

INCOME TAX

NON-RESIDENTS

Appeal from Tax Court of Canada (T.C.C.) decision (2018 TCC 152) allowing respondent's appeal from assessment made under *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (Act) for its 2013 taxation year — Respondent claiming that large taxable capital gain realized from disposition of Alta Energy Partners Canada Ltd. (Alta Canada) shares not taxable in Canada — Alta Canada petroleum, natural gas explorer, acquired by respondent — As part of restructuring, respondent formed under laws of Luxembourg, shares of Alta Canada transferred to it — Canada Revenue Agency agreeing that fair market value of shares of Alta Canada at that time equal to adjusted cost base of these shares — Therefore, no capital gain realized on transfer of shares of Alta Canada to respondent — Shares of Alta Canada sold in 2013, resulting capital gain in excess of \$380 million — Act, s. 2(3) providing that non-resident disposing of any taxable Canadian property required to pay tax under Act on that person's taxable income — Crown arguing that general anti-avoidance rule (GAAR) applying — *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (Luxembourg Convention) [1], Arts. 1, 4(1), 13(4),(5) at issue herein — Exemption from taxation in Canada arising as result of combination of Arts. 13(4),(5) — Relevant net effect of Art. 13(4) being that Canada surrendered its right to tax gains derived by resident of Luxembourg from sale of shares of private corporation if their value deriving principally from immovable property situated in Canada in which business of corporation carried on — Since Art. 13(4) not applying to allow Canada to tax gain on disposition of such shares, Art. 13(5) applying, gain could only be taxed in Luxembourg — T.C.C. finding that shares of Alta Canada treaty-protected property as result of application of Luxembourg Convention, Arts. 13(4),(5) — Also finding that GAAR not applying because no abuse of Act or Luxembourg Convention — Respondent conceding existence of tax benefit, avoidance transaction — Only issue therefore whether transactions resulting in abuse of provisions of Act or Luxembourg Convention for purposes of application of GAAR — Although appellant raised issue of whether Act, s. 115(1)(b) abused, focus of hearing was whether abuse of relevant provisions of Luxembourg Convention occurring — Carve-out for treaty-protected property in s. 115(1)(b) simply reflecting what Canada agreeing to do under Luxembourg Convention — Therefore, proper focus for GAAR analysis being on provisions of Luxembourg Convention — Claiming exemption from tax in Canada, on gain realized on sale of shares of particular company not predicated on resident of Luxembourg having made any particular investment in that company — GAAR cannot be used to add requirement for investment that would have to be satisfied if GAAR applied, but which would not have to be satisfied if GAAR not applying — Addition of this requirement not warranted — No basis to find that rationale for definition of "resident" in Luxembourg Convention, Art. 4 suggesting any criteria other than criteria included in definition should be used to determine if person resident of Luxembourg for purposes of Luxembourg Convention — No dispute respondent resident of Luxembourg — Respondent entitled to claim benefit of Arts. 13(4),(5) — No distinction in Luxembourg Convention between residents with strong economic or commercial ties, those with weak or no commercial or economic ties — Object, spirit, purpose of relevant provisions of Luxembourg Convention reflected in words as chosen by Canada, Luxembourg — Since provisions operating as intended, no abuse present — Appeal dismissed.

CANADA V. ALTA ENERGY LUXEMBOURG S.A.R.L. (A-315-18, 2020 FCA 43, Webb J.A., reasons for judgment dated February 12, 2020, 33 pp.)