Federal Courts Reports
Recueil des décisions des Cours fédérales

[2022] 2 F.C.R. D-28

INCOME TAX

INCOME CALCULATION

Capital Gains and Losses

Appeal from Tax Court of Canada (T.C.C.) decision (2021 TCC 71) determining that *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (Act), s. 40(3.6)(a) applying to deem CIBC's loss from disposition of Class B Shares of CIBC Delaware Holdings Inc. (DHI) to be nil — In 2006, appellant subscribed for shares of CIBC Delaware Holdings Inc. — In 2007, DHI redeemed shares held by appellant — Appellant reported allowable capital loss in its 2007 income tax return due to fluctuation in Canadian dollar — Minister of National Revenue denied appellant's claim for allowable capital loss — *Canada v. Bank of Montreal*, 2020 FCA 82 (*BMO*) playing dominant role in decision of T.C.C., arguments of appellant in appeal herein — Court in *BMO* deciding that Act, s. 39(2) applied to disposition of shares when loss arose by virtue of fluctuation in value of foreign currency — Loss deemed to be capital loss from disposition of foreign currency — In *BMO*, relevant stop-loss provision was Act, s. 112(3.1) — S. 40(3.6) relevant stop-loss provision in this appeal — Appellant argued that *BMO* supported its position that it had capital loss from disposition of foreign currency — In appellant's view, there was no loss from disposition of shares to which s. 40(3.6) could apply — Respondent argued that *BMO* supported its position that loss deemed nil under s. 40(3.6), therefore no loss to which provisions of s. 39(2) could apply — Even though T.C.C. opined that version of s. 39(2) in effect in 2007 did not apply to disposition of shares, T.C.C. adopted interpretation of s. 39(2) as found in *BMO* — Concluded that provisions of s. 40(3.6) applied to determine loss before application of s. 39(2) — Whether, based on decision of Court in *BMO*, s. 39(2) applying before s. 40(3.6) — T.C.C. not erring in concluding that s. 40(3.6) applying to deem applicant's loss from disposition of Class B Shares of DHI to be nil — Appellant arguing that structure it adopted similar to structure employed by Bank of Montreal in *BMO*, therefore result under Act should be same, i.e. loss realized on redemption of shares should not be deemed nil — However, stop-loss provision engaged in this appeal (s. 40(3.6)) not the same stop-loss provision engaged in *BMO* (Act, s. 112(3.1)) — Different stop-loss rules were engaged because transactions were different — No redemption of shares in *BMO* — S. 40(1) providing for determination of gain or loss, not capital gain or capital loss — Therefore, in order for another provision to expressly provide otherwise, that other provision must specify or affect amount of gain or loss, not amount of any capital gain or capital loss — As noted in *BMO*, s. 39(2) premised on assumption that amount of loss had already been determined — No formula set out in s. 39(2) that would have applied to determine amount of loss, nor did s. 39(2) deem amount of loss to be any particular amount — Tax consequences, if s. 39(2) applied, would have been determined solely on basis that net gains, losses attributable to fluctuation in value of foreign currency were deemed to be capital gain or capital loss from disposition of foreign currency — Since in *BMO* Bank of Montreal did not have loss from disposition of shares, there was no loss from disposition of shares to which s. 112(3.1) could have applied — Nothing in s. 40(3.6) requiring application of s. 39(2) before loss realized on redemption of shares deemed to be nil by s. 40(3.6) — Loss realized by appellant on redemption of shares deemed to be nil, therefore there was no loss that could have been deemed to be capital loss under s. 39(2) — Wording of ss. 40(3.6), 112(3.1) provided that, in 2007, all other provisions of Act affecting loss applied before s. 112(3.1) applied and that s. 40(3.6) applied before s. 39(2) applied — Different treatment of loss deemed nil under s. 40(3.6), loss reduced under s. 112(3.1) could explain why loss attributable to foreign currency

fluctuations not subject to adjustment under s. 112(3.1) but did not alter deeming of loss nil under s. 40(3.6) — Support for argument that taxpayer's income determined under Act, Division B before taxpayer's taxable income determined under Act, Division C — However, s. 112(3.1) not providing for addition or deduction in computing taxable income of taxpayer — Division B, Division C not two separate self-contained parts with consequence that once income determined under Division B it is not altered by any provision of Division C — As illustrated by s. 112(3.1), it may be necessary to reapply provisions of Division B to redetermine taxpayer's income once particular provision in Division C applied — However, interpretation of phrase "the loss determined without reference to this subsection" as found in s. 112(3.1) resulting in all provisions of Division B being applied to determine loss from disposition of shares before s. 112(3.1) applied to reduce that loss — This interpretation consistent with general principle enunciated in Act, s. 2(2) that provisions of Division B applying before provisions of Division C — Appeal dismissed.

CANADIAN IMPERIAL BANK OF COMMERCE V. CANADA (A-305-21, 2023 FCA 91, Webb J.A., reasons for judgment dated May 4, 2023, 22 pp. + 5 pp.)