

News Analysis: Supreme Court Holds off on *Daishowa*

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COUNTRY DIGEST

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The Supreme Court of Canada (SCC) on April 26 took the unusual step of ordering an oral hearing on an appeal application in *Daishowa-Marubeni International Ltd. v. The Queen*, a case involving the tax treatment of liabilities inherited by the buyer of two sawmill operations owned by the appellant.

In September 2011 Canada's Federal Court of Appeal, in a 2-1 decision, held that *Daishowa* should be required to include in its taxable sale proceeds an estimated amount of the reforestation liabilities connected to the sawmill properties. The majority on the court reasoned that the inherited obligations formed part of the consideration received by *Daishowa* because the company ceased to be liable for them. (For the Federal Court of Appeal's decision in *Daishowa*, see *Doc 2011-20940* or *2011 WTD 193-16*; for prior coverage, see *Tax Notes Int'l*, Oct. 10, 2011, p. 108, *Doc 2011-20925*, or *2011 WTD 193-3*.)

In a dissenting judgment, the minority concluded that the liabilities should be excluded from *Daishowa's* sale proceeds because the liabilities simply constituted a feature of the property that reduced its fair market value.

In the minority's view (which seems to be the more logical and well-reasoned approach to the issue), liabilities such as the ones at issue in this case are an inher-

ent part of the property being sold and cannot be borne by anyone other than the owner of the property. As such, they form part of the property itself, are taken into account when the property is valued, and should not be treated separately when the seller's proceeds from the disposition of the property are determined.

Daishowa subsequently sought leave to appeal the court's decision to the SCC. In tax matters, appeals to the SCC are permitted only if the SCC grants the applicant permission to appeal, and permission is granted only if the SCC is convinced that the issue is of national importance.

In this case, rather than simply granting or dismissing *Daishowa's* application for leave to appeal, the SCC ordered the company and the Canada Revenue Agency to appear before the three-judge panel considering the appeal application to present arguments as to why the SCC should or should not grant leave to appeal.

Hopefully, the June 4 oral hearing indicates that the SCC may consider the difficult issue of the tax treatment of liabilities on a sale of property to indeed be of national importance. The Canadian tax community will watch this important case closely, as many practitioners believe the minority decision to be the better view. ◆

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