
>
> (2) An appellant shall be deemed to deny the allegations of fact made in the reply if an answer is not delivered.

[10] To put this provision into context, we must consider sections 48 and 49 of the Rules, which deal with the rules applicable to the notice of appeal and the reply to the notice of appeal. It should be noted that section 48 and Form 21(1)(a) applicable in this case provide that the notice of appeal must relate the material facts relied on, specify the issues to be decided, refer to the statutory provisions relied on, set forth the reasons the appellant intends to rely on and indicate the relief sought.

[11] Section 49 of the Rules provides that the Reply must state the facts that are admitted, the facts that are denied and the facts of which the respondent has no knowledge and puts in issue. I agree with the comments of Justice Sommerfeldt, who stated at paragraph 8 of *Husky Oil Operations Limited v R,* 2019 TCC 136, that, although section 49 of the Rules does not expressly state the source of the facts that are to be admitted or denied or put in issue, it is clear from the context that section 49 refers to the facts set out in the notice of appeal. In drafting his reply and specifying which facts are to be admitted, denied or put in issue, the respondent must therefore limit himself to the allegations of fact in the notice of appeal. Of course, the respondent also states the assumptions of fact on which the Minister relied in making the assessment and any other material facts. In addition, like the notice of appeal, the reply states the issues to be decided, the statutory provisions relied on, the reasons the respondent intends to rely on and the relief sought.

[12] However, the wording of section 50 of the Rules reproduced above limits what the answer may contain, first with regard to the facts. It should be noted that, pursuant to subsection 50(2), an appellant shall be deemed to deny the allegations of fact made in the reply if an answer is not delivered. However, an appellant who chooses to deliver an answer states the new facts raised in the reply that are admitted, the new facts that are denied and the new facts of which the appellant has no knowledge and puts in issue. The appellant also states in the answer any facts material to the facts pleaded in the reply that were not already pleaded in the notice

of appeal. Therefore, the appellant cannot relate new facts in the answer that were not raised in the notice of appeal and have no connection with the facts raised in the reply.

[13] The issues to be decided must be specified in the notice of appeal, in accordance with section 48 of the Rules, and section 50 does not provide that the answer may be used to specify new issues to be decided.

Section 51 of the Rules

[14] The respondent also bases his motion on section 51, which sets out the rules applicable to all pleadings. Subsection 51(3) reads as follows:

> 51(3) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading.

[15] The restriction that a party may not raise a new ground of claim ("*un nouveau motif*" in the French version) in subsection 51(3) should not be confused with the authorization in paragraph 50(1)(f) to state any other reasons the appellant intends to rely on ("*tous autres moyens sur lesquels l'appelant entend se fonder*" in the French version).

[16] The appellant cannot use the answer to raise a new ground of claim, but must proceed by way of amendment to the notice of appeal. This view is supported by the following excerpt from the reasons given by Justice Lamarre-Proulx in *Modlivco Inc v Canada*, 95 DTC 692 at paragraphs 22 to 24, a case in which the appellant attempted to raise a new ground of claim (see para 6 and the reference to "ground of appeal"):

> 22 Counsel for the Appellant referred also to the *Tax Court of Canada Rules (General Procedure)* (the "Rules") and stated that section 50, dealing with the rules of pleadings applicable to the "Answer" provides as follows in subsection (2):
>
> (2) An appellant shall be deemed to deny the allegations of fact made in the reply if an answer is not delivered.
>
> 23 He submits that he is therefore not barred from making arguments on the merits of the additional assessment even though such arguments were not raised in the notice of appeal. If the Court finds against him on this point he will ask permission to amend the notice of appeal for that purpose.

> 24 The Rules require that the notice of appeal specify the issues to be decided and set forth the reasons upon which the Appellant intends to rely. If the Appellant wishes to raise other points than the issue of due dispatch respecting the first assessment, it must do so by amendment of its notice of appeal and not by way of subsection 50(2) of the Rules.

Having found that the appellant was attempting to raise a new issue to be decided (see *Modlivco* at para 6, "ground of appeal"), Justice Lamarre-Proulx held that it must do so by amendment of its notice of appeal and not by way of section 50 of the Rules applicable to the answer.

Section 53 of the Rules

[17] The respondent also cites section 53 and relies more specifically on paragraph 53(1)(a), which sets out the following:

> 53(1) The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document
>
> (a) may prejudice or delay the fair hearing of the appeal;

[18] The case law principles that apply to a motion to strike under section 53 of the Rules are well established and have been reiterated in numerous decisions of this Court and the Federal Court of Appeal. It is well settled in the case law that the test applicable to motions to strike is to determine whether it is "plain and obvious" that the facts as alleged do not disclose any reasonable cause of action or that the position has no hope of succeeding, and the threshold to be met is high.

[19] Chief Justice Bowman (as he then was) provided a brief summary of the case law principles relevant to this case in *Sentinel Hill Productions (1999) Corporation, Strother v R*, 2007 TCC 742, cited by the appellant in support of his position relating to this motion. Justice Bowman stated the following:

> [4] I shall begin by outlining what I believe are the principles to be applied on a motion to strike under Rule 53. There are many cases in which the matter has been considered both in this court and the Federal Court of Appeal. It is not necessary to quote from them all as the principles are well established.
>
> (a) The facts as alleged in the impugned pleading must be taken as true subject to the limitations stated in *Operation Dismantle Inc. v. R*, [1985] 1 S.C.R. 441 (S.C.C.), at 455. It is not open to a party attacking a pleading under Rule 53 to challenge assertions of fact.

> (b) To strike out a pleading or part of a pleading under Rule 53 it must be plain and obvious that the position has no hope of succeeding. The test is a stringent one and the power to strike out a pleading must be exercised with great care.
>
> (c) A motions judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.
>
> [Emphasis added; footnote omitted.]

[20] More recently, in *Canadian Imperial Bank of Commerce v R*, 2013 FCA 122, the Federal Court of Appeal affirmed the test for striking pleadings. It stated the following:

> [7] There is no dispute as to the general test for striking pleadings. It was recently restated in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paragraph 17. In the context of a motion to strike the Crown's reply in an income tax appeal, the motion will be granted only if it is plain and obvious, assuming the facts as pleaded in the reply are true, that the reply fails to state a reasonable basis for concluding that the reassessment under appeal is correct.
>
> [Emphasis added.]

[21] It is worth repeating the words of Justice Campbell, who stated the following in *General Motors of Canada Ltd v R*, 2006 TCC 184:

> [24] Generally speaking portions of pleadings will not be struck under section 53 of the *Rules* except in the most plain and obvious cases. . . . If it is to be struck because it is prejudicial or irrelevant, the case to do so must be clear and apparent.

[22] In summary, in order to determine whether certain paragraphs of the appellant's Amended Answer should be struck out as requested by the respondent in this case, it must be plain and obvious that they may prejudice the fair hearing of the appeal pursuant to paragraph 53(1)(a) of the Rules.

[23] The case law cited above confirms that the test for striking out pleadings is stringent and requires that the party that filed the motion to strike meet a high threshold to succeed (see *Husky Oil*, *supra* at para 18). I will deal with the respondent's motion to strike based on the principles discussed above.

III. Analysis

Inconsistency between the facts raised in the Notice of Appeal and those in the Amended Answer

[24] In his Notice of Motion, the respondent argued that certain allegations in the Amended Answer should be struck out because they were inconsistent with earlier allegations in the Notice of Appeal. The respondent presented his arguments by dividing the disputed amendments into three groups. I propose to deal with the amendments that the respondent seeks to have struck out by grouping them under the headings Block 1, Block 2 and Block 3.

[25] It is worth restating the relevance of sections 48 and 50 of the Rules, discussed above, according to which the appellant must relate the material facts in his Notice of Appeal and cannot, in his answer, raise new facts that are not related to the facts raised in the Reply to the Notice of Appeal. Furthermore, section 51 bars a party from making an allegation that is inconsistent with an allegation made in a previous pleading.

Block 1 of alleged inconsistencies

[26] In his Notice of Motion, the respondent argued that the allegations in paragraphs 1(f), 1(g), 12, 22, 23, 33, 60 and 61 of the Amended Answer were inconsistent with the allegations at paragraphs 2, 4, 26, 68 and 69 of the Notice of Appeal, which read as follows:

> [TRANSLATION]
>
> Notice of Appeal
>
> Statement of facts
>
> 2. The appellant was a resident of Canada until September 30, 2007;
>
> 4. J. Cayouette was a resident of Canada until September 30, 2007;
>
> 26. On September 30, the appellant and J. Cayouette ceased to be residents of Canada in order to establish their residence in Monaco and carry out their retirement plan.
>
> Statutory provisions and grounds in support of this appeal
>
> 68. However, when this amount was actually payable to J. Cayouette under subsections 104(13) and 104(24) of the ITA, J. Cayouette and the appellant were no longer residents of Canada;

> 69. Moreover, the appellant argues that the respondent erred in holding that JCS Trust ceased to be a resident of Canada at the same time as the appellant and J. Cayouette, namely, on September 30, 2007;

[27] In these paragraphs of his Notice of Appeal, the appellant made allegations concerning the residence of the appellant and of J. Cayouette. I note that, at paragraphs 2.1 and 2.9 of his Reply and his Amended Reply to the Notice of Appeal, the respondent admitted the allegations of fact made by the appellant at paragraphs 2, 4 and 26 of his Notice of Appeal.

[28] Paragraphs 1(f), 1(g), 12, 22, 23, 33, 60 and 61 of the Amended Answer read as follows:

> [TRANSLATION]
>
> 1. (f) On September 30, 2007, the appellant and his spouse left Canada and flew to Cap d'Ail, France. In the weeks that followed, they settled in Monaco and submitted a formal application for permanent residence to the Monaco authorities;
>
> 1. (g) It was not until October 25, 2007, that the Monaco authorities formally approved their applications to become residents of Monaco and issued their respective residence cards.
>
> Finally, he denies that no tax was paid in Canada and specifies that the appellant duly reported and paid all his taxes for the Period (as did his spouse), including ~~his~~ the departure tax, specifically, on deemed gains totalling approximately $3.2 million for the appellant (and more than $315,000 for his spouse). Therefore, ~~and~~ the appellant duly filed his income tax return for the Period with the Canada Revenue Agency (**CRA**) (as did his spouse), in accordance with the *Income Tax Act* (Canada) (**ITA**).
>
> 12. He notes the denials in paragraph 2.16 of the Amended Reply to the Notice of Appeal and joins issue. He adds that no amount equivalent to that of the deemed dividend was paid or credited to Johanne Cayouette as beneficiary of ~~the~~ JCS Trust, while JCS Trust was a resident of Canada. ~~and the said beneficiary was a non-resident of Canada.~~ Finally, he notes that no amount ~~had~~ became payable to the beneficiary of JCS Trust while the beneficiary ~~as well as~~ and JCS Trust were both residents of Canada ~~since, in accordance with subsection 104(24) of the ITA, no amount had been paid to the beneficiary, and she was not entitled to enforce payment of it during the Period.~~
>
> 22. He denies the allegations ~~contained~~ in paragraph 9.2 of the Amended Reply to the Notice of Appeal and specifies that the appellant and his spouse ~~settled in~~ went to ~~Monaco~~ Cap d'Ail, France, on October 1, 2007, to settle in Monaco. He adds that they did not actually become residents of Monaco until October 25, 2007,

after the Monaco authorities had hand-delivered their respective residence cards. ~~the date on which they became non-residents of Canada.~~

23. He admits the facts ~~alleged~~ contained in paragraphs 9.3 to 9.7 of the Amended Reply to the Notice of ~~Appeal.~~ Appeal, but clarifies that they did not become residents of Monaco until October 25, 2007.

33. As for paragraph 9.25 of the Amended Reply to the Notice of Appeal, the appellant relies on the tax returns for the Period that he and ~~J. Cayouette~~ Johanne Cayouette filed and denies anything that is inconsistent with them. He clarifies that, although he and his spouse left Canada on September 30, 2007, they arrived in Cap d'Ail, France, on October 1, 2007, to file an application for residence with the Monaco authorities.

60. He denies the allegations ~~contained at~~ in paragraph 9.51(f) of the Amended Reply to the Notice of Appeal as worded and states that Johanne Cayouette and he ~~became non-residents of~~ left Canada on September 30, 2007, but did not become residents of Monaco until October 25, 2007, when they received their respective residence cards. It is for this court to determine the date on which he and his spouse became non-residents of Canada. Furthermore, ~~October 1, 2007.~~ h~~H~~e denies that the facts described in that paragraph constitute a series of transactions for the purposes of section 245 of the ITA.

61. He denies the allegations ~~contained at~~ in paragraph 9.51(g) of the Amended Reply to the Notice of Appeal as worded, namely, that JCS Trust "allocated" an amount equivalent to the deemed dividend of $12,919,334 to Johanne Cayouette on October 1, 2007. He ~~and~~ clarifies that JCS Trust actually reported a deemed dividend of $12,919,334 in its income tax return for its fiscal year ending October 1, 2007, and ~~that JCS Trust also~~ claimed a deduction for the same amount, to which it was not entitled, relying on ~~in accordance with~~ subsection 104(6) of the ITA. The amount equivalent to the $12,919,334 deemed dividend was in no way "allocated" to Johanne Cayouette on October 1, 2007, contrary to the respondent's claims, since no amount had become payable to the beneficiary on that date. The respondent had the power to assess JCS Trust in order to disallow the said deduction and tax it on the amount of the deemed dividend, but chose not to do so. As for the remainder of the paragraph, the appellant relies on the income tax return that JCS Trust filed for its fiscal year ending on October 1, 2007, and denies anything that is inconsistent with it. ~~He adds that, as of October 1, 2007, Johanne Cayouette was a non-resident of Canada and that Part I of the ITA did not apply to her.~~ He also clarifies that the tax under Part XIII of the ITA could not apply either because the amount ~~of the said~~ equivalent to the said deemed dividend had not been paid or credited to Johanne Cayouette as of that date. Finally, he denies that the allegations ~~described~~ in paragraph 9.51(g) of the Amended Reply to the Notice of Appeal constitute a series of transactions for the purposes of section 245 of the ITA.

[29] At the hearing, the respondent highlighted the words added and crossed out in paragraphs 1(f), 1(g), 12, 22, 23, 33, 60 and 61 of the Amended Answer regarding the residence of the appellant and his spouse. He submitted that the amendments raised questions regarding the date on which they ceased to be residents of Canada. He pointed out that these allegations were made in the Notice of Appeal and admitted in the Reply (and in the Amended Reply) to the Notice of Appeal. For example, we can see that in paragraph 22 of the Amended Answer, the appellant crossed out the words [TRANSLATION] "the date on which they became non-residents of Canada", referring to October 1, 2007. This amendment created an inconsistency between paragraph 22 of the Amended Answer and the allegations of fact in the Notice of Appeal, which were admitted in the Reply, with respect to the residence of the appellant and his spouse.

[30] In his submissions at the hearing, the appellant argued that the Court would have to determine when the amount became payable by JCS Trust to the beneficiary, J. Cayouette. The parties take opposing positions on the issue of the beneficiary's residence at the time the amount became payable by the trust. Regarding the date of residence raised in the Amended Answer, the appellant stated that [TRANSLATION] "technically it should not even be good for us" and added that [TRANSLATION] "we did not enter a date of non-residence in Canada because we realized that determining residence or whether someone is a resident of Canada or not is a question of mixed fact and law. And it is a matter for the Court to determine" (Transcript of the hearing at 39). The appellant argued that the amendments made to the Answer with respect to the allegations relating to the residence of the appellant and his spouse merely reflected what was said on discovery and he wanted to include that in the pleadings (Transcript of the hearing at 42).

[31] When the Court asked why the appellant did not opt for an amendment to his Notice of Appeal, counsel for the appellant replied that [TRANSLATION] "first, because we are of the view that it makes no difference if we do it in the Answer" and that "the elements that we raised did not affect the debate" (Transcript of the hearing at 42, 46). He added that this would also have caused an undue delay.

[32] With respect, once the appellant made allegations regarding the date on which the appellant and his spouse became non-residents and the respondent admitted those allegations of fact, this question was no longer at issue. However, if the appellant wishes to amend his allegations of fact in this regard, he must do so by way of amendment to his Notice of Appeal. Otherwise, the allegations in the Amended Answer are inconsistent with the allegations made in the Notice of Appeal and admitted in the Reply and Amended Reply to the Notice of Appeal. In my view, this

is contrary to subsection 51(3) of the Rules. For these reasons, paragraphs 1(f), 1(g), 12, 22, 23, 33, 60 and 61 of the Amended Answer are struck out, without leave to amend.

Block 2 of alleged inconsistencies

[33] In his Notice of Motion, the respondent argued that the allegations in paragraphs 37, 38, 39, 45, 50, 55, 61 (also in Block 1), 63, 64, 67, 71, 77, 78, 79, 80, 81 and 83 to 90 of the Amended Answer were inconsistent with the allegations in paragraph 34(b) of the Notice of Appeal, which reads as follows:

> [TRANSLATION]
>
> 34. (b) Pursuant to subsection 104(6) of the ITA, JCS Trust claimed a deduction for the same amount with respect to the income allocated to J. Cayouette;

[34] Paragraphs 37, 38, 39, 45, 50, 55, 61, 63, 64, 67, 71, 77, 78, 79, 80, 81 and 83 to 90 of the Amended Answer read as follows:

> [TRANSLATION]
>
> 37. He denies paragraph 9.28(b) of the Amended Reply to the Notice of Appeal as worded and clarifies that JCS Trust actually reported a $12,919,334 deemed dividend in its income tax return for the fiscal year ending October 1, 2007, and that JCS Trust ~~also~~ erroneously claimed a deduction for the same amount ~~in accordance with~~ relying on subsection 104(6) of the ITA. Because no amount equivalent to the amount of the deemed dividend was payable by JCS Trust to its beneficiary on October 1, 2007, JCS Trust was not entitled to claim the deduction set out in subsection 104(6) of the ITA. ~~As for the remainder of the paragraph, the appellant relies on the income tax return that JCS Trust filed and denies anything that is inconsistent with it.~~
>
> 38. He denies paragraph 9.28(c) of the Amended Reply to the Notice of Appeal as worded and specifies that JCS Trust was not required to include an amount of tax payable under Part XII.2 of the ITA in its income tax return for the fiscal year ending October 1, 2007. ~~As for the remainder of the paragraph, the appellant relies on the income tax return that JCS Trust filed and denies anything that is inconsistent with it.~~
>
> 39. He denies paragraph 9.28(d) of the Amended Reply to the Notice of Appeal as worded and specifies that JCS Trust was not required to include an amount of tax payable under Part XIII of the ITA in its income tax return for the fiscal year ending October 1, 2007, because no amount had been paid or credited to the beneficiary of JCS Trust as of October 1, 2007. ~~As for the remainder of the paragraph, the~~

~~appellant relies on the income tax return that JCS Trust filed and denies anything that is inconsistent with it.~~

45. He denies the allegations ~~contained~~ in paragraph 9.34 of the Amended Reply to the Notice of Appeal. He specifies that the beneficiary of JCS Trust instructed JCS Trust~~'s RBC Bahamas bank~~ to pay the amount of $12.5 million, ~~which had become payable to her on November 1, 2007,~~ to the appellant instead, since she had assumed JCS Trust's $12.5 million debt to the appellant.

50. He denies the allegations ~~contained~~ in paragraph 9.45 of the Amended Reply to the Notice of Appeal. He specifies that the amount payable to the beneficiary of JCS Trust is not determined when the income is supposedly earned by the trust, but only when the trustee, in exercising his discretion, declares the quantum of the amount the trustee intends to distribute to the said beneficiary or when the said amount is paid. He adds that the allegations ~~contained~~ in paragraph 9.45 of the Amended Reply to the Notice of Appeal constitute a finding of fact and law and that they were not part of the CRA's tax audit of the appellant. Consequently, the onus to ~~prove~~ establish them is on the respondent. He also states that JCS Trust did not receive any income or other amount arising from Margesca's common shares during the Period. In addition, Margesca paid an initial dividend of $12,719,335 to JCS Trust only on November 1, 2007. Therefore, no amount could be payable or paid to Johanne Cayouette before that date, contrary to the respondent's claims, which are denied. On November 1, 2007, Johanne Cayouette and JCS Trust were residents of Monaco and the Bahamas, respectively.

55. He admits the facts ~~alleged~~ contained in paragraph 9.50 of the Amended Reply to the Notice of Appeal. However, he adds that JCS Trust erroneously claimed the deduction under subsection 104(6) of the ITA, since no amount was payable to its beneficiary at that time.

61. He denies the allegations ~~contained~~ in paragraph 9.51(g) of the Amended Reply to the Notice of Appeal as worded, namely, that JCS Trust "allocated" an amount equivalent to the deemed dividend of $12,919,334 to Johanne Cayouette on October 1, 2007. He ~~and~~ clarifies that JCS Trust actually reported a $12,919,334 deemed dividend in its income tax return for the fiscal year ending on October 1, 2007, and ~~that JCS Trust also~~ claimed a deduction for the same amount, to which it was not entitled, relying on ~~in accordance with~~ subsection 104(6) of the ITA. The amount equivalent to the $12,919,334 deemed dividend was not "allocated" to Johanne Cayouette on October 1, 2007, contrary to the respondent's claims, since no amount had become payable to the beneficiary on that date. The respondent had the power to assess JCS Trust in order to disallow the said deduction and tax it on the amount of the deemed dividend, but chose not to do so. As for the remainder of the paragraph, the appellant relies on the income tax return that JCS Trust filed for its fiscal year ending on October 1, 2007, and denies anything that is inconsistent with it. ~~He adds that, as of October 1, 2007, Johanne Cayouette was a non-resident of Canada and that Part I of the ITA did not apply to her.~~ He also clarifies that the

tax under Part XIII of the ITA could not apply either since the amount ~~of the said~~ equivalent to the said deemed dividend had not, , been paid or credited to Johanne Cayouette as of that date. Finally, he denies that the allegations ~~described~~ in paragraph 9.51(g) of the Amended Reply to the Notice of Appeal constitute a series of transactions for the purposes of section 245 of the ITA.

63. He denies the allegations ~~contained~~ in paragraphs 9.52 and 9.53 of the Amended Reply to the Notice of Appeal and clarifies that he duly reported and paid all his income taxes for the Period, including the departure tax specifically applicable to his deemed gains at the end of the said ~~same~~ Period, all in accordance with the ITA. He further states that, since JCS Trust was not entitled to the deduction claimed under subsection 104(6) of the ITA, the respondent had the power to assess JCS Trust in order to disallow the amount of this deduction and tax it on the deemed dividend, but chose not to do so.

64. He denies the allegations ~~contained~~ in paragraph 9.54 of the Amended Reply to the Notice of Appeal. As for paragraph 9.54(c), he clarifies that no amount equivalent to the $12,919,334 deemed dividend was allocated to Johanne Cayouette on October 1, 2007, and that JCS Trust erroneously claimed the said dividend as a deduction. No amount was payable by JCS Trust to its beneficiary at that time.

67. He denies paragraph 10.2 of the Amended Reply to the Notice of Appeal in its entirety and specifies that it constitutes only allegations relating to tax policies and statements of law, which only this Court is authorized to determine. As for paragraph 10.2(c), he adds that JCS Trust erroneously claimed the deduction pursuant to subsection 104(6) of the ITA. Because no amount was payable to its beneficiary at that time, JCS Trust was not entitled to such a deduction. ~~the respondent will have to demonstrate before this Court.~~

71. As for paragraph 11.1(e) of the Amended Reply to the Notice of Appeal, he specifies that the amount of $12.5 million became payable by JCS Trust to its beneficiary on November 1, 2007.

77. He also specifies that JCS Trust reported a deemed dividend ~~income~~ of $12,919,334 for its taxation year ending on October 1, 2007, and claimed a deduction for the same amount, to which it was not entitled, ~~pursuant to~~ under subsection 104(6) of the ITA; the beneficiary of JCS Trust and the appellant (through the operation of the attribution rules set out in the ITA) were not required to include the said amount in their income for the Period under Part I of the ITA, because no amount was payable by JCS Trust to its beneficiary on that date pursuant to the ITA. ~~they were both non-residents of Canada at that time, and Part I of the ITA did not apply to them.~~

78. The respondent has made much of the fact that JCS Trust claimed a deduction under subsection 104(6) of the ITA with respect to the amount of the dividend deemed to have been received by JCS Trust on August 30, 2007. According to the respondent, the fact of having claimed such a deduction was necessarily equivalent

to the same amount being distributed to its beneficiary, an amount that the beneficiary would otherwise have had to include in computing her income under subsection 104(13) of the ITA. However, this position of the respondent does not take into account subsection 104(24) of the ITA or the wording of subsections 104(6) and 104(13) of the ITA.

79. Subsection 104(24) is clear and specific. No deduction (by a trust) under subsection 104(6) is permitted, and no inclusion (in the beneficiary's income) under subsection 104(13) is required unless the amount that may be deducted by a trust and that should be included in the beneficiary's income "was paid … or the beneficiary was entitled … to enforce payment of it". According to the facts, by the time any amount became payable or paid by JCS Trust to its beneficiary, the beneficiary (and the appellant) and JCS Trust were residents of Monaco and the Bahamas, respectively.

80. The fact that JCS Trust claimed the amount of the deemed dividend as a deduction while not authorized to do so under subsection 104(6) does not in any way support the conclusion that its beneficiary was then required to include the said amount in computing her income under subsection 104(13) of the ITA. On the contrary, the ITA contains no provisions that presume that, where a trust erroneously claims the deduction set out in subsection 104(6), the amount deducted must be considered to have been allocated to the beneficiary. In other words, the fact that a trust erroneously claims a deduction under subsection 104(6) does not give rise to the presumption that an amount equivalent to this deduction has been allocated to the beneficiary.

~~73.~~81. Although JCS Trust claimed a deduction for the $12,919,334 deemed dividend in its return for the taxation year ending on October 1, 2007, JCS Trust was not entitled to such a deduction under subsection 104(6) of the ITA because no amount was payable to its beneficiary at that time. The respondent had the power to assess JCS Trust in order to disallow that deduction and to tax it on the said amount, but chose not to do so. The appellant reiterates that the obligation of JCS Trust's beneficiary to include the amount of $12,919,334 in computing her income under subsection 104(13) of the ITA is subject to the terms of that provision (i.e. the amount had become payable) and of subsection 104(24) (i.e. an amount is deemed not to have become payable unless it was paid or the beneficiary was entitled to enforce payment of it). In this case, with respect to the $12,719,335 dividend paid to JCS Trust on November 1, 2007, by Margesca, only an amount of $12.5 million became payable by JCS Trust to the beneficiary on that day. On November 1, 2007, both the beneficiary and the appellant were residents of Monaco, and Part I of the ITA did not apply to them.

83. As for the respondent's position that the GAAR applies in this case, the appellant submits that applying it is erroneous.

84. According to the case law, the GAAR may apply when the parties to a transaction or series of transactions used the provisions of the ITA in accordance with their wording.

85. In other words, the GAAR comes into play to redefine tax consequences when provisions of the ITA were used correctly but a tax benefit that was not intended by these provisions resulted.

86. In this case, the appellant argues that he and JCS Trust did not take advantage of any of the provisions of the ITA in order to circumvent their spirit, including subsection 104(6) of the ITA, given that JCS Trust was simply not entitled to the deduction set out in that subsection. Since an amount equivalent to the $12,919,334 deemed dividend was not payable to the beneficiary on October 1, 2007, JCS Trust could not legally claim the deduction of this amount in the income tax return it filed for the taxation year ending on October 1, 2007.

87. The fact that JCS Trust claimed a deduction to which it was not entitled is not subject to the GAAR. According to the case law, section 245 of the ITA is a provision of last resort. The respondent may rely on this provision when the other provisions of the ITA were used correctly by a taxpayer in the context of transactions or series of transactions, but only when the spirit of those provisions was frustrated or abused in order to obtain a tax benefit.

88. The problem with the respondent's position is that JCS Trust was not eligible for the deduction claimed under subsection 104(6) of the ITA. The respondent chose not to assess JCS Trust to disallow this deduction and to tax it on the $12,919,334 deemed dividend.

89. The only tax benefit in this appeal is that JCS Trust claimed a deduction to which it was not entitled.

~~74.~~90. The appellant therefore submits that the GAAR clearly cannot apply to this appeal.

[35] The respondent pointed to the fact that several of the paragraphs in the Amended Answer found in Block 2 contain an allegation that JCS Trust *erroneously* claimed the deduction set out in subsection 104(6) of the ITA (see paragraphs 37, 55, 64, 67 and 80) or claimed a deduction to which it was not entitled (see paragraphs 61, 63, 77, 81, 86, 87, 88 and 89). In other paragraphs (38, 39), the appellant crossed out his allegation that he [TRANSLATION] "relies on the tax return that JCS Trust filed and denies anything that is inconsistent with it", which, according to the respondent, includes a change of position with respect to the deduction in subsection 104(6) of the ITA. As for paragraphs 45, 50, 71 and 78, according to the respondent, these are statements that also touch on the concept of the time when the amount became payable by JCS Trust to the beneficiary. The same

also applies to paragraph 79. Paragraph 90, as drafted with the word "therefore", simply flows from the preceding paragraphs and has no meaning if the other paragraphs are crossed out. I note that some of the paragraphs in Block 2 contain new arguments, which could under certain circumstances be consistent with section 50 of the Rules, but the fact remains that they contain allegations inconsistent with paragraph 34(b) of the Notice of Appeal.

[36] At the hearing, the appellant argued that the paragraphs in Block 2 merely state that JCS Trust claimed an amount under subsection 104(6) of the ITA, a provision that authorizes a trust to claim a deduction for an amount payable to a beneficiary. He added that subsection 104(13) provides that the beneficiary of the amount payable shall include it in computing her income, whereas subsection 104(24) provides that an amount is deemed not to have become payable to a beneficiary unless it was paid or the beneficiary was entitled to enforce payment of it. The appellant now argues that JCS Trust erroneously claimed the deduction. The appellant states that he would like to raise an additional argument to this effect. The respondent argues that, by stating in his Notice of Appeal that the trust claimed a deduction pursuant to subsection 104(6), the appellant was indicating that the amount was payable or that the beneficiary was entitled to enforce payment of it. However, by stating in the Amended Answer that the trust erroneously claimed the deduction, the appellant is now submitting that, at the time the deduction was claimed by the trust, the amount was not payable to the beneficiary. According to the respondent, this constitutes a change of position on the part of the appellant.

[37] In response to my questions, the appellant acknowledged that the impugned statements contain [TRANSLATION] "something new" and added that, [TRANSLATION] "at the end of the day, it makes absolutely no difference because JCS Trust is not the appellant in this case" (Transcript at 35–36).

[38] The appellant submits that paragraphs 50(1)(e) and (f) of the Rules allow him to state in an answer any further statutory provisions relied on and any other reasons he intends to rely on. He argues that is what he did in the paragraphs included in Block 2. I disagree. While I do not disagree with his submissions regarding what is permitted under paragraphs 50(1)(e) and (f) of the Rules, in the paragraphs included in Block 2, except paragraphs 83, 84 and 85, which I will address below, the appellant attempted to add a new allegation of fact that JCS Trust claimed a deduction to which it was not entitled or that it erroneously claimed that deduction. This allegation is different and is inconsistent with his Notice of Appeal. If the appellant wishes to make new allegations of fact, the answer is not the appropriate vehicle for doing so.

[39] Paragraphs 83, 84 and 85 of the Amended Answer contain the appellant's arguments regarding the application of the GAAR. The respondent did not make any submissions regarding these three paragraphs to explain how these paragraphs are inconsistent with paragraph 34(b) of the Notice of Appeal. Neither did the appellant. In his Notice of Appeal (see paragraphs 78 and following), the appellant argued his position regarding the application of the GAAR in this case. In my opinion, there is no reason to strike out paragraphs 83, 84 and 85, which reiterate the appellant's general position with respect to the GAAR.

[40] Paragraphs 37, 38, 39, 45, 50, 55, 61, 63, 64, 67, 71, 77, 78, 79, 80, 81, and 86 to 90 of the Amended Answer are inconsistent with the allegations in paragraph 34(b) of the Notice of Appeal and raise new allegations of fact. Accordingly, they are struck out, without leave to amend. Paragraphs 83, 84 and 85 are not struck out.

Block 3 of alleged inconsistencies

[41] In his Notice of Motion, the respondent argued that the allegations in paragraphs 41 and 70 of the Amended Answer are inconsistent with the allegations in paragraph 35 of the Notice of Appeal, which reads as follows:

> [TRANSLATION]
>
> 35. On October 31, 2007, Margesca distributed the amount of $12,719,335.00 to JCS Trust.

[42] Paragraphs 41 and 70 of the Amended Reply read as follows:

> [TRANSLATION]
>
> 41. He denies the allegations ~~contained~~ in paragraph 9.29 of the Amended Reply to the Notice of Appeal and states that an initial dividend of $12,719,335 was ~~declared~~ established on October 29, 2007, and ~~paid~~ became payable by Margesca to JCS Trust on November 1, 2007.
>
> 70. As for paragraph 11.1(c) of the Amended Reply to the Notice of Appeal, he clarifies that an initial dividend of $12,719,335 was declared on October 29, 2007, and became payable by Margesca to JCS Trust on November 1, 2007.

[43] At the beginning of his oral arguments, the appellant mentioned paragraphs 41 and 70 of the Amended Answer in order to add them to Block 3, but made no

representations concerning his position with respect to the motion to strike out these paragraphs.

[44] At paragraph 35 of his Notice of Appeal, the appellant states that Margesca distributed more than $12 million to JCS Trust on October 31, 2007, whereas paragraphs 41 and 70 of his Amended Answer state that this amount became payable only on November 1, 2007. On its face, there is an inconsistency between the allegation of fact in the Notice of Appeal and the statements in the Amended Answer. For this reason, paragraphs 41 and 70 of the Amended Answer are struck out, without leave to amend.

Motions to strike out new issues

[45] The respondent asks that three new issues that appear in the Amended Answer at paragraphs 74(a), (c) and (d) be struck out. They read as follows:

> 74. As for paragraph 12 of the Amended Reply to the Notice of Appeal, he relies on paragraph 54 of his Notice of Appeal. However, he adds that the following issues will also have to be determined by this Court in this appeal:
>
> (a) On what date(s) did the appellant and his spouse cease to be residents of Canada and become residents of Monaco?
>
> . . .
>
> (c) During the Period, was JCS Trust legally entitled to claim the deduction set out in subsection 104(6) of the ITA?
>
> (d) Can this court apply the provisions relating to the General Anti-Avoidance Rule (GAAR) when a taxpayer has erroneously taken advantage of a provision of the ITA (subsection 104(6)), which it was not entitled to do?

[46] As the respondent pointed out, the issue in paragraph 74(a) is related to the new allegations of fact concerning the residence of the appellant and his spouse. These allegations in Block 1 were struck out for the reasons stated above. With respect to paragraphs 74(c) and (d) of the Amended Answer, these are issues arising from new allegations of fact regarding whether JCS Trust [TRANSLATION] "erroneously" claimed the deduction set out in subsection 104(6) of the ITA. These Block 2 allegations were struck out for the reasons stated above.

[47] At the hearing, the appellant maintained that these were not new issues (Transcript at 59). In his view, the issue added at paragraph 74(c) is [TRANSLATION] "incidental" to determining the issue of when the amount was payable.

[48] The appellant noted that section 245 had already been cited in an issue identified in the Notice of Appeal and characterized the issue added in paragraph 74(d) as [TRANSLATION] "a sub-sub-category of the same issue". It is true that the appellant raised the issue of applying section 245 in the issues to be decided listed in paragraphs 54(f), (g) and (h) of his Notice of Appeal. However, these issues, as stated, make no mention of whether JCS Trust lawfully or erroneously claimed the deduction permitted by subsection 104(6) of the ITA.

[49] The respondent responded to the appellant's submissions by stating that there is [TRANSLATION] "a huge difference between the appellant's Notice of Appeal, where he stated in black and white that he and his spouse became non-residents on September 30, and his Amended Answer, where he alleged that they potentially became non-residents in the month of October" (Transcript at 63). Because the residence of the appellant and his spouse was the subject of allegations of fact admitted by the respondent, this issue was not explored on discovery and, according to the respondent, he is entitled to respond to these issues.

[50] With respect, in my view, not only are these issues connected with new allegations of fact in the Amended Answer that have been struck out, but more importantly, these are new issues that were added in the Amended Answer. As discussed above, this is contrary to the appellant's obligation to specify the issues to be decided in his Notice of Appeal pursuant to section 48 and Form 21(1)(a) of the Rules. Furthermore, this is inconsistent with section 50 of the Rules, which does not provide that new issues can be added in an answer. For these reasons, the new issues set out in paragraphs 74(a), (c) and (d) of the Amended Answer are struck out, without leave to amend.

IV. Conclusion

[51] It should be noted that, at the hearing, the respondent pointed out that the purpose of his motion to strike was not to prevent the appellant from making new allegations, but to challenge the appellant's decision to include these allegations in an Amended Answer rather than in an amendment to his Notice of Appeal. According to the respondent, this way of proceeding deprives him of his right to

respond to the allegations and constitutes a breach of procedural fairness. The respondent indicated that he had suggested to the appellant that he amend his Notice of Appeal. The appellant acknowledged that this was true, stating that the parties had only had a cursory discussion on this subject. I asked the appellant why he had not proceeded with an amendment to his Notice of Appeal since it appears that the respondent would have agreed to it. He replied that this would have unduly delayed the proceedings. He added that it was not certain that the respondent would have agreed to the amendments to the Notice of Appeal. With respect, I fail to see how amending the Notice of Appeal would have created an undue delay greater than that created by amending the Answer.

[52] The motion is granted, with costs, and the following paragraphs of he Amended Answer are struck out, without leave to amend: 1(f), 1(g), 12, 22, 23, 33, 37, 38, 39, 41, 45, 50, 55, 60, 61, 63, 64, 67, 70, 71, 74(a), 74(c), 74(d), 77, 78, 79, 80, 81 and 86 to 90. Paragraphs 83, 84 and 85 of the Amended Answer are not struck out.

Signed at Ottawa, Canada, this 3rd day of March 2023.

"Gabrielle St-Hilaire"

St-Hilaire J.

Translation certified true
On this 8th day of August 2025

Margarita Gorbounova, Senior Jurilinguist

APPENDIX 1

2019-2929(IT)G

TAX COURT OF CANADA

BETWEEN:

JACQUES MARTINEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED ANSWER

In answer to the Amended Reply to the Notice of Appeal (**Amended Reply to the Notice of Appeal)** relating to the taxation year ending on September 30, 2007, (the **Period**), a copy of which was sent to the appellant on March ~~13~~8, 202~~2~~0.

THE APPELLANT STATES THE FOLLOWING:

1. He denies the allegations ~~contained~~ in paragraph 1 of the Amended Reply to the Notice of Appeal and specifies that they constitute statements of law, which are for this Court to determine. ~~He~~ The appellant further notes that, during the Period:~~,~~ ~~he and his spouse, Johanne Cayouette, considered retiring, but that it was imperative for the appellant to be able to improve his spouse's financial situation beforehand to ensure that she had an income that would allow her to continue to meet the financial obligations she had prior to her retirement. To do so, the appellant had only one completely free and available asset during the Period, the shares of~~

~~Margesca, his company. He adds that the creation of the Johanne Cayouette Spousal Trust (**JCS Trust**) in Canada and the sale of his Margesca shares to JCS Trust were in fact intended to enable his spouse and him to retire and not, as the respondent claims, to carry out tax planning aimed at disposing of the Margesca shares without paying tax. He also explains that the appellant's primary intention was to ensure his spouse's financial security, in addition to his own, with a view to preparing for their retirement in Canada in the reasonably near future and that it was only towards the end of the Period that they chose to retire outside of Canada, more specifically, by leaving the country to settle in Monaco.~~

(a) He was considering retiring, but it was imperative that he first improve the financial situation of his spouse, Johanne Cayouette, so she would have sufficient assets to continue to meet the financial obligations she had at the time and to have sufficient income to maintain her standard of living;

(b) To do so, the appellant had only one completely free and available asset during the Period, the shares of his company, Margesca.

(c) The creation of the Johanne Cayouette Spousal Trust (**JCS Trust**) in Canada in March 2007 and the sale of the Margesca shares to JCS Trust were in fact intended to satisfy the condition set by the appellant, as stated in paragraph 1(a) of the Amended Answer. He denies that this was tax planning designed to dispose of the Margesca shares without paying tax;

(d) After the creation of JCS Trust, the appellant began preparing for his own retirement in Canada, and not abroad, as the respondent claims, scheduled to occur after the end of Margesca's fiscal year (8/31/07);

(e) His spouse reminded the appellant on a few occasions that he would never be fully retired if he were still a resident of Canada (given his difficulty in cutting his close ties with his former Canadian clients and friends). The appellant argued against it because of the serious consequences and complex immigration requirements as well as the significant financial implications (departure tax and risk of imminent stock market losses). Thus, it was not until mid-August 2007 that the spouses decided to leave Canada and to apply for permanent residence in Monaco;

(f) On September 30, 2007, the appellant and his spouse left Canada and flew to Cap d'Ail, France. In the weeks that followed, they settled in Monaco and submitted a formal application for permanent residence to the Monaco authorities;

(g) It was not until October 25, 2007, that the Monaco authorities formally approved their applications to become residents of Monaco and issued their respective residence cards.

Finally, he denies that no tax was paid in Canada and specifies that the appellant duly reported and paid all his taxes for the Period (as did his spouse), including ~~his~~

the departure tax, specifically on deemed gains totalling approximately $3.2 million for the appellant (and more than $315,000 for his spouse). Therefore, ~~and~~ the appellant duly filed his income tax return for the Period with the Canada Revenue Agency (**CRA**) (as did his spouse), in accordance with the *Income Tax Act* (Canada) (**ITA**).

2. He notes the admissions of fact in paragraphs 2.1 to 2.5 of the Amended Reply to the Notice of Appeal.

3. He notes the denial in paragraph 2.6 of the Amended Reply to the Notice of Appeal and joins issue. He also denies the allegations ~~contained~~ in the remainder of the paragraph and refers to paragraph 1 of the Amended Answer.

4. He notes the admissions of fact in paragraph 2.7 of the Amended Reply to the Notice of Appeal.

5. He notes the denial in paragraph 2.8 of the Amended Reply to the Notice of Appeal and joins issue. He also denies the allegations ~~contained~~ in the remainder of the said paragraph and relies on paragraph 1 of the Amended Answer. He points out that the distribution actually received ~~received by the beneficiary of~~ by JCS Trust was approximately $420,000. This was the difference between the amount equivalent to the deemed dividend from ~~the value of the shares of~~ Margesca of approximately $12.92 million and the value of the note payable by JCS Trust to the appellant of $12.5 million.

6. He notes the admissions of fact in paragraph 2.9 of the Amended Reply to the Notice of Appeal.

7. He notes the denial in paragraph 2.10 of the Amended Reply to the Notice of Appeal and joins issue. He also denies the allegations ~~contained~~ in the ~~at~~ remainder of the said paragraph and relies on paragraph 1 of the Amended Answer. He points out that the distribution actually received by ~~the beneficiary of~~ JCS Trust was approximately $420,000. This was the difference between the amount equivalent to the deemed dividend from Margesca ~~the value of the shares of Margesca~~ of approximately $12.92 million and the value of the note payable by JCS Trust to the appellant of $12.5 million.

8. He notes the admissions of fact in paragraph 2.11 of the Amended Reply to the Notice of Appeal.

9. He notes the denial in paragraph 2.12 of the Amended Reply to the Notice of Appeal and joins issue.

10. He notes paragraph 2.13 of the Amended Reply to the Notice of Appeal and the denials in the said paragraph and joins issue. He adds that, because the trustee and JCS Trust became residents of the Bahamas on October 2, 2007, JCS Trust's deemed fiscal year end, in accordance with the ITA, was therefore October 1, 2007.

11. He notes the admissions of fact in paragraph 2.14 and the allegations ~~allegations~~

~~of fact contained~~ in ~~at~~ paragraph 2.15 of the Amended Reply to the Notice of Appeal.

12. He notes the denials in paragraph 2.16 of the Amended Reply to the Notice of Appeal and joins issue. He adds that no amount equivalent to that of the deemed dividend was paid or credited to Johanne Cayouette as beneficiary of ~~the~~ JCS Trust, while JCS Trust was a resident of Canada. ~~and the said beneficiary was a non-resident of Canada.~~ Finally, he notes that no amount ~~had become~~ became payable to the beneficiary of JCS Trust while the beneficiary ~~as well as~~ and JCS Trust were both residents of Canada ~~since, in accordance with subsection 104(24) of the ITA, no amount was paid to the beneficiary, and during the Period she was not entitled to enforce payment.~~

13. He notes the admissions of fact in paragraph 2.17 of the Amended Reply to the Notice of Appeal.

14. He notes paragraph 2.18 of the Amended Reply to the Notice of Appeal and the denials therein and joins issue. He adds that the Notice of Reassessment dated January 24, 2017, was never sent to the appellant and clarifies that it was not sent to him until June 5, 2019.

15. As for paragraph 3 of the Amended Reply to the Notice of Appeal, he relies on the Notice of Assessment dated August 25, 2008, and denies anything that is inconsistent with it.

16. As for paragraph 4 of the Amended Reply to the Notice of Appeal, he relies on the Notice of Reassessment dated March 10, 2011, and denies anything that is inconsistent with it. He adds that the said Notice mentions a $1,620,488.24 tax reduction, ~~but~~ as well as a revised balance of tax payable, including interest, of $1,588,493.36.

17. He admits the facts ~~alleged~~ contained in paragraph 5 of the Amended Reply to the Notice of Appeal.

18. As for paragraph 6 of the Amended Reply to the Notice of Appeal, he relies on the Notice of Reassessment dated June 24, 2011, and denies anything that is inconsistent with it. He adds that the said Notice showed a revised tax payable balance of $904,678.51 and clarifies that this reassessment cancelled and replaced the previous one dated March 10, 2011.

19. He admits the facts ~~alleged~~ contained in paragraph 7 of the Amended Reply to the Notice of Appeal.

20. He denies paragraph 8 of the Amended Reply to the Notice of Appeal as worded and clarifies that the reassessment dated January 24, 2017, mentioned a $1,199,182.77 tax credit giving rise to a refund in favour of the appellant for the same amount. He admits that the said reassessment cancelled and replaced the previous one dated June 24, 2011, and clarifies that ~~it was this one~~ the January 24, 2017, assessment ~~that~~ is the subject of the appeal before this court.

21. He admits the facts ~~alleged~~ contained in paragraph 9.1 of the Amended Reply to the Notice of Appeal.

22. He denies the allegations ~~contained~~ in paragraph 9.2 of the Amended Reply to the Notice of Appeal and specifies that the appellant and his spouse ~~settled in~~ went to ~~Monaco~~ Cap d'Ail, France on October 1, 2007, to settle in Monaco. He adds that they did not actually become residents of Monaco until October 25, 2007, after the Monaco authorities had hand-delivered their respective residence cards. ~~the date on which they became non-residents of Canada.~~

23. He admits the facts ~~alleged~~ contained in paragraphs 9.3 to 9.7 of the Amended Reply to the Notice of ~~Appeal.~~ Appeal, but clarifies that they did not become residents of Monaco until October 25, 2007.

24. He denies the allegations ~~contained at~~ in paragraph 9.8 of the Amended Reply to the Notice of Appeal and clarifies that the estimated book value of the Margesca shares was $12.5 million and that this amount was equal to the estimated fair market value of the said shares as of March 16, 2007. He adds that, after March 16, 2007, Margesca continued its operations and that the estimated book value of its shares was ~~over~~ about $12.92 million as of August 30, 2007, as was the estimated fair market value of the said shares.

25. He denies the allegations ~~contained~~ in paragraphs 9.9 and 9.10 of the Amended Reply to the Notice of Appeal.

26. He admits the facts ~~alleged~~ contained in paragraphs 9.11 to 9.16 of the Amended Reply to the Notice of Appeal.

27. He denies the allegations ~~contained~~ in paragraph 9.17 of the Amended Reply to the Notice of Appeal and clarifies that Margesca ceased operating its business on August 30, 2007, but only with respect to its consulting services and that it maintained its activities as a management company.

28. As for paragraph 9.18 of the Amended Reply to the Notice of Appeal, he admits that he sold all his Margesca common shares to JCS Trust at their estimated book value of $12,500,000 as of March 16, 2007. He clarifies that the amount of $12,500,000 was equal to 100% of the estimated fair market value as of that date.

29. He admits the facts ~~alleged~~ contained in paragraphs 9.19 and 9.20 of the Amended Reply to the Notice of Appeal.

30. He denies paragraph 9.21 of the Amended Reply to the Notice of Appeal as worded and clarifies that paid-up capital of a company's shares is always increased without payment, in accordance with the ITA.

31. He admits paragraphs 9.22 and 9.23 of the Amended Reply to the Notice of Appeal with respect to the applicable general conclusions of law.

32. He denies paragraph 9.24 of the Amended Reply to the Notice of Appeal as worded and points out that, in the said paragraph, the respondent did not establish in whose favour the deemed disposition was made.

33. As for paragraph 9.25 of the Amended Reply to the Notice of Appeal, the appellant relies on the tax returns for the Period that he and ~~J. Cayouette~~ Johanne Cayouette filed and denies anything that is inconsistent with them. He specifies that, although he and his spouse left Canada on September 30, 2007, they arrived in Cap d'Ail, France, on October 1, 2007, to file an application for residence with the Monaco authorities.

34. He admits the facts ~~alleged~~ contained in paragraph 9.26 of the Amended Reply to the Notice of Appeal, but clarifies that JCS Trust also emigrated from Canada, in this case, to the Bahamas, on October 2, 2007.

35. He denies paragraph 9.27 of the Amended Reply to the Notice of Appeal as worded and clarifies that the JCS Trust trustee did not declare a taxation year end on October 1, 2007, but that this deemed year-end date was a consequence of the application of the ITA.

36. He denies paragraph 9.28(a) of the Amended Reply to the Notice of Appeal as worded and clarifies that JCS Trust did not declare a taxation year end on October 1, 2007, but that this deemed year-end date was a consequence of the application of the ITA.

37. He denies paragraph 9.28(b) of the Amended Reply to the Notice of Appeal as worded and clarifies that JCS Trust actually reported a $12,919,334 deemed dividend in its income tax return for the fiscal year ending October 1, 2007, and

that JCS Trust ~~also~~ erroneously claimed a deduction for the same amount ~~in accordance with~~ relying on subsection 104(6) of the ITA. Because no amount equivalent to the amount of the deemed dividend was payable by JCS Trust to its beneficiary on October 1, 2007, JCS Trust was not entitled to claim the deduction set out in subsection 104(6) of the ITA. ~~As for the remainder of the paragraph, the appellant relies on the income tax return that JCS Trust filed and denies anything that is inconsistent with it.~~

38. He denies paragraph 9.28(c) of the Amended Reply to the Notice of Appeal as worded and specifies that JCS Trust was not required to include an amount of tax payable under Part XII.2 of the ITA in its income tax return for the fiscal year ending October 1, 2007. ~~As for the remainder of the paragraph, the appellant relies on the income tax return that JCS Trust filed and denies anything that is inconsistent with it.~~

39. He denies paragraph 9.28(d) of the Amended Reply to the Notice of Appeal as worded and specifies that JCS Trust was not required to include an amount of tax payable under Part XIII of the ITA in its income tax return for the fiscal year ending October 1, 2007, because no amount had been paid or credited to the beneficiary of JCS Trust as of October 1, 2007. ~~As for the remainder of the paragraph, the appellant relies on the income tax return that JCS Trust filed and denies anything that is inconsistent with it.~~

40. He admits the facts ~~alleged~~ contained in paragraph 9.28(e) of the Amended Reply to the Notice of Appeal.

41. He denies the allegations ~~contained~~ in paragraph 9.29 of the Amended Reply to the Notice of Appeal and states that an initial dividend of $12,719,335 was ~~declared~~ established on October 29, 2007, and ~~paid~~ became payable by Margesca to JCS Trust on November 1, 2007.

42. He admits the facts ~~alleged~~ contained in paragraph 9.30 of the Amended Reply to the Notice of Appeal and further indicates that Johanne Cayouette issued a promissory note for the same amount to the appellant on the same day.

43. He denies the allegations ~~contained~~ in paragraph 9.31 of the Amended Reply to the Notice of Appeal. He specifies that the $12.5 million became payable by JCS Trust to its beneficiary on November 1, 2007.

44. He admits the facts ~~alleged~~ contained in paragraphs 9.32 and 9.33 of the Amended Reply to the Notice of Appeal, but clarifies that Johanne Cayouette instructed JCS Trust's RBC Bahamas bank to pay the appellant the amount of $12.5 million instead.

45. He denies the allegations ~~contained~~ in paragraph 9.34 of the Amended Reply to the Notice of Appeal. He specifies that the beneficiary of JCS Trust instructed JCS Trust's RBC Bahamas bank to pay the amount of $12.5 million, ~~which had~~

~~become payable to her on November 1, 2007,~~ to the appellant instead since she had assumed JCS Trust's $12.5 million debt to the appellant.

46. He admits the facts ~~alleged~~ contained in paragraphs 9.35 and 9.36 of the Amended Reply to the Notice of Appeal, but relies on Margesca's date of dissolution, as confirmed by official corporate documents.

47. He denies the allegations ~~contained~~ in paragraphs 9.35 to 9.41 of the Amended Reply to the Notice of Appeal and clarifies that they constitute findings of fact and law. He adds that these allegations were not part of the CRA's tax audit of the appellant. Consequently, the onus to prove them is on the respondent.

48. He admits the facts ~~alleged~~ contained in paragraph 9.42 of the Amended Reply to the Notice of Appeal.

49. He denies the allegations ~~contained~~ in paragraphs 9.43 and 9.44 of the Amended Reply to the Notice of Appeal and specifies that this is not JCS Trust's income but its asset. He adds that these allegations were not part of the CRA's tax audit of the appellant. Consequently, the onus to prove them is on the respondent.

50. He denies the allegations ~~contained~~ in paragraph 9.45 of the Amended Reply to the Notice of Appeal. He specifies that the amount payable to the beneficiary of JCS Trust is not determined when the income is supposedly earned by the trust, but only when the trustee, through the exercise of his discretion, declares the quantum of the amount he intends to distribute to the said beneficiary or when the said

amount is paid. He adds that the allegations ~~contained at~~ in paragraph 9.45 of the Amended Reply to the Notice of Appeal constitute a finding of fact and law and that they were not part of the CRA's tax audit of the appellant. Consequently, the onus to ~~prove~~ prove them is on the respondent. He adds that JCS Trust did not receive any income or other amount arising from Margesca's common shares during the Period. In addition, Margesca paid an initial dividend of $12,719,335 to JCS Trust only on November 1, 2007. Therefore, no amount could be payable or paid to Johanne Cayouette before that date, contrary to the respondent's claims, which are denied. On November 1, 2007, Johanne Cayouette and JCS Trust were residents of Monaco and the Bahamas, respectively.

51. He denies the allegations ~~contained~~ in paragraph 9.46 of the Amended Reply to the Notice of Appeal. He specifies that they constitute a finding of fact and law. He adds that they were not part of the CRA's tax audit of the appellant. Consequently, the onus to prove them is on the respondent. He adds that the amount of the deemed dividend of $12,919,334 did not become payable to the beneficiary, unless it was paid to her or she was entitled to enforce payment of it, pursuant to subsection 104(24) of the ITA. As of August 30, 2007, JCS Trust had not paid the beneficiary ~~the said~~ an amount equivalent to the deemed dividend, nor could the beneficiary legally enforce payment of it. Furthermore, it was practically impossible for JCS Trust to pay its beneficiary anything while Margesca itself was

unable to pay JCS Trust any dividend given that Margesca's assets were either frozen or not convertible into cash as of August 30, 2007, as more fully detailed in Margesca's financial statements, a copy of which is in the respondent's possession.

52. He admits the facts ~~alleged~~ contained in paragraph 9.47 of the Amended Reply to the Notice of Appeal but adds that the duties of JCS Trust's trustee did not have to be delegated or contracted out.

53. He denies paragraph 9.48 of the Amended Reply to the Notice of Appeal as worded and clarifies that Johanne Cayouette was not JCS Trust's trustee, but its beneficiary. He specifies that ~~S~~she was acting in the name and on behalf of the trustee in her capacity as officer.

54. He denies the allegations ~~contained~~ in paragraph 9.49 of the Amended Reply to the Notice of Appeal and adds that they were not part of the CRA's tax audit of the appellant. Consequently, the onus to prove them is on the respondent.

55. He admits the facts ~~alleged~~ contained in paragraph 9.50 of the Amended Reply to the Notice of Appeal. However, he adds that JCS Trust erroneously claimed the deduction under subsection 104(6) of the ITA, since no amount was payable to its beneficiary at that time.

56. He admits the facts ~~alleged~~ contained in paragraphs 9.51(a) and 9.51(b) of the Amended Reply to the Notice of Appeal, but denies that they constitute a series of transactions for the purposes of section 245 of the ITA.

57. He denies the allegations ~~contained at~~ in paragraph 9.51(c) of the Amended Reply to the Notice of Appeal as worded and specifies that the estimated book value of the Margesca shares was $12.5 million, which was equal to the estimated fair market value of the said shares as of March 16, 2007. He also states that the amount of $12,500,000 was equal to 100% of the estimated fair market value on that date. Finally, he denies that the sale of the Margesca shares to JCS Trust constitutes a series of transactions for the purposes of section 245 of the ITA.

58. He denies the allegations ~~contained at~~ in paragraph 9.51(d) of the Amended Reply to the Notice of Appeal as worded and states that the paid-up capital of a company's shares is always increased without payment, in accordance with the ITA. He denies that the increase in the paid-up capital of the Margesca shares constitutes a series of transactions for the purposes of section 245 of the ITA. He adds that the allegations ~~contained at~~ in paragraph 9.51(d) of the Reply to the Notice of Appeal constitute a finding of fact and law.

59. He admits the facts ~~alleged~~ contained in paragraph 9.51(e) of the Amended Reply to the Notice of Appeal, but denies that they constitute a series of transactions for the purposes of section 245 of the ITA.

60. He denies the allegations ~~contained at~~ in paragraph 9.51(f) of the Amended Reply to the Notice of Appeal as worded and states that Johanne Cayouette and he ~~became non residents of~~ left Canada on September 30, 2007, but did not

become residents of Monaco until October 25, 2007, when they received their respective residence cards. It is for this court to determine the date on which he and his spouse became non-residents of Canada. Furthermore, ~~October 1, 2007.~~ ~~H~~he denies that the facts described in that paragraph constitute a series of transactions for the purposes of section 245 of the ITA.

61. He denies the allegations ~~contained at~~ in paragraph 9.51(g) of the Amended Reply to the Notice of Appeal as worded, namely, that JCS Trust allegedly "allocated" an amount equivalent to the deemed dividend of $12,919,334 to Johanne Cayouette on October 1, 2007. He ~~and~~ clarifies that JCS Trust actually reported a $12,919,334 deemed dividend in its income tax return for the fiscal year ending on October 1, 2007, and ~~that JCS Trust also~~ claimed a deduction for the same amount, to which it was not entitled, relying on ~~in accordance with~~ subsection 104(6) of the ITA. The amount equivalent to the $12,919,334 deemed dividend was not "allocated" to Johanne Cayouette on October 1, 2007, contrary to what the respondent claims, since no amount had become payable to the beneficiary on that date. The respondent had the power to assess JCS Trust in order to disallow the said deduction and tax it on the amount of the deemed dividend, but chose not to do so. As for the remainder of the paragraph, the appellant relies on the income tax return that JCS Trust filed for its taxation year ending on October 1, 2007, and denies anything that is inconsistent with it. ~~He adds that as of October 1, 2007,~~

~~Johanne Cayouette was a non-resident of Canada and that Part I of the ITA did not apply to her.~~ He also clarifies that the tax under Part XIII of the ITA could not apply either since the amount ~~of the said~~ equivalent to the said deemed dividend had not, as of the same date, been paid or credited to Johanne Cayouette. Finally, he denies that the allegations ~~described at~~ in paragraph 9.51(g) of the Amended Reply to the Notice of Appeal constitute a series of transactions for the purposes of section 245 of the ITA.

62. He denies the allegations ~~contained at~~ in paragraph 9.51(h) of the Amended Reply to the Notice of Appeal as worded and points out that JCS Trust and its trustee did not "supposedly" emigrate to the Bahamas; they "actually" emigrated there. He also denies that the allegations described in paragraph 9.51(h) of the Amended Reply to the Notice of Appeal constitute a series of transactions for the purposes of section 245 of the ITA.

63. He denies the allegations ~~contained at~~ in paragraphs 9.52 and 9.53 of the Amended Reply to the Notice of Appeal and clarifies that he duly reported and paid all his income tax for the Period, including the departure tax, among other things, applicable to his deemed gains at the end of the said ~~same~~ Period, all in accordance with the ITA. He further states that, since JCS Trust was not entitled to the deduction claimed under subsection 104(6) of the ITA, the respondent had the

power to assess JCS Trust in order to disallow the amount of this deduction and tax it on the deemed dividend, but chose not to do so.

64. He denies the allegations ~~contained~~ in paragraph 9.54 of the Amended Reply to the Notice of Appeal. As for paragraph 9.54(c), he clarifies that no amount equivalent to the $12,919,334 deemed dividend was allocated to Johanne Cayouette on October 1, 2007, and that JCS Trust erroneously claimed the said dividend as a deduction. No amount was payable by JCS Trust to its beneficiary at that time.

65. As for paragraph 10 of the Amended Reply to the Notice of Appeal, the appellant admits that the Minister reassessed the appellant on the basis of section 245 of the ITA, among others, but denies that section 245 applies to this appeal.

66. He denies the allegations ~~contained at~~ in paragraph 10.1 of the Amended Reply to the Notice of Appeal and indicates that they constitute conclusions of law ~~that the respondent will have to demonstrate before this Court~~. He adds that it is for this court to rule on the merits of such allegations and to determine the applicable legal principle.

67. He denies paragraph 10.2 of the Amended Reply to the Notice of Appeal in its entirety and specifies that it constitutes only allegations relating to tax policies and conclusions of law that only this Court is authorized to determine. As for paragraph 10.2(c), he adds that JCS Trust erroneously claimed the deduction pursuant to subsection 104(6) of the ITA. Because no amount was payable to its

beneficiary at that time, JCS Trust was not entitled to such a deduction. ~~the respondent will have to demonstrate before this Court.~~

68. He denies paragraph 10.3 of the Amended Reply to the Notice of Appeal and adds that only this Court was authorized to determine the said tax consequences.

69. He denies the allegations ~~contained at~~ in paragraphs 11 and 11.1 of the Amended Reply to the Notice of Appeal and notes that the respondent bears the burden of proving them because they were not considered during the tax audit of the appellant for the Period.

70. As for paragraph 11.1(c) of the Amended Reply to the Notice of Appeal, he clarifies that an initial dividend of $12,719,335 was declared on October 29, 2007, and became payable by Margesca to JCS Trust on November 1, 2007.

71. As for paragraph 11.1(e) of the Amended Reply to the Notice of Appeal, he specifies that the amount of $12.5 million became payable by JCS Trust to its beneficiary on November 1, 2007.

72. He denies the allegations in paragraph 11.2 of the Amended Reply to the Notice of Appeal and joins issue.

~~69.~~73. He denies the allegations in paragraph 11.3 of the Amended Reply to the Notice of Appeal and joins issue. He specifies that, on October 2, 2007, JCS Trust emigrated to the Bahamas from Canada.

~~70.~~74. As for paragraph 12 of the Amended Reply to the Notice of Appeal, he relies on paragraph 54 of his Notice of Appeal~~.~~ However, he adds that the following issues will also have to be determined by this Court in this appeal:~~.~~

(a) On what date(s) did the appellant and his spouse cease to be residents of Canada and become residents of Monaco?

(b) On what date(s) did JCS Trust and its trustee cease to be residents of Canada and become residents of the Bahamas?

(c) During the Period, was JCS Trust legally entitled to claim the deduction set out in subsection 104(6) of the ITA?

(d) Can this court apply the provisions relating to the General Anti-Avoidance Rule (**GAAR**) when a taxpayer has erroneously taken advantage of a provision of the ITA (subsection 104(6)), which it was not entitled to do?

~~71.~~75. With respect to paragraphs 13 to 17.4 of the Amended Reply to the Notice of Appeal, he relies on paragraphs 55 to 86 of his Notice of Appeal.

~~72.~~76. He also specifies that the $12.5 million that became payable by JCS Trust to its beneficiary on November 1, 2007, could not, as the respondent argues, have been deemed received by the beneficiary of JCS Trust on August 30, 2007. Pursuant to subsection 104(24) of the ITA, this amount was deemed not to have become payable to the beneficiary because it had not been paid to her on August 30, 2007, and she could not enforce payment of it on that date, as further explained in

paragraph 51 of the Amended Answer. In fact, the $12.5 million to be distributed to the beneficiary by JSC [*sic*] Trust became payable on November 1, 2007, and it was paid to the appellant on November 2, 2007. Before those dates, the beneficiary of JCS Trust was not entitled to any distribution or payment.

77. He also indicates that JCS Trust reported $12,919,334 ~~in~~ as a deemed dividend ~~income~~ for its taxation year ending October 1, 2007, and claimed a deduction for the same amount to which it was not entitled ~~under~~ pursuant to subsection 104(6) of the ITA. The beneficiary of JCS Trust and the appellant (by application of the attribution rules set out in the ITA) were not required to include the said amount in their income for the Period under Part I of the ITA, because no amount was payable by JCS Trust to its beneficiary on that date pursuant to the ITA. ~~they were both non-residents of Canada at that time, and Part I of the ITA did not apply to them.~~

78. The respondent made much of the fact that JCS Trust claimed a deduction under subsection 104(6) of the ITA with respect to the amount of the dividend deemed to have been received by JCS Trust on August 30, 2007. According to the respondent, the fact of having claimed such a deduction was necessarily equivalent to the same amount being distributed to its beneficiary, an amount that the beneficiary would otherwise have had to have been taxed on under subsection 104(13) of the ITA. However, this position of the respondent does not

take into account subsection 104(24) of the ITA or the wording of subsections 104(6) and 104(13) of the ITA.

79. Subsection 104(24) is clear and specific. No deduction (by a trust) is permitted under subsection 104(6) and no inclusion (in the beneficiary's income) is required under subsection 104(13) unless the amount that may be deducted by a trust and that should be included in the beneficiary's income "was paid or the beneficiary was entitled to enforce payment of it". According to the facts, by the time any amount became payable or paid by JCS Trust to its beneficiary, the beneficiary (and the appellant) and JCS Trust were residents of Monaco and the Bahamas, respectively.

80. The fact that JCS Trust claimed the amount of the deemed dividend as a deduction while not authorized to do so under subsection 104(6) does not in any way support the conclusion that its beneficiary was then required to include the said amount in computing her income under subsection 104(13) of the ITA. On the contrary, the ITA contains no provisions that presume that, where a trust erroneously claims the deduction set out in subsection 104(6), the amount deducted must be considered to have been allocated to the beneficiary. In other words, the fact that a trust erroneously claims a deduction under subsection 104(6) does not give rise to the presumption that an amount equivalent to this deduction has been allocated to the beneficiary.

~~73.~~81. Although JCS Trust claimed a deduction for the $12,919,334 deemed dividend in its return for the taxation year ending on October 1, 2007, JCS Trust was not entitled to such a deduction under subsection 104(6) of the ITA because no amount was payable to the beneficiary at that time. The respondent had the power to assess JCS Trust in order to disallow this deduction and to tax it on the said amount, but chose not to do so. The appellant reiterates that the JCS Trust beneficiary's obligation to include an amount of $12,919,334 in computing her income under subsection 104(13) of the ITA is subject to the terms of that provision (i.e. the amount had become payable) and to the terms of subsection 104(24) (i.e. an amount is deemed not to have become payable unless it was paid or the beneficiary was entitled to enforce payment of it). In this case, with respect to the $12,719,335 dividend paid to JCS Trust on November 1, 2007, by Margesca, only $12.5 million became payable by JCS Trust to the beneficiary on the same day. On November 1, 2007, both the beneficiary and the appellant were residents of Monaco and Part I of the ITA did not apply to them.

82. ~~Finally~~ In addition, the appellant states that, contrary to the respondent's arguments, in accordance with the provisions of Part XIII of the ITA then applicable to the Period, JCS Trust was not required to withhold Part XIII tax in respect of the beneficiary or the appellant (according to the applicable attribution rules) on the $12,919,334 deemed dividend allocated to JCS Trust on

October 1, 2007. He points out that, on that date, ~~the said~~ the equivalent of the said amount had not been "paid or credited" to the beneficiary. In fact, ~~the~~ an amount of $12.5 million to be distributed to the beneficiary by JSC [*sic*] Trust became payable on November 1, 2007, and was paid to the appellant on November 2, 2007. On those dates, the JCS Trust trustee, JCS Trust and its beneficiary and the appellant were all ~~non-residents~~ residents of the Bahamas or Monaco ~~of Canada~~. Consequently, Part XIII of the ITA cannot apply.

83. As for the respondent's position that the GAAR applies in this case, the appellant submits that applying it is erroneous.

84. According to the case law, the GAAR may apply when the parties to a transaction or series of transactions have used the provisions of the ITA in accordance with their wording.

85. In other words, the GAAR comes into play to redefine tax consequences when the provisions of the ITA were used correctly, but a tax benefit that these provisions did not intend resulted.

86. In this case, the appellant argues that he and JCS Trust did not take advantage of any of the provisions of the ITA in order to circumvent their spirit, including subsection 104(6) of the ITA, given that JCS Trust was simply not entitled to the deduction set out in that subsection. Since an amount equivalent to the $12,919,334 deemed dividend was not payable to the beneficiary on October 1,

2007, JCS Trust could not legally claim the deduction of this amount in the income tax return it filed for the taxation year ending on October 1, 2007.

87. The fact that JCS Trust claimed a deduction to which it was not entitled does not come within the scope of the GAAR. According to the case law, section 245 of the ITA is a provision of last resort. The respondent may rely on this provision when other provisions of the ITA were correctly used by a taxpayer in the context of transactions or series of transactions, but only when the spirit of those provisions was frustrated or abused in order to obtain a tax benefit.

88. The problem with the respondent's position is that JCS Trust was not eligible for the deduction claimed under subsection 104(6) of the ITA. The respondent chose not to assess JCS Trust in order to disallow this deduction and to tax it on the $12,919,334 deemed dividend.

89. The only tax benefit in this appeal is that JCS Trust claimed a deduction to which it was not entitled.

~~74.~~90. The appellant therefore submits that the GAAR clearly cannot apply to this appeal.

TORONTO, this ~~27th~~6th day of May ~~April~~ 2022~~0~~:

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