Univar Holdco Canada ULC V. Her Majesty The Queen, 2016 TCC 159

September 21, 2016

Facts: Univar Holdco Canada ULC (the "Appelant") was the holding company used to accomplish a series of transactions (the "Transactions") that would allow its ultimate parent company to strip Canadian surplus without paying withholding tax. CVC Capital Properties (the "Parent Company"), a United Kingdom based corporation, sought to acquire Univar NV, a Netherlands public corporation (the "Target"). At that time, the corporate structure of Univar NV included Univar Inc., an American subsidiary, Univar North American Corporation ("UNAC"), an American subsidiary wholly-owned by Univar Inc., and Univar Canada Ltd. ("Univar Canada"), a Canadian subsidiary held by UNAC with high fair market value and low paid-up capital ("PUC").

Immediately following the acquisition, Univar NV incorporated Univar Holdco Inc. ("UHI") as an American subsidiary, and the latter then incorporated the Appellant as its Canadian subsidiary. Further reorganizations took place that allowed the Appellant to purchase the shares of Univar Inc. from the Parent Company in exchange for notes and shares, and for UHI to assume said notes in exchange for shares of the Appellant. The result was that Univar Canada was now indirectly held by the Appellant through Univar Inc. The implementation of this "sandwich" structure allowed for Univar Inc. to redeem its shares held by the Appellant by transferring all shares it held of Univar Canada at fair market value. The Minister of National Revenue (the "Minister") assessed the Appellant on the basis of the general anti-avoidance rule in section 245 of the Act. Although the Appellant acknowledged that there was an avoidance transaction and a resulting tax benefit as defined in section 245 of the Act, it nonetheless contended that the Transactions did not result in abusive tax avoidance within the meaning of section 245(4) of the Act.

Held: The appeal was dismissed. The Transactions undertaken clearly circumvented the application of 212.1 of the Act in a manner that "frustrated or defeated the object, spirit or purpose" of section 212.1 in general and subsection 212.1(4) in particular.

The Tax Court of Canada (the "Court") explained that the purpose of subsection 212.1(1) of the Act is to ensure that a non-resident be limited to withdrawing only its PUC tax free in the context of a non-arm's length disposition of a Canadian resident corporation's shares to another Canadian resident corporation. Pursuant to the reliving provisions found subsection 212.1(4) of the Act, however, subsection 212.1(1) will not apply if the non-resident corporation is controlled by the purchaser corporation

immediately before the sale of the shares of the subject corporation. The reasoning, as the Court explained, is that any surplus from the subject corporation would remain in Canada.

The Appellant raised two interesting arguments in its defence. First, it argued that the Transactions were not inconsistent with section 212.1 since they arose in the circumstances of an arm's length purchase of Univar NV by the Parent Company. The Court denied this based on the fact that the Transactions took place once the parties were no longer at arm's length. Alternatively, the Appellant submitted a memo from the GAAR Committee in which it noted that an alternative structure of capitalizing a Canadian-resident acquisition entity would have ensured the same outcome. The Court did not accept this argument either, concluding that since this alternative structure was not implemented it was of no consequence to the case.

The Court placed a significant emphasis on the fact that had the Appellant not used subsection 212.1(4) of the Act, it would have been required to withhold the amount of tax on the dividend deemed to UHI. Given the narrow and exceptional circumstances in which said subsection applies, the Court inferred that the relieving provision cannot be used so as to defeat the very application of section 212.1 of the Act. It held that the legislator's intent could not have been to allow a manipulation of corporate structures to satisfy the conditions of subsection 212.1(4).

Additionally, in what is sure to be a contested matter when the decision is heard on appeal, the Court took into consideration a proposed amendment to subsection 212.1(4) announced in the March 2016 Federal Budget to further identify the underlying purpose of the provision. The Court was of the opinion that the reliving provision does not apply in the context of a series of non-arm's length reorganizations carried out by a non-resident in respect of its Canadian subsidiaries to convert what would otherwise be divided distributions into tax-free capital gains.

By

Joseph (Hovsep) Takhmizdjian

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Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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