

Supreme Court Grants Taxpayer Leave to Appeal in *Daishowa*

by Steve Suarez

Reprinted from *Tax Notes Int'l*, June 11, 2012, p. 1006

COUNTRY DIGEST

Supreme Court Grants Taxpayer Leave To Appeal in *Daishowa*

The Supreme Court of Canada (SCC) on June 4 ensured that there will be one more chapter written in the case of *Daishowa-Marubeni International Ltd. v. The Queen*. The Court granted the company leave to appeal a decision that it had to include in its taxable sale proceeds the noncash consideration it derived from the transfer of a reforestation obligation. (For prior coverage, see *Tax Notes Int'l*, May 7, 2012, p. 514, *Doc 2012-8948*, or *2012 WTD 82-2*.)

The case is extremely interesting for a number of reasons. The issues involved are clearly unsettled as a matter of law, despite being applicable to taxpayers in many different industries.

In the case at issue, *Daishowa-Marubeni International Ltd.* (DMI), a Canadian forest products company, disposed of timber property that was subject to governmental obligations to reforest and remediate the land. The reforestation obligations could not be retained by the seller; by law, they were inherited by the purchaser of the property to which they related.

The Tax Court of Canada concluded that a portion (about one-third) of the estimated cost of fulfilling the future reforesting obligations should be included in DMI's sale proceeds. On appeal to the Federal Court of Appeal, the Canada Revenue Agency won a split decision in which a majority of the court decided that DMI should include the entire estimated amount of those liabilities in its sale proceeds. Because DMI ceased to be liable for the reforestation obligations inherited by the purchaser, that constituted valuable (noncash) consideration that must be included in the sale proceeds for tax purposes, the majority held.

The FCA's dissenting minority reached a completely opposite result, concluding that the obligations were inextricably linked to (and hence were a feature of) the transferred property and simply reduced its fair market

value. As such, the minority concluded, the liabilities had already been taken into account in valuing the property, and DMI received no additional consideration in ceasing to be responsible for them.

In response to the taxpayer's application for leave to appeal,¹ the SCC took the highly unusual step of ordering an oral hearing rather than simply deciding whether to hear the appeal based on the parties' written submissions. The hearing took place on June 4, and at its conclusion, the SCC granted the taxpayer leave to appeal based on two questions:

- Should the reforestation liabilities inherited by the purchaser be included in the seller's proceeds of disposition?
- Is it relevant whether the seller and purchaser agreed as to the amount of those liabilities?²

The granting of leave to appeal is a welcome development after three conflicting judgments in the case, and many in the tax community consider the FCA minority decision to be the better view.

Clearly, the questions raised in the *Daishowa* case meet the standard for SCC review — that is, being issues of national importance that can potentially arise regarding various seller obligations for which a purchaser assumes responsibility (for example, pension obligations, environmental liabilities, and so on). Whatever clarity the SCC can offer will be helpful in guiding both taxpayers and the CRA. ◆

◆ *Steve Suarez, Borden Ladner Gervais LLP, Toronto*

¹In tax matters there is no automatic right of appeal to the highest court.

²The webcast of the oral hearing was being archived as of June 6, and it will be posted on the SCC website at <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/webcasts-webdiffusions-eng.aspx>.