

Supreme Court to Hear Appeal in Amalgamation Case

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Canada's Supreme Court on June 21 granted the taxpayer leave to appeal in an interesting case involving the rules governing the amalgamation of two corporations.

In *Envision Credit Union v. The Queen*, the taxpayer sought to claim capital cost allowance (CCA — the Canadian tax version of depreciation) on the basis that the amalgamation that produced the taxpayer was a taxable transaction that did not fall under the rules providing for a tax-deferred merger of the two participating entities (two credit unions governed by the laws of the province of British Columbia).

The Tax Court of Canada held that the merger of the two predecessor corporations failed to qualify as a tax-deferred amalgamation because the participants intentionally transferred some property of one of the participants to a subsidiary corporation at the moment of the amalgamation. As a result, the transaction did not meet one of the essential requirements of section 87 of the Income Tax Act (Canada) for a merger of two Canadian corporations to be tax deferred — namely, that the amalgamated corporation acquire all the property of all of its predecessors. The result, which was what the taxpayer intended, allowed the taxpayer to argue that the undepreciated capital cost (UCC) of its depreciable property should be the acquisition cost of the predecessor corporations, and not a lesser amount reduced by CCA previously claimed by the predecessors up to the time of the merger (as would be the case had the merger qualified as a tax-deferred amalgamation under section 87). (For prior coverage of the Tax Court decision (2010 TCC 576), see *Doc 2011-3299* or *2011 WTD 44-17*; for the decision, see *Doc 2011-2289* or *2011 WTD 23-14*.)

However, the Tax Court disagreed with the taxpayer as to the result of the amalgamation not being tax deferred. Based on the fact that the underlying corporate

law treats the amalgamated corporation as the continuation of the predecessors, the Tax Court concluded that the reduced UCC of the predecessors flowed through to the amalgamated corporation, with the same result as if section 87 had applied to the merger. However, the taxpayer's claim for higher CCA was allowed for its 2001 tax year, on the technical grounds that it was statute-barred from reassessment by the Canada Revenue Agency (that is, the time limit for reassessing that year had passed).

On appeal by the taxpayer for its 2002-2004 tax years, the Federal Court of Appeal agreed with the Crown that section 87 applied to the merger and concluded that even if it had not applied, the result would have been the same as determined by the Tax Court — that is, the reduced UCC of the predecessors' depreciable property flowed through to the taxpayer on the merger.¹ The Federal Court of Appeal held that because the amalgamated entity acquired the consideration receivable from the simultaneous transfer of property to the subsidiary (namely shares of the subsidiary), it had acquired all the property of the predecessors within the meaning of section 87; that the form of some of that property had changed at the same time was irrelevant.

The June 21, 2012, decision of the Supreme Court of Canada to grant leave for the taxpayer to appeal means the Court believes the case raises an issue of national importance and that it will therefore hear the case.² ◆

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¹2011 FCA 321, available at <http://decisions.fca-caf.gc.ca/en/2011/2011fca321/2011fca321.html>.

²The announcement is available at http://scc.lexum.org/en/news_release/2012/12-06-21.3a/12-06-21.3a.html.