

INCOME TAX

INCOME CALCULATION

Capital Gains and Losses

Appeal from Tax Court of Canada (T.C.C.) decision (2018 TCC 225) dismissing appellant's appeal from reassessment by Minister of National Revenue to assess tax related to appellant's Tax Free Savings Account (TFSA) in respect of 2009, 2010, 2012 taxation years — Appellant sophisticated investor with extensive knowledge of stock market — Wanting to capture gains earned on stocks held in TFSA, RRSP accounts, shelter from tax future gains on stocks held in trading account — TD Waterhouse confirming to appellant that it permitted holders of TFSAs to conduct asset swaps between their accounts — Appellant deciding to move stocks from Canadian trading account to TFSA, RRSP accounts to eliminate or defer tax payable on possible future gains — Completing several swap transactions relating to TFSA — Later, TD Waterhouse no longer permitting swap transactions because of proposed amendments to *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, s. 207.01(1) — Definition of "advantage" amended to include "swap transactions" — Amendment not applying herein since appellant's swap transactions occurring before amendment — Minister's assessment based on appellant receiving advantage within meaning of term "advantage" as used in Act, s. 207.01(1) in each relevant taxation year — T.C.C. dismissing appeal for 2009 tax year — Concluding sufficient that appellant "planned on doing swap transactions with the purpose of achieving the objectives of the series" of transactions; swap transactions not occurring in open market wherein parties dealing with each other at arm's length, acting prudently, knowledgeably, willingly — Allowing appeal for 2010, 2012 taxation years — T.C.C. concluding appellant not receiving "advantage" in relation to TFSA in those years — This conclusion flowing from T.C.C.'s findings, in particular, that phrase "directly or indirectly" in s. 207.01(1)(b) should be narrowly interpreted — Respondent arguing T.C.C. erring in interpreting statutory definition of "advantage" by construing that phrase too narrowly; that T.C.C.'s interpretation improperly excluding from scope of "advantage" increase in value in TFSA in subsequent years attributable to amounts previously inappropriately shifted into TFSA due to improper transactions — Issues on appeal whether T.C.C. erring in finding that swap transactions part of series of transactions; that parties to series of transactions not dealing at arm's length; that one of main purposes of series of transactions being that appellant could benefit from TFSA's tax exemption — Issue on cross appeal whether T.C.C. erring when interpreting phrase "directly or indirectly" contained in definition of "advantage" in Act, s. 207.01(1)(b) — T.C.C. not erring in concluding, *inter alia*, all transactions completed in contemplation of series — Act, s. 248(10) broadening common law meaning of "series of transactions" — Language of s. 248(10) allowing either prospective or retrospective connection of related transaction to common law series — T.C.C. not erring in finding that appellant single mind directing all of swap transactions; that parties to series of transactions herein not dealing at arm's length — Also not erring in finding that main purpose of series of transactions was so that appellant could benefit from TFSA's tax exemption — With respect to cross-appeal, T.C.C. erring in its interpretation of definition of "advantage" found in Act, s. 207.01(1)(b); in failing to find that increase in fair market value of TFSA in 2010, 2012 indirectly attributable to swap transactions undertaken in 2009 so as to fall within definition of "advantage" — Requirement to base determination about source of increase in value of TFSA upon what "it is reasonable to consider, having regard to all the circumstances" not constraining broad, textual meaning of phrase "directly or indirectly" — *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, relied upon by T.C.C., not

dictating that concept of reasonableness constraining meaning of “directly or indirectly” — Nothing in statutory context requiring or favouring narrow, restricted definition of “advantage” — T.C.C.’s concerns about legislative tension, future, ongoing impact of impugned transactions not diminishing clear purpose of s. 207.01 — Anti-avoidance purpose of ss. 207.01, 207.05 supporting broad interpretation of definition of “advantage” — T.C.C. erring in applying restrictive interpretation of s. 207.01(1)(b) of definition of “advantage” — Swap transactions conducted in 2009 non-market transactions — Swap transactions inappropriately increasing number of shares held in TFSA, value of TFSA in 2009 — Appellant not providing evidence to rebut Minister’s assumptions attributing increases in value in appellant’s TFSA in 2010, 2012 to impugned swap transactions — In circumstances, not open to T.C.C. to find increases attributable to what happened in market — Appeal dismissed with respect to 2009 taxation year; cross appeal allowed with respect to 2010, 2012 taxation years.

LOUIE V. CANADA (A-410-18, 2019 FCA 255, Dawson J.A., reasons for judgment dated October 17, 2019, 27 pp.)