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20-SEP-2023		
Tina Duguay		
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FEDERAL COURT OF CANADA

B E T W E E N:

BLACK GOLD OPERATING GROUP INC.

Applicant

- and -

CANADA REVENUE AGENCY

Respondent

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENTS:

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

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this appeal be heard at the Federal Judicial Centre, 180 Queen Street West, in the City of Toronto, in the Province of Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the Applicant's solicitor WITHIN 10 DAYS of being served with this notice of application.

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 613-992-4238) or at any local office.

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

September 20, 2023

Issued By: Alice Prodan-Gil
(Senior Registry Officer)

FEDERAL COURT OF CANADA
180 Queen Street West, Suite 200
Toronto, Ontario
M5V 3L6

TO: DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, Ontario
M5H 1T1

AND TO: CANADA REVENUE AGENCY
555 MacKenzie Avenue
Ottawa, Ontario
K1A 1K4

APPLICATION

I. OVERVIEW OF APPLICATION FOR JUDICIAL REVIEW

1. Black Gold Operating Group Inc. (the “Applicant”) brings this application for rescission and/or rectification in respect of its declaration of a duplicate capital dividend on or about March 1, 2021 (the “Second Dividend”), the filing of a duplicate capital dividend election dated March 31, 2022 (the “Second Election”), and the assessment of part III tax thereon by the Canada Revenue Agency (the “CRA”).

II. THE APPLICANT MAKES AN APPLICATION FOR:

2. An order rescinding, voiding, and/or negating the Second Election, and directing the CRA to reassess the Applicant for tax year 2022 as if the Second Election had never been filed;
3. In the alternative, an Order rectifying the Second Election to reflect a declared capital dividend of \$1.00, and directing the CRA to reassess the Applicant for tax year accordingly;
4. In the further alternative, an Order directing the CRA to hold the processing of the Second Election in abeyance pending further Order of the court or written agreement between the Applicant and the CRA;
5. The Applicant’s costs of this application, if contested; and
6. Such further and other relief as counsel may advise and this Honourable Court may deem just.

III. THE GROUNDS FOR THE APPLICATION ARE:

Factual Context

7. The Applicant is a corporation incorporated pursuant to the laws of Ontario.
8. As of March 1, 2021, the Applicant had a balance in its capital dividend account (“CDA”) of \$862,604.00.
9. On March 1, 2021, by way of directors’ resolution, the Applicant declared a capital dividend of \$862,604.00 (the “First Dividend”).
10. On March 31, 2021, in order to perfect the capital dividend treatment of the CDA balance, the Applicant filed Form T2054 – Election for a Capital Dividend with the CRA (the “First Election”), pursuant to Subsection 83(2) of the *Income Tax Act* (the “Act”).
11. As of March 2, 2022, the Applicant had not received any correspondence from the CRA with respect to the declaration of the capital dividend or the First Election.
12. Accordingly, the Applicant formed the mistaken belief that the First Dividend had not been perfected and that the First Election had not been filed with or received by the CRA.
13. At this time, the Applicant had, or believed that it had, a balance of no less than \$862,604.00 in its CDA.
14. On March 3, 2022, on the basis of these mistaken beliefs, the Applicant declared the Second Dividend in the amount of \$862,605.00 by way of corporate resolution.

15. Also on or about March 3, 2022, to perfect what it believed to still be the First Dividend, the Applicant also filed the Second Election for a capital dividend of \$862,605.00.
16. On or about August 19, 2022, the CRA processed the First Election and wrote to the Applicant to confirm the filing of same, and to advise that their CDA balance was now \$1.00.
17. On or about January 13, 2023, the CRA processed the Second Election and wrote to the Applicant to confirm the filing of same, and to advise that the Second Declaration resulted in an excess election of \$862,604.00, subject to Part III tax at 60%.
18. Part III tax in this situation would be in the amount of \$517,562.40.
19. The Applicant subsequently filed a protective election under subsection 184(3) of the Act in accordance with the CRA's policy in Income Tax Folio S3-F2-C1, Capital Dividends, at paragraph 1.93.
20. The CRA agreed to hold the second election and assessment in abeyance pending the results of the within application.

Grounds for the Application

21. The Applicant submits that the situation arose from a simple error or misunderstanding.
22. The second dividend and election did not accompany any transfer of funds from the Applicant to its shareholders, as would be the case with the declaration of a capital dividend.

23. Essentially, the Applicant has incurred payable taxes in respect of a transaction that never took place.
24. There was no taxable disposition, deemed or otherwise, which accompanied the creation of a taxable liability.
25. This outcome is inconsistent with the principles articulated in the *Act* and in the case law more generally.
26. The Second Dividend and Second Election served no purpose, business, financial, bookkeeping, or otherwise. The second set of filings was simply a result of the Appellant's misapprehension that the First Election had not been processed, and accordingly, that the First Dividend was never perfected.
27. At worst, the Second Election was an attempt to use up the remaining CDA balance, which was only \$1.00.
28. In some sense, the situation arose from delays in CRA processing times.
29. In the circumstances, it would be unjust for Part III tax in the amount of \$517,562.40 to be assessed by the CRA and levied as against the Applicant.
30. It is entirely appropriate for this Honourable Court to exercise its discretion to rescind, void, and/or nullify the Second Election in its entirety.
31. In such a circumstance, the Applicant will file an accompanying rectification resolution to rescind the Second Declaration dated on or about March 3, 2022.

32. In the alternative, it is entirely appropriate for this Honourable Court to exercise its discretion to rectify the Second Election to reflect a capital dividend of \$1.00.
33. In such a circumstance, the Applicant will file an accompanying rectification resolution to rectify the Second Declaration dated on or about March 3, 2022 to be at the amount of \$1.00 rather than \$862,605.00.
34. In the further alternative, it would be appropriate for this Honourable Court to order that the Second Election be held in abeyance pending further order or written agreement of the parties.
35. The Applicant intends to rely upon sections 83(2), 184(3) of the *Income Tax Act*, and Section 18.1 of the *Federal Courts Act*.
36. Such further and other grounds as counsel may advise and this Honourable Court may allow.

IV. THE APPLICATION WILL BE SUPPORTED BY:

37. An affidavit, or affidavits to be sworn;
38. Documentary evidence with respect to the Dividends and Elections;
39. Written correspondence between the Applicant and the CRA;
40. Any and all relevant materials provided by the Respondents to the Applicant pursuant to Rule 317 as requested in Part V below; and

41. Such further and other evidence as counsel may advise and this Honourable Court may allow.

V. THE APPLICANT FURTHER REQUESTS THAT:

42. Pursuant to Rule 317 of the *Federal Courts Rules*, the Respondents send certified copies of the following materials that are in the possession of the CRA, but not in the possession of the Applicant, to the Registry and to the Applicant:
- a. All written communications between the CRA and the Applicant relevant or in any way related to the subject matter of the Application;
 - b. Any internal policies, procedures or guidelines with respect to the subject matter; and
 - c. All communication between CRA employees related to the Application, including memoranda, letters and emails.



DEVRY SMITH FRANK LLP

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Per:

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Counsel for the Applicant

TO: Registry of the Federal Court of Canada
180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

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