



INCOME TAX

ASSESSMENT AND REASSESSMENT

Allowable business investment loss — Appeal from Tax Court of Canada (T.C.C.) decision (2019 TCC 161) dismissing appellant's reassessment denying its claims for allowable business investment loss (ABIL), deduction for certain interest expense in its 2011 taxation year — Appellant wholly-owned subsidiary of B.W. Strassburger Ltd. (BWS) — BWS acquiring common, non-voting preferred shares of Vidabode, concrete producer — Arranging for GE Capital to provide financing to Vidabode — Appellant, BWS guaranteeing debt to GE Capital — Vidabode incurring losses between 2005–2009 — Appellant borrowing over \$14 million from TD Bank to pay subscription price payable to Vidabode for shares issued to appellant — Vidabode in turn using funds to pay its debt to GE Capital — Total of 19 343 493 common shares issued to appellant — Appellant claiming ABIL for half the value of shares issued — Parties agreeing, prior to T.C.C. hearing, that fair market value of shares acquired by appellant nil — If appellant, Vidabode not dealing with each other at arm's length, appellant would be deemed to have acquired shares at that amount— If adjusted cost base of shares nil, there would be no capital loss, hence no ABIL on disposition of these shares — T.C.C. finding that appellant, Vidabode not dealing with each other at arm's length for purposes of *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 — Therefore no ABIL realized by appellant — With respect to interest on money borrowed by appellant to acquire shares, T.C.C. finding that loan not incurred for purpose of earning income — As result, appellant could not claim deduction for this interest — Main issue whether T.C.C. erring in finding that Vidabode, appellant not dealing with each other at arm's length — T.C.C. not erring in concluding that appellant, Vidabode not dealing at arm's length when appellant acquired shares of Vidabode — ABIL only available in relation to capital loss realized as result of disposition of shares of small business corporation (Act, s. 248(1)), or disposition of debt owing by small business corporation, (Act, s. 39(1)(c)) — If taxpayer corporation, debt must be owing to it by another corporation with which it deals at arm's length (Act, s. 39(1)(c)(iv)) — Little evidence of any dealings between appellant, Vidabode in relation to acquisition of shares in issue — Necessary to determine meaning of "dealing at arm's length" for purposes of Act — Question in this case whether appellant was dealing at arm's length with Vidabode when it acquired shares of Vidabode, not whether appellant controlled, directly or indirectly in any manner whatever, Vidabode, for purposes of Act, s. 256(5.1) — T.C.C. erring in law in relying on *McGillivray Restaurant Ltd. v. Canada*, 2016 FCA 99, [2017] 1 F.C.R. 209 (*McGillivray Restaurant*) — Issue therein was whether two corporations were associated with each other — Question here whether appellant dealing at arm's length with Vidabode when acquiring shares thereof — Necessary to look at case law addressing that issue — No practical difference between concepts of *de facto* control, directing mind in relation to determination of whether two persons dealing with each other at arm's length — Appellant only source of

funds to repay GE Capital — More likely than not that appellant controlled both sides of transaction related to issue of shares by Vidabode to appellant — Vidabode also completely captive to interests of appellant, BWS — Degree of financial dependence of Vidabode on appellant, BWS significant factor pointing towards finding that appellant, Vidabode not dealing with each other at arm's length — Where a person pays in excess of \$14 million for shares having no value, magnitude of discrepancy raising doubts that parties dealing at arm's length — More likely than not that appellant was directing mind of both parties to transaction related to its acquisition of common shares of Vidabode — Appeal dismissed.

KEYBRAND FOODS INC. V. CANADA (A-354-19, 2020 FCA 201, Webb J.A., reasons for judgment dated November 19, 2020, 34 pp.)