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Lipson: More Uncertainty About the Application of GAAR

By David W. Chodikoff, Miller Thomson LLP

On January 8, 2009, the Supreme Court of Canada released its decision in *Lipson v. R.*, 2009 CarswellNat 1, 2009 SCC 1 (S.C.C.). In a four to three decision, Justice LeBel, speaking for the majority, upheld the finding of the lower courts that the disallowance of the interest expense in computing the income or loss to the taxpayer and the allocation of that interest back to the wife was a reasonable outcome. In applying the GAAR, the majority of the court concluded that it was not the re-financing aspect of the transaction that was offensive, but rather the taxpayer's use of the income attribution rules to reduce tax by attributing the interest expense to the higher income spouse. There were two separate dissents. One dissent was authored by Justice Binnie with Justice Deschamps concurring and the second written by Justice Rothstein.

The facts of *Lipson* are straightforward. Earl and his spouse Jordanna wanted to buy a personal residence. The Lipsons needed to borrow cash to buy the house. They also wanted to deduct the interest to be paid on the mortgage. As you know, in such circumstances, paragraph 20 (1) (c) of the *Income Tax Act* (the "ITA") would normally apply and therefore, such interest would not be deductible. However, in an effort to circumvent the 'purpose test' found in paragraph 20(1) (c) of the ITA the Lipsons completed a series of transactions. First, Jordanna obtained a demand loan from a bank. Next, she used the money to buy shares of the family company from Earl. In respect of the purchase of shares, Earl did not elect out of subsection 73(1) of the ITA on the sale. Earl then used the funds to buy the personal residence. And finally, Earl and Jordanna secured further financing by placing a mortgage on the new home using those proceeds to repay the demand loan.

The only issue at the Tax Court of Canada was whether the transactions, which the parties agreed were avoidance transactions resulting in a tax benefit, constituted abusive tax avoidance (ss. 245(4) of the ITA) and were therefore prohibited by the application of the GAAR. Relying upon the analytical framework set out in *Canada Trustco Mortgage Co. v. R* and *Mathew v. R.*, Chief Justice Bowman held that the "overall purpose as well as the use to which each

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individual provision was put was to make interest on money used to buy a personal residence deductible." The Chief Justice thus easily found that the series of transactions resulted in a misuse of ss. 20(1)(c), 20 (3), 73 (1) and 74.1 of the ITA and he dismissed the Lipson's appeal.

At the FCA, Justice Noel, speaking for the Court, concurred with Bowman, C.J.'s reasoning and the appeals were again dismissed.

In dismissing the appeals, the Supreme Court followed the steps outlined in *Canada Trustco* and *Mathew* for the appropriate GAAR analysis. The Court found that there was a misuse of the attribution rules. Specifically, the Court stated that "the series of transactions did not become problematic until (Earl) and his wife turned to (the attribution rules) in order to obtain the result contemplated. . . which resulted in (Earl) applying his wife's interest deduction to his own income." There are many interesting points to consider in these reasons. However, I will focus on just two.

First, the majority of the Court was able to quickly distinguish the case at bar with *Singleton*. Simply, the majority found that the GAAR was not at issue in *Singleton*, nor was section 74.1 of the ITA and as a consequence, *Singleton* is thus distinguishable. However, in Justice Binnie's dissent, he suggests that just like in *Singleton*, there was a change in the taxpayer's position with real economic substance. And the share sale must be accepted as an essential part of the series of transactions. Parliament, he said, must have contemplated that by giving taxpayers a choice under subsection 73(1) in the context of an inter-spousal transfer of property, they would indeed exercise it in a tax minimizing manner. Justice Binnie also concluded that the 'overall purpose' approach which the FCA and TCC both employed was an error of law.

A second point of interest is the apparent extension or broad application of the GAAR. As Justice Rothstein pointed out in his dissent, section 74.5(11) is a specific anti-avoidance rule that precludes the use of the attribution rules where one of the main reasons for the transfer of property was to reduce the amount of tax that would be payable on the income derived from the property. He then pointed out that a central reason for the transfer of shares to Jordanna was to reduce or eliminate the dividend income on the shares. Therefore, Rothstein said that the Minister should have relied on section 74.5(11) to reassess the taxpayer in respect of his use of section 74.1(1). According to Rothstein, J., the Minister's failure to invoke section 74.5(11) is fatal to his reassessment in respect of section 74.1(1) and the Minister should not be allowed to pre-emptively rely upon the GAAR. Simply stated, section 245 did not apply under these circumstances. The majority had no difficulty with this issue. Justice LeBel said that both parties stated at the outset that section 74.5(11) does not apply to the facts of this case and while the majority agreed with Rothstein that the SCC is not bound to adopt, on a question of law, an interpretation on which the parties agree, it is quite another matter to settle their dispute on a basis of a construction and an application of the

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statute expressly disavowed by all parties throughout the proceedings. As the majority in this case said, the SCC's decision must turn on the issues as framed in the proceedings and litigated in the courts below and on appeal to the SCC.

Unfortunately, I am troubled by Justice Label's reasoning. I am in agreement with the persuasive logic of Justice Rothstein's reasoning. After all, isn't it the SCC's job to make sure that the answers they provide are given to "properly framed" questions? And in this case, there already exists an anti-avoidance provision in the section. Shouldn't that have been applied? And now does this mean that the Crown will always use GAAR as a catch all for every transaction even if the impugned provision has a GAAR provision? What license has the SCC given to the CRA in applying the GAAR to future situations? And with the *Lipson* decision, has the SCC added more uncertainty and less predictability to the application of the GAAR? ■

TFSAs - Are They Right for Your Client?

By Ryan Keey, Carswell

Section 146.2, Tax-Free Savings Account (TFSA), was added as proposed in the February 26, 2008 Federal Budget and is applicable after 2008. A TFSA is a general-purpose savings account that allows individuals to make contributions each year and to withdraw funds at any time for any purpose. Income and capital gains earned within a TFSA are not subject to tax and distributions can be made from a TFSA free of tax. Also, withdraws are not required to be made at any given age. However, unlike contributions to an RRSP, TFSA contributions are not deductible. Any individual (other than a trust) who is resident in Canada and 18 years of age or older can establish a TFSA and an individual is permitted to hold more than one TFSA.

An individual can make TFSA contributions (and not be subject to a penalty) up to the amount of the individual's available TFSA contribution room. Beginning in 2009, TFSA contribution room accrues each year to individuals who are at least 18 years of age and resident in Canada. Unlike the RRSP system, contribution room is created regardless of an individual's income for a taxation year. The amount of TFSA contribution room that accrues in 2009 is $5,000 (see the definitions "TFSA dollar limit" and "unused TFSA contribution room" in subsection 207.01(1)). After 2009, the $5,000 annual accrual amount is increased for inflation, rounded to the nearest $500. Unused TFSA contribution room is carried forward and may be utilized in any future year. For example, ignoring indexation, if an individual contributes $1,000 to a TFSA in 2009, the individual's contribution room for 2010 would be $9,000 ($5,000 for 2010 plus $4,000 carried forward from 2009). There is no limit on the number of years that unused contribution room can be carried forward.

An individual can make in-kind contributions to a TFSA. The contributed property would be considered to have disposed of for its fair market value at the time of the contribution. The amount of the contribution would be equal to the fair market value of the property. The contribution-in-kind may give rise to a capital gain or loss. If a capital loss arises on the contribution, the loss is denied pursuant to subparagraph 40(2)(g)(iv). Thus, if a property has an accrued loss, a taxpayer may first sell the property to realize the capital loss and then transfer the proceeds to a TFSA (note that if the TFSA repurchases the same property within 30 days, the loss incurred by the taxpayer will generally be denied; see the definition "superficial loss" in section 54 and see paragraph 251.1(1)(g)).

Available TFSA contribution room also includes the amount of distributions made under the TFSA in the preceding year. Thus, individuals who access their TFSA savings have the ability to re-contribute an equivalent amount to a TFSA in the future. For example, if an individual contributed $5,000 to a TFSA in 2009 and by 2020, the value of the TFSA grew to $20,000, the individual could withdraw the $20,000 from their TFSA and then re-contribute the same amount at a later date without affecting their TFSA contribution room.

Proposed subsection 146.2(9) provides for special rules that modify the tax treatment of trusteed TFSAs on the death of a holder of

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a TFSA. Generally, the rules provide that the former TFSA trust will retain its tax-exempt status until the earlier of the cessation of the trust and the end of the year following the year in which the holder dies.

Under Part XI.01 of the Act, taxes are imposed on excess contributions made to a TFSA (similar to RRSPs, excess contributions are subject to a tax of 1 per cent per month). The amount of TFSA contribution room available to an individual for a year is not specifically defined; rather, contribution room is essentially the amount of contributions that the individual can make in the year without creating an excess amount. Taxes are also imposed under Part XI.01 on contributions made by an individual to a TFSA while the individual was non-resident, in respect of investing in non-qualified or prohibited investments, and in connection with extending supplementary advantages. Generally, a TFSA is permitted to hold the same types of investments as an RRSP. Thus, a TFSA may hold a broad range of investments, including publicly-traded securities, government and corporate bonds, guaranteed investment certificates, mutual fund units and, in certain cases, shares of a small business corporation. However, it is important to highlight that a TFSA cannot hold "prohibited investments" (generally, investments in an entity with which the TFSA account holder does not deal at arm's length). Based on the July 2008 Technical Notes to proposed Regulation 5000, the prohibited investment rules are intended to guard against tax planning opportunities with respect to closely-held investments and the distinction between non-qualified investments and prohibited investments is intended to recognize practical difficulties TFSA issuers would have in obtaining the necessary information to ensure compliance with the prohibited investment rules.

Further to the above, the following is a general summary of some of the other important aspects of TFSAs:

- As TFSA withdrawals are not included in computing income for tax purposes, income, losses and gains in respect of investments held within a TFSA, as well as amounts withdrawn, will not be taken into account in determining eligibility for income-tested benefits or credits (such as, for example, the Canada Child Tax Benefit, the GST credit, OAS benefits, the Guaranteed Income Supplement or Employment Insurance benefits);
- Interest on money borrowed to invest in a TFSA is not deductible;
- An individual can take advantage of TFSA contribution room available to them by using funds provided by their spouse or common-law partner and the spousal attribution rules will not apply to income earned in the TFSA;
- Generally, a TFSA loses its tax-exempt status upon the death of the holder of the account; however, an individual is permitted to name his or her spouse or common-law partner as the successor account holder and in such a case, the account will maintain its tax-exempt status. Alternatively, the assets of a deceased individual's TFSA may be transferred to a TFSA of the surviving spouse or common-law partner regardless of whether the survivor has available contribution room;
- On the breakdown of a marriage or a common-law partnership, an amount may be transferred directly from the TFSA of one party to the TFSA of the other on a tax-free basis (the transfer will not re-instate contribution room of the transferor, and will not reduce the contribution room of the transferee);
- An individual who becomes non-resident can maintain his/her TFSA; however, no contributions are permitted while the individual is non-resident and contribution room will not accrue for any year throughout which the individual is non-resident;
- It is expected that the CRA will report TFSA contribution room to each eligible individual who files an annual income tax return;
- Generally, financial institutions eligible to issue RRSPs are permitted to issue TFSAs and are required to file annual information returns.
- Trusts governed by TFSAs are excluded for the purpose of the 21-year deemed disposition rule and certain other specified measures applicable to trusts;
- The proceeds of a deceased individual's TFSA that are donated by way of a direct designation under the terms of the TFSA to a qualified donee may be claimed as a tax credit in computing the deceased individual's tax for the year of death;
- A holder of a TFSA who immigrates to or emigrates from Canada will not be treated as having disposed of their rights under a TFSA;
- Non-resident withholding tax applies to certain payments made out of a trust governed by a former TFSA after the death of the holder of the TFSA; and
- Where a TFSA holds an interest as a limited partner in a limited partnership, the TFSA will not, solely because of its

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acquisition and holding of the limited partnership interest, be considered to carry on any business or other activity of the partnership.

TFSAs should be compared to RRSPs, RESPs and RDSPs, each of which has advantages and disadvantages. A common aspect of all plans is that investment income that accrues within a registered plan is sheltered from tax, which provides a significant tax advantage when comparing registered and non-registered investments.

Unlike RRSP's, payments made out of a TFSA are not included in computing income (also note that TFSA withdraws do not affect income-tested benefits and can be recontributed to a TFSA without affecting contribution room). However, contributions to a TFSA are not deductible in computing income. RRSP contributions are deductible in computing income (provided sufficient RRSP contribution room is available); however, RRSP withdrawals are included in computing income and can affect income-test benefits. Also, RRSP contributions are subject to withdrawal requirement rules at the end of the year in which the individual attains 71 years of age.

Contributions to TFSAs, RESPs and RDSPs are not deductible in computing income. Unlike TFSAs, where certain conditions are met, contributions (within certain limits) to RESPs and RDSPs attract government grants. However, investment income earned while investments are held in an RESP or an RDSP in addition to government grants paid into the plan are taxable upon withdraw (note, however, that taxation may be nil or minimal as where certain conditions are met, withdraws are taxed in the hands of the student or disabled individual who are the beneficiaries under the trust). As noted above, TFSA withdraws are not included in computing income.

Whether an individual should utilize a TFSA, an RRSP, an RESP, an RDSP or a combination of each depends on many factors, including savings needs, cash flow needs, investment return expectations, and whether the individual has dependents (in particular, a child who is expected to attend secondary school or a disabled child). TFSA's should be attractive for individuals that have used all of their RRSP room (and RESP and RDSP government grant room where applicable) in a taxation year. Also, TFSA's may be particularly attractive to retirees who no longer have RRSP contribution room or child education savings needs.

Further to the above, reference should be made to the Supplementary Information (Annex 4) to the 2008 Federal Budget under "Features of TFSA and Other Registered Savings Vehicles" which provides a discussion and examples comparing investing in a TFSA, RRSP and an RESP. The calculations provided illustrate that the net after-tax rates of return on TFSA and RRSP savings are equivalent when effective tax rates are the same at the time of contribution and the time of withdraw (in other words, in such a case, the value of the tax deduction available for RRSP contributions is equivalent to the value of withdrawing funds from a TFSA on a tax-free basis).

For an in-depth technical commentary on TFSAs, see the commentary to section 146.2 in the Canada Tax Service.

Recent CRA Views

In Views document 2006-0174701E5, dated October 1, 2008, the CRA was asked to provide its views on whether a Canadian resident who pays foreign income tax on income that is attributed to him under subsection 75(2) of the *Income Tax Act* is entitled to a foreign tax credit or deduction under either subsection 20(11) or 20(12) in respect of the foreign taxes paid.

The taxpayer is a U.S. citizen who immigrated to Canada, having previously established a U.S. grantor trust which is resident in the U.S. and invests solely in property that is not taxable Canadian property and is not real estate. Under U.S. legislation, the income from the trust's investments is reported on the individual taxpayer's U.S. income tax return and the individual pays U.S. income tax on that income. For the first four calendar years following the individual's immigration to Canada, the grantor trust is not deemed resident in Canada under paragraph 94(1)(c) or proposed ss. 94(3) because the individual, as the sole contributor of property to the trust, has not been resident in Canada for more than 60 months by the end of the taxation year.

The CRA noted that there must be a clear connection between the amount sought to be deducted under either subsection 20(11) or 20(12) and the foreign taxes paid, and that this connection would be met in the taxpayer's situation. Therefore, assuming that the income earned by the trust is the sole property income earned by the individual from the U.S. and that the individual's tax rate exceeds 15%, the CRA's view was that the individual would be entitled to a 15% foreign tax credit in respect of the foreign tax paid by the individual on U.S. property income that is attributed to him under subsection 75(2), and that any balance of tax payable would be deductible under subsection 20(11). The CRA's

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response assumed that paragraph 75(3)(c.2) does not apply, and that the income from the non-resident trust is included in the individual's income under ss.75(2).

The CRA noted that this response is consistent with its position taken in CRA Views 2007-0233701C6 and 2002-0143605.

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In Views document 2008-0267721E5, dated November 12, 2008, the CRA was asked to provide its views on whether the donation of a right to use a vacation property, such as a cottage, to a registered charity for occasional limited-time use would qualify as a charitable gift under section 118.1 of the *Income Tax Act*.

The CRA commented that there must be a transfer of property for a donation to qualify as a charitable gift for purposes of the *Income Tax Act*. A right to use property is a property, but the granting of such a right is not a transfer of property, per *Dunkelman v. Minister of National Revenue*,[1] which held that a loan of money is not a transfer of property. Therefore, the CRA concluded that a gratuitous loan of property is not a gift for purposes of sections 110.1 and 118.1 of the *Income Tax Act*, since such a loan does not constitute a transfer of property. The CRA noted that there is nothing to prevent a charity from paying rent or interest on a loan of property and later accepting the return of all or a portion of the payment as a gift, provided it is returned voluntarily, and as long as there are two separate transactions which are independent of each other (see Income Tax Technical News, No. 17 for further discussion).

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In Views document 2008-0286381E5, dated December 5, 2008, the CRA confirmed its position on the taxability of employer-provided parking.

In the taxpayer's situation, all of the employees were provided with employer-paid parking at the particular work location where they report for work. The CRA stated that employer-provided parking generally constitutes a taxable benefit to an employee under paragraph 6(1)(a) of the *Income Tax Act* whether or not the employer owns the lot, subject to the following specific exceptions: (1) where parking is provided to an employee who is regularly required by the employer to use his automobile in the performance of employment duties three or more days a week for employment-related travel and requires a parking space for this purpose, and (2) the CRA provides an administrative exception for "scramble parking" (where there are fewer parking spaces than there are employees who require parking and the parking spaces are available on a first-come, first-served basis) because, although a benefit is conferred, its value to any particular employee is difficult to determine.

The CRA concluded that in the taxpayer's circumstances there was a taxable benefit to the employees because in most cases the employees are not required to use their automobiles in the performance of their duties of employment on a regular basis, and it could not be considered to be scramble parking since each employee appears to get a parking space and the employer pays the parking fee for each employee.

In its reasons, the CRA referred to the recent decision in *Adler v. R.*[2] where the Tax Court of Canada considered whether parking provided by an employer to 16 of its employees resulted in a taxable benefit. The Tax Court found that 14 out of the 16 employees received an economic advantage in respect of the free parking that accrued primarily for their benefit, and also indicated that such a determination "requires an examination of the totality of the evidence with a view to assessing on a reasonable, practical basis whether under the particular circumstances the employee's enjoyment of the expenditure by the employer was ancillary to the benefit derived by his employer." The court also cited several factors in its decision that could be considered by an employer providing such benefits to its employees if taxation is a matter of concern.

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In Views document 2008-0299051M4, dated December 9, 2008, the CRA was asked to provide its views on whether a person can have two spouses under the *Income Tax Act*.

The CRA responded that when the *Income Tax Act* refers to a taxpayer's "spouse," the reference is to an individual to whom the taxpayer is legally married; however, common-law relationships are also recognized for income tax purposes. A "common-law partner" is defined in the *Income Tax Act* as someone who is not the taxpayer's spouse but with whom the taxpayer is living and having a conjugal relationship and to whom at least one of the following situations applies:

- He/she has been living with the taxpayer in such a relationship for at least 12 consecutive months;

[1] [1959] C.T.C. 375, 59 D.T.C. 1242 (Can. Ex. Ct.).

[2] 2007 TCC 272, 2007 D.T.C. 783 (Eng.), [2007] 4 C.T.C. 2205 (T.C.C. [General Procedure]).

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- He/she is the parent of the taxpayer's child by birth or adoption; or
- He/she has custody and control of the taxpayer's child and the taxpayer's child is wholly dependent on that person for support.

Therefore, it is possible that a person might have both a spouse and a common-law partner for purposes of the *Income Tax Act*.

Cases of Note

Lipson v. ***Canada*** (S.C.C.) – Docket 32041, 2009 SCC 1, 2009 CSC 1 – 08/01/2009 - Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. - The taxpayer and his wife entered into an agreement of purchase and sale for a family residence. The wife borrowed $562,500 from a bank to finance the purchase of shares in a family corporation. She paid the borrowed money directly to the taxpayer who transferred the shares to her. The taxpayer and his wife obtained a mortgage from a bank for $562,500. That same day, they used the mortgage loan funds to repay the share loan in its entirety. On his 1994, 1995 and 1996 tax returns, the taxpayer deducted the interest on the mortgage loan and reported the taxable dividends on the shares as income when applicable. The brother of the taxpayer, J, conducted similar transactions. The Minister of National Revenue disallowed the deductions for those taxation years and reassessed the taxpayers accordingly. The Tax Court of Canada dismissed the taxpayers' appeals, holding that the series of transactions constituted a misuse of ss. 20(1)(*c*), 20(3), 73(1) and 74.1 of the *Income Tax Act* and the taxpayers' appeals were dismissed. The Federal Court of Appeal upheld that decision.

Held (Binnie, Deschamps and Rothstein JJ. dissenting): The appeals should be dismissed.

Per LeBel, Fish, Abella and Charron JJ.: Taxpayers may order their affairs so as to minimize the amount of tax payable, but this principle has never been absolute, and Parliament has enacted the general anti-avoidance rule ("GAAR") to limit the scope of allowable avoidance transactions while maintaining certainty for taxpayers. The GAAR denies a tax benefit where three criteria are met: the benefit arises from a transaction (ss. 245(1) and 245(2)); the transaction is an avoidance transaction as defined in s. 245(3); and the transaction results in an abuse and misuse within the meaning of s. 245(4). The taxpayer bears the burden of proving that the first two of these criteria are not met, while the burden is on the Minister to prove, on the balance of probabilities, that the avoidance transaction results in abuse and misuse within the meaning of s. 245(4). Here, all the transactions were conceded to result in two tax benefits and to be avoidance transactions.

A two-part inquiry must be followed to determine whether a transaction results in a misuse/abuse for the purposes of s. 245(4) of the Act. First, the provisions giving rise to the tax benefit must be analyzed to determine their essential spirit and purpose. It is important to identify which provision is associated with each tax benefit. Here, the tax benefit of interest deductibility is associated with ss. 20(1)(*c*) and 20(3) and the tax benefit arising out of the use of the attribution rules by the taxpayer to reduce his income is linked with ss. 73(1) and 74.1(1). Second, a court must determine if the avoidance transaction frustrates the spirit or purpose of the relevant provisions. In assessing a series of transactions, the misuse/abuse must be related to the specific transactions forming part of the series. However, the entire series of transactions should be considered in order to determine whether the individual transactions within the series abuse one or more of the provisions of the Act. Individual transactions must be viewed in the context of the series. This approach is consistent with the wording of the GAAR provisions, in particular with ss. 245(2) and 245(3)(*b*). Further, the use of the words "directly or indirectly" in s. 245(4), indicates that Parliament intended the GAAR to apply even where abuse is an indirect result of a transaction and consequently, that regard may be had to the series of transactions when determining whether a transaction within the series is abusive. It is preferable to refer to the "overall result" of the transactions which more accurately reflects the wording of s. 245(4), and the jurisprudence of this Court rather than "overall purpose" which may incorrectly imply that the taxpayer's motivation or the purpose of the transaction is determinative. An avoidance purpose is needed to establish a violation of the GAAR when s. 245(3) is in issue, but is not determinative in the s. 245(4) analysis.

The Minister has failed to establish that the purpose of ss. 20(1)(*c*) and 20(3) have been misused/abused. The series of transactions did not become problematic until the taxpayer and his wife turned to ss. 73(1) and 74.1(1), in order to obtain the result contemplated in the design of the series of transactions which resulted in the taxpayer applying his wife's interest deduction to his own income. The attribution by operation of s. 74.1(1) that allowed the taxpayer to deduct the interest in order to reduce the tax payable on the dividend income from the shares and other income, which he would not have been able to do were the wife dealing with him at arm's length, qualifies as abusive tax avoidance. It does not matter that s. 74.1(1) was triggered automatically when the taxpayer did not elect to opt out of s. 73(1). To allow s. 74.1(1) to be used to reduce the taxpayer's income tax from what it would have been without the transfer to his wife frustrates the purpose of the attribution rules.

It is not open to the Court to consider the interpretation and application of the specific anti-avoidance rule in s. 74.5(11) as it was expressly disavowed by all parties throughout the proceedings. The GAAR's application was the focus of the appeals and was the proper basis for the reassessments of the transactions. These transactions are caught by the GAAR.

Finally, in determining the tax consequences of the GAAR's application under s. 245(5), courts must be satisfied that an avoidance transaction has been found under s. 245(4), that s. 245(5) provides for the tax consequences and that they deny the tax benefits that would flow from the abusive transactions. Courts must then determine whether these tax consequences are reasonable in the circumstances. In the present case, the disallowance of the interest expense in computing the income or loss attributed to the taxpayer and allocation of that interest deduction back to his wife is a reasonable outcome.

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White v. R. (T.C.C. [Informal Procedure]) - 2008 CarswellNat 2543, 2008 TCC 414 – 24/07/2008 - M.A. Mogan J. - The taxpayer acquired a life insurance policy in 1983 at the age 48. The policy had "return of premium" benefit for which he paid a separate premium. The policy terminated in 2005 when he turned 70 years old. Because the taxpayer survived the termination of the policy, he received a cheque from the insurer for $24,909 representing the "return of premium" benefit. The taxpayer filed his 2005 tax return reporting total income of approximately $21,200 derived primarily from pensions and old age security. On reassessment, the Minister added $24,909 to reported income, in effect, taxing the return of premiums. The taxpayer appealed and the appeal was allowed in part. The appeal was allowed for the sole purpose of reducing income from $24,909 to $23,888, which was taxable pursuant to s. 148(1) of the *Income Tax Act*. While the words "proceeds of disposition" and "adjusted cost basis" are similar to words used in the Act to define capital gain, with respect to life insurance policy, any gain on disposition of interest therein flows directly into the policyholder's income because of the opening words of s. 148(1) and the specific words of s. 56(1)(j). The maturity of the policy in 2005 was a "disposition" of his interest in the policy. The "proceeds of disposition" of his interest in the policy was the amount that he was entitled to receive in 2005 when the term of the policy expired. The taxpayer's adjusted cost basis of his interest in the policy was the total of all amounts paid as premiums for pure life insurance plus all amounts paid as premiums for the return of premium benefit ("ROP") minus net cost of pure insurance as defined by Regulation 308 and determined by the insurer. When the taxpayer disposed of his interest in the policy, he was required to include the amount by which his proceeds of disposition exceeded his adjusted cost base in computing his 2005 income. Therefore, the amount to be included in his 2005 income was $23,888. The taxpayer's frustration was understandable as he paid $24,909 in premiums, which was not deductible in computing his income. The taxpayer naturally thought of the ROP benefit as a return of non-taxable dollars. But according to CRA, a greater portion of the ROP benefit was the share of income earned by the insurer over the 22 year term. That share was going to be taxed to taxpayer because he was the recipient.

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Re Wade Estate (Ont. S.C.J.) - 2008 CarswellOnt 6446, 43 E.T.R. (3d) 305 – 04/11/2008 - C. McKinnon J. - In 1997, the deceased made a holograph will and died two weeks later. She was survived by her children George and Karen. The will stated that everything the deceased owned was to be left to George with "provisal [sic]" that he pay $20,000 to Karen and $5,000 to George's son, Andrew. On application by Karen requiring George to pass accounts, it was agreed by the parties that the litigation would be disposed of by determining whether Karen was a beneficiary under the will. Karen claimed that she was the beneficiary of a specific bequest and George was the residuary beneficiary. George claimed that he was beneficiary of the entire estate, subject to the condition subsequent that he pay amounts to Karen and to Andrew. George also claimed that the condition subsequent was ambiguous and therefore void for uncertainty. The deceased's major asset was her home which she and George held as tenants in common. George upgraded the house and sold it in 2002. Karen was not a beneficiary under the will. When the deceased wrote the will, she mistakenly believed that she had a $40,000 life insurance policy with George as the designated beneficiary. But the policy was only for accidental death and the deceased died of natural causes. It was clear that the deceased intended that the entire estate be left to George, who would make gifts to Karen and Andrew as circumstances allowed. Surrounding circumstances showed that George had used an earlier inheritance to provide the deceased with housing during her old age and she wanted to repay him. In fact, the estate was unable to pay its debts and George had to contribute funds to reduce the shortfall. The direction to pay Karen and Andrew was ambiguous and void for uncertainty. Presumably, the deceased thought that George would have funds from the insurance policy to make payments to Karen and Andrew; otherwise he would be required to make those payments from his own resources which would be manifestly unjust.

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Re Kerzner (Ont. S.C.J.) - 2008 CarswellOnt 4905, 42 E.T.R. (3d) 311 – 26/08/2008 - D.M. Brown J. - The general will of the testator excluded shares in certain private companies. The general will clearly expressed the testator's intention not to revoke his excluded properties will. The applicants brought an application for certificates for multiple wills. The applicants were directed to file an affidavit confirming that the testator's general will remained in force and had not been revoked by his excluded properties will. If the affidavit is provided, the certificate would be issued.

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Re Goushleff Estate (Ont. S. C. J.) - 2008 CarswellOnt 6102, 43 E.T.R. (3d) 319 – 8/10/2008 - D.M. Brown J. - The deceased made two wills each dealing with different assets and each naming different executors. The deceased's wife, as executrix in the second will, applied for a Certificate of Appointment of Estate Trustee with Will Limited to Assets Referred to in Will. The Toronto Region Estates Office raised a question as to whether the more appropriate procedure would be for the executor in the first will to return his Certificate, and then a new certificate would be issued to both executors distinguishing their respective powers under the two wills. The Toronto Region Estates Office was authorized to proceed to process the executrix's application. The executrix was entitled to apply for a separate Certificate of Appointment without any need to recall the certificate already granted to the other executor.

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Barnes v. Barnes (Ont. S.C.J.) - 2008 CarswellOnt 6153, 2008 CarswellOnt 6153 - 15/10/2008 - Langdon J. - Nancy Barnes was the daughter of deceased parents who established testamentary trusts. The trust company's application to act as guardian of Nancy's property was approved. The trust company's management plan was approved. The plaintiff sister objected to the sequence of calls on the trusts to pay for the living expenses of Nancy. Additional reasons were issued regarding the ongoing maintenance and benefit of Nancy. It was directed that the father's testamentary trust shall be used to pay for Nancy's maintenance and care, next recourse should be had to mother's testamentary trust, and last to Nancy's own funds. A provision for Nancy's care was made in the father's trust and not in the mother's trust. ■