Current Tax Cases

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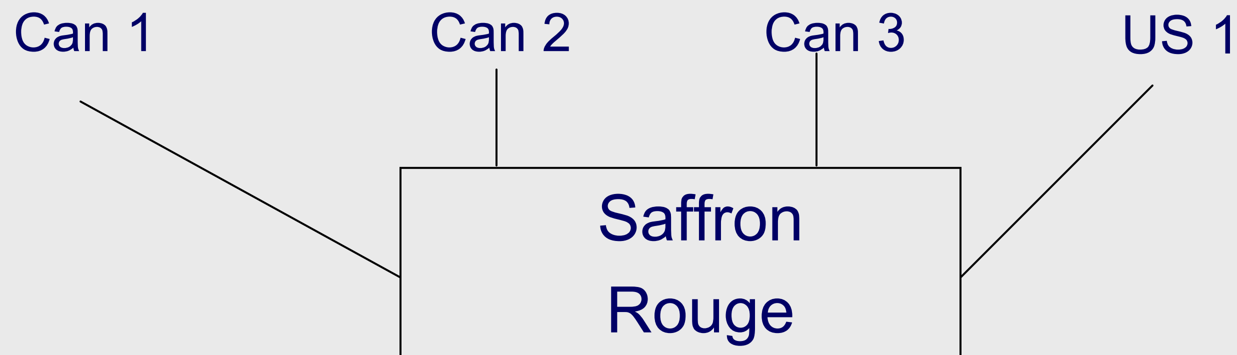
Tax Cases of Internet

1. **Binder and Binder v. Saffron Rouge et al** 2008 DTC 6112 (Ont. SCJ);
2. **Prevost Car Inc. v. Her Majesty the Queen** 2008 DTC 231 (TCC)
3. **Darte v. Her Majesty the Queen** 2008 TCC 66 (TCC)
4. **Laramee v. Her Majesty the Queen** 2007 DTC 1723 (TCC)
5. **La Survivance v. Her Majesty the Queen** 2008 DCT 5096 (FCA)

Binder and Binder v Saffron Rouge et al



- Saffron Rouge in 2004 – CCPC
- Saffron Rouge in 2005 – cash flow problems approached US 1 to invest in more shares

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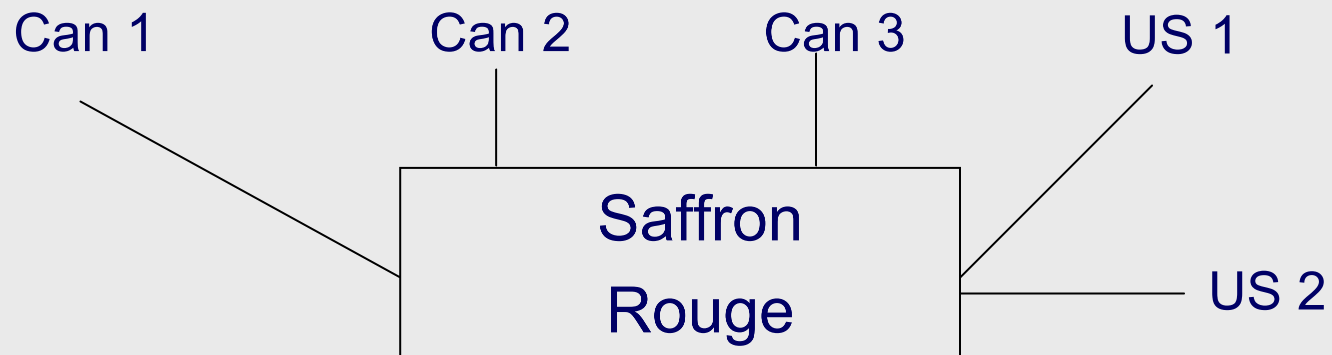
Binder and Binder v Saffron Rouge et al



- US 1 invested in more shares
- US 2 also became a shareholder
- US 1 and US 2 – 2005 controlled Saffron Rouge – no longer a CCPC

Binder and Binder v Saffron Rouge et al

- 2007 – Third Party Offer to acquire the shares of Saffron Rouge
- Can1, Can2, Can3 – Capital Gains Exemption
- Can1, Can2, Can3 – US1 and US2 agreed in 2005 subscription under valued FMV of Saffron shares agreed to reduce # of shares subscribed by US1 and US2
- Consequence of share value adjustment – Saffron Rouge – CCPC and capital gains exemption
- Can1, Can2, Can3 – seeked a rectification order to reduce # of shares held by US1 and US2

Binder and Binder v. Saffron Rouge et al

- Court reaffirmed and restated the rectification principles set out in Juliar v H.M.Q. (2000) DTC 6589

1. *The court has discretion to rectify where it is satisfied that the document does not carry out the intention of the parties.*
2. *Parties are entitled to enter into any transaction which is legal, and, in particular, are entitled to arrange their affairs to avoid payment of tax if they legitimately can.*

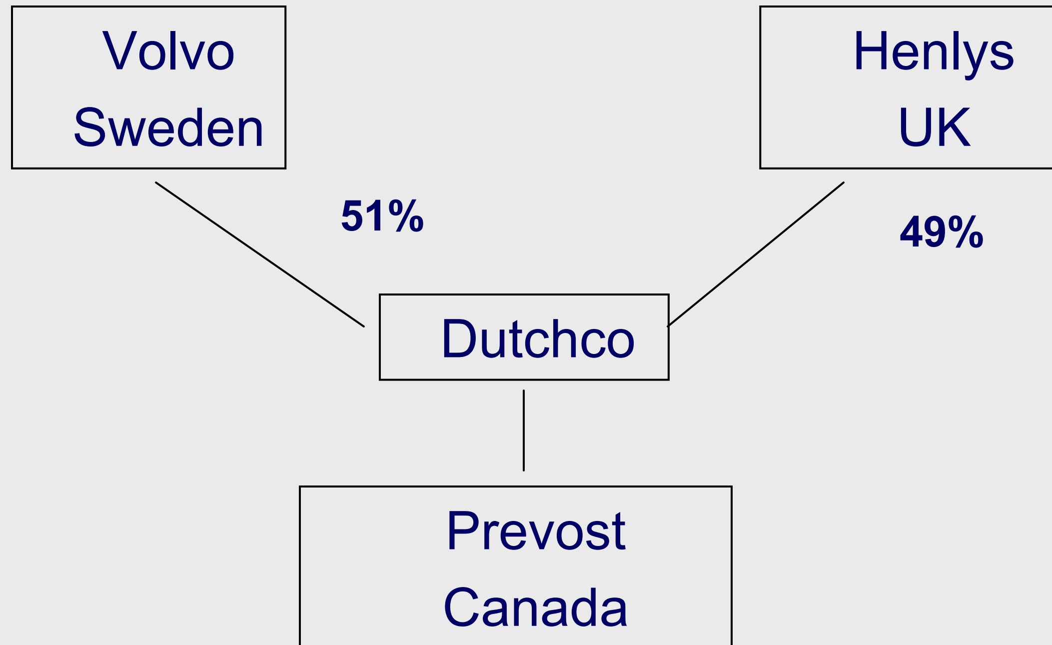
Binder and Binder v. Saffron Rouge et al

3. *If a mistake is made in a document legitimately designed to avoid the payment of tax, there is no reason why it should not be corrected. It would not be a correct exercise of discretion in such circumstances to refuse rectification merely because the Crown would thereby be deprived of an accidental and unexpected windfall.*
4. *Rectification need not be refused because the sole purpose of seeking it is to enable the parties to obtain a legitimate fiscal advantage which it was their common intention to obtain at the time of the execution of the document.*

Binder and Binder et al

- What is rectified is not a mistake in a transaction itself, but a mistake in the way that the transaction has been expressed in writing
- CT denied the rectification order
  - 2005 parties had been advised of loss of CCPC status and did not restructure investment;
  - 2005 no common mistake – in valuation
  - 2007 US1 and US2 provided a concession to common shareholders
- that rectification is not a tool that will allow a tax payer achieve retroactive tax planning

Prevost Car Inc. v H.M.Q.



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Prevost Car Inc. v H.M.Q.

- Volvo and Henly’s agreed to purchase the shares of Prevost in 1995
- Structured purchase through Dutchco
- Dutchco shareholders agreement – 80% of the profits of Dutchco and Prevost would be distributed to shareholders.

Prevost Car Inc.

- Dividends paid by Prevost to Dutchco – WH rate – 5%
- Dividends were then paid from Dutchco to Volvo and Henlys
- Minister – reassessed Prevost –
  - Dutchco was not “beneficial owner” of Prevost for purposes of Treaty
  - Sweden WH – 15%
  - UK WH – 10%

- TCC – was Dutchco the beneficial owner of the Prevost shares?

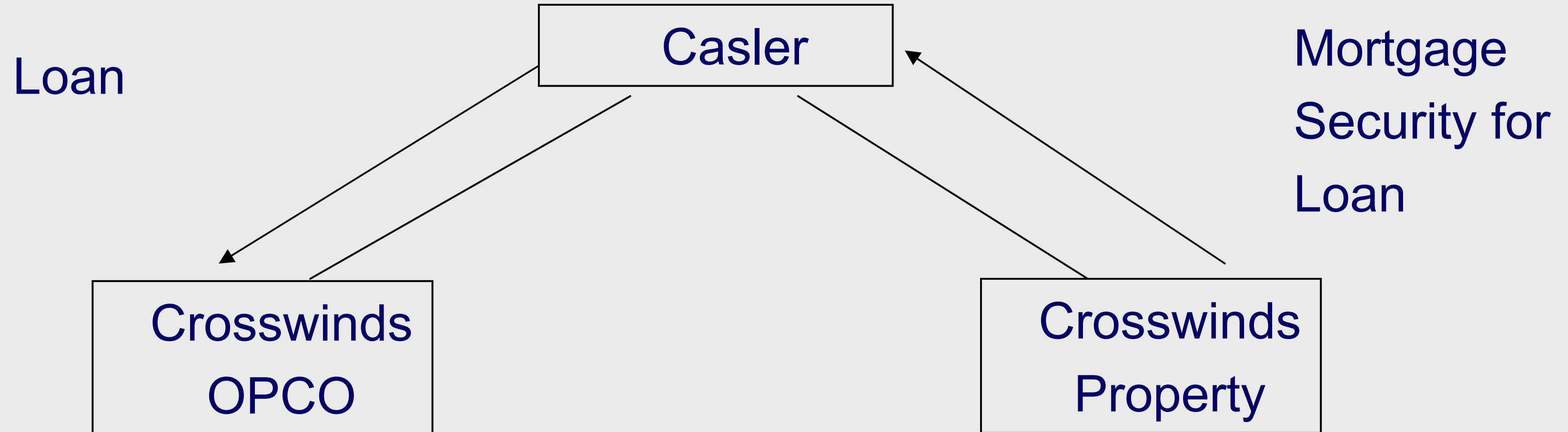
Prevost Car Inc.

- CRA –Dutchco mere conduit or funnell for Volvo and Henlys
- Beneficial ownership not defined in Treaty – words should not have a technical or legal meaning
- CRA – look to the ultimate beneficiary of the dividend
- TCC – Rejected CRA argument – concluded that corporate law Dutchco owned the Prevost shares and unless Dutchco had otherwise contracted to hold the Prevost shares as an agent, bare trustee
- Dutchco was the beneficial owner of the Prevost shares

Prevost Car Inc.

- Dutchco was the person who received the dividend for its own use and enjoyment and assumed the risk and control of the dividend that it received
- Treaty Term “beneficial owner” should not be used by Minister to challenge what it perceived as abusive treaty shopping

Laramee and Casey v H.M.Q.



L & C invested in golf course development project

L & C used Casler to own the shares of Opco & Property and to loan funds to Opco

L & C through Casler loaned Opco/Property 6.755M

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Laramee Casey

- Opco/Property – sold insufficient to repay the 6.755 M
- L & C claimed a business loss of 6.755 M as an adventure in the nature of trade
- CRA – reassessed and denied business loss however treated the loss as an ABIL
- Did the investment by L & C constitute an adventure in the nature of trade?

Laramee – Casey

- TCC

- Surprisingly concluded that T's acquisition of shares in Opco and Propertyco to build a golf course constituted an adventure in nature of trade
- However, the 6.755 M advances made to Caslar, a separate legal entity that was not acting as an agent, was not incidental to their adventure in the nature of trade
- Funds into Casler – capital property
- Capital nature of the loans did not change when Casler loaned the funds to Opco and Propertyco
- Denied the appeal

Darte v H.M.Q.

- S160 ITA/325 of ETA
- derivative liability – transferor transferred property to non-arm’s length transferee where transferor had a tax debt and price paid by transferee less than fair market value of property transferred.
- Darte’s common law partner transferred a rental propterty in 2001 to Darte, however common law partner had taxes owing at the time of the transfer
- At the time of the transfer there was no consideration paid by Darte for the rental property
- Minister assessed Darte – s160/$78,792 s. 325 - $59,143.

Darte v H.M.Q.

- Darte appealed to TCC
- Did Darte have any right, title or interest in the rental property, at the time it was transferred to her?
- Darte argued
  - Rental property acquired by common law partner- 100% financied – rental income paid mortgages.
  - Renovations were made by Darte and her family;
  - Common law partner did not assist in looking after their children;
  - Darte requested no compensation for her work from common law partner;
  - Common law partner was "unjustly enriched" by Darte – transfer of property was in compensation for unjust enrichment.

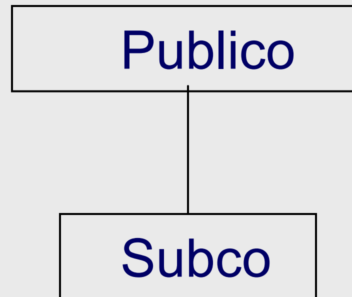
Darte v H.M.Q.

- Claim for unjust enrichment

    1. An enrichment
    2. A corresponding deprivation
    3. Absence of a juristic reason for the enrichment

- TCC : Darte Common law partner held the property in a constructive trust for Darte - unjust enrichment.
- Also held you need, not obtain a court order of unjust enrichment before asserting unjust enrichment- as a defence to s160/325
- Darte owed no duty to her common law spouse to perform work for him or provide services to him and therefore had no duty to perform work on the property.
- Darte surrendered her equitable right to unjust enrichment or compensation for the transfer of the rental property

La Survivance v H.M.Q.



- Privateco agrees to purchase the shares of Subco on July 5, 1994
- Privateco is a CCPC
- Publico on the sale of Subco to Privateco realizes a 2.6 M capital loss
- Publico claims on ABIL or the 2.6 M capital loss

La Survivance v H.M.Q.

Taxpayer:

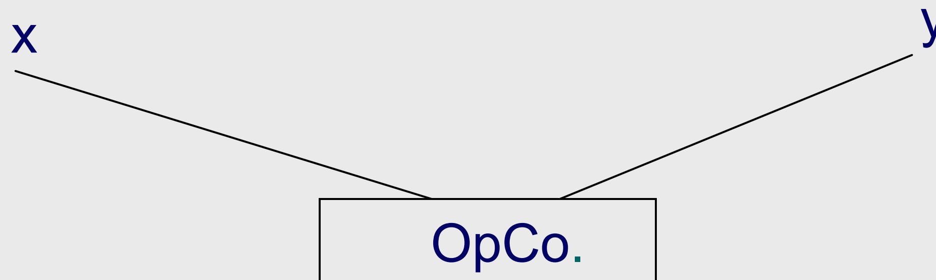
- ABIL because Subco was a CCPC – SBC
- Applied 249(4) – Deemed Year End at Acquisition of Control
- Applied 256(9) – timing of year end
- Taxpayer argued – legal fiction that on the beginning of July 5, 1994 – Privateco acquired control of Subco – Privateco – CCPC – Subco now CCPC – SBD
- TCC – ct held – 256(9) applied to Privateco and was not applicable to Publico.
- T appealed to FCA

La Survivance v H.M.Q.

FCA:

- Accepted that "legal fiction" of 256(9) applied to Privateco.
- However – language of 256(9) does not distinguish between Purchaser and Vendor –
- FCA held – 256(9) applies equally to Privateco and Publico
- Allowed Appeal:
- Control cannot be acquired without there being concomitantly an abandonment of control

Impact of FCA decision in La Survivance



- Opco FMV 2M
- X and Y agree to sell shares of Opco to Publico/NRCO
- Opco – CCPC shares otherwise qualify for 750,000 Capital Gains Exemption
- Transaction to close July 1, 2008 – Opco Year End – June 30, 2008
- X & Y intend to claim the CGE on the sale of Opco shares;
- Do the shares of Opco satisfy 110.6(2.1) ?

Impact

- Publico/NRco – non CCPC
- Operation of 256(9) – control deemed to occur at the beginning of July 1, 2008
- Consequence of the decision – La Survivance – 256(9) applies to both Opco and purchaser
- Opco – operation of 256(9) (unless otherwise elect not to have 256(9) apply)
- Opco – no longer SBC – x : y not entitled to claim CGE.
- See CRA document 2006 – 0214781E5
- Need to elect out of 256(9) – suffer the cost of a one day year end