

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	09/29/2022
	L-R Movila
MONTRÉAL, QC	1

id# 1

NOTICE OF APPEAL

(Court File No.A-201-22)

FEDERAL COURT OF APPEAL

BETWEEN:

3295940 Canada Inc.

Appellant

and

His Majesty The King

Respondent

NOTICE OF APPEAL

(under subsection 27(1.1) of the Federal Courts Act)

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant. The relief claimed by the Appellant appears on the following page.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the court directs otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard at Montréal in the Province of Québec.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the judgment appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the court and other necessary information may be obtained on request to the Administrator of this court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

09/29/2022

Issued by: L-R Movila, Registry Officer
(Registry Officer)

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Judgment of the Tax Court of Canada dated June 30, 2022, per Mr. Justice Réal Favreau, which dismissed the Appellant's tax appeal with costs to the Respondent.

THE APPELLANT ASKS that the its appeal from the Judgment of the Tax Court dated June 30, 2022 be allowed, with costs in this Honourable Court and in the Court below, on the basis that the Appellant did not realize a capital gain in the amount of \$31.5 million in its taxation year ending March 31, 2005 as a consequence of the sale of its interest in the Sabex pharmaceutical business via the sale of its shares in 4244851 Canada Inc. ("4244") to Novartis Pharmaceuticals Canada Inc. ("Novartis") on August 13, 2004 and, in particular, that the general anti-avoidance rule (the "GAAR") in s. 245 of the *Income Tax Act* (the "Act")¹ did not apply to deny recognition of the Appellant's adjusted cost base of its shares in 4244 of \$88,390,000.

THE GROUNDS OF APPEAL are as follows:

1. The learned Tax Court Judge erred in law by not following the approach set out by the Supreme Court of Canada in *Lipson*² and *Copthorne*³ for the determination of whether a transaction or series of transactions has resulted in an abuse of the provisions of the Act, namely, that the abuse issue must be determined "in the context of the series of transactions of which it is a part and the overall result that is achieved."⁴ In his reasons for judgment, the learned Tax Court Judge determined that two of the transactions in the series had abused the object, spirit and purpose of s. 55(2) of the Act without regard for the context in which those two transactions took place and the tax-benign nature of the overall result achieved by the series of transactions: that the acquisition cost (or at least two-thirds thereof)

¹ Revised Statutes of Canada, 1985, c. 1 (5th Supplement), as amended.

² *Lipson et al. v. The Queen*, 2009 SCC 1, at paras. 3, 36, 37.

³ *Copthorne Holdings Limited v. The Queen*, 2011 SCC 63, at para. 71.

⁴ *Ibid.*, at paragraph 71.

incurred in acquiring a 100% interest in the Sabex pharmaceutical business was taken into account in computing the capital gain realized upon the sale of that interest to Novartis, consistent with the intent of the capital gains regime in sections 39 and 40 of the Act.

2. The learned Tax Court Judge also erred in law in his determination of the abuse issue by discounting the relevance of alternative transactions which would have produced the same result as the series of transactions in issue, namely a capital gain of \$64,550,000 (and not \$96,050,000 as contended for by the Crown), contrary to the *ratio decidendi* of this Honourable Court's decision in *Univar*.⁵ (The simple sale to Novartis of the Appellant's shares held by its parent Gestion Micsau Inc. ("Micsau") would have achieved this result, an alternative tendered in evidence at trial but not addressed by the learned Tax Court Judge.) Indeed, the learned Tax Court Judge (at paragraph 158 of his reasons for judgment) purported to limit the scope of the relevance of alternative transactions to the abuse issue on the basis of a passage from what he believed to be the subsequent decision of this Court in *Satoma Trust*⁶ which was, in fact, the earlier decision of the Tax Court. The Tax Court decision in *Satoma Trust*⁷ was decided four months *before* this Court's decision in *Univar*.

3. In any event, the learned Tax Court Judge erred in law in concluding that the object, spirit and purpose of s. 55(2) of the Act had been abused by two transactions between the Appellant and 4244, which transactions were undertaken within the series of transactions in question and in which the deemed dividend resulting from the redemption by each company of shares held by the other was elected to be a capital dividend pursuant to s. 83(2) of the Act. The learned Tax Court Judge thus, by mistaken reliance on his interpretation of the object, spirit and purpose of s. 55(2) of the Act,

⁵ *Univar Canada Holdco LLC v. The Queen*, 2017 FCA 207.

⁶ *Fiducie Financière Satoma v. The Queen*, 2018 FCA 74

⁷ *Fiducie Financière Satoma v. The Queen*, 2017 TCC 84.

expanded its scope beyond the intention of Parliament in that it made s. 55(2) of the Act applicable to capital dividends, contrary to the language of said provision which applies only to taxable dividends and to the definition “taxable dividend” in s. 89(1) of the Act which expressly excludes capital dividends from the definition.

The Appellant requests that the Tax Court of Canada send a certified copy of the following material that is not in the possession of the Appellant but is in the possession of that Court to the Appellant and to the Registry:

- A. All pleadings before the Tax Court of Canada, including the Partial Agreed Statement of Facts;
- B. Written transcripts of the evidence of all witnesses at trial;
- C. All exhibits entered into evidence at trial.

Dated at Montreal this 29 day of September, 2022.



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