

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260827

**Dockets: A-382-24 (lead file)
A-388-24**

Citation: 2026 FCA 142

**CORAM: MACTAVISH J.A.
ROUSSEL J.A.
GOYETTE J.A.**

Docket: A-382-24 (lead file)

BETWEEN:

HARVARD PROPERTIES INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Docket: A-388-24

AND BETWEEN:

HIS MAJESTY THE KING

Appellant

and

HARVARD PROPERTIES INC.

Respondent

Heard at Toronto, Ontario, on April 23, 2026.

Judgment delivered at Ottawa, Ontario, on August 27, 2026.

REASONS FOR JUDGMENT BY:

GOYETTE J.A.

CONCURRED IN BY:

MACTAVISH J.A.

ROUSSEL J.A.

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REASONS FOR JUDGMENT

GOYETTE J.A.

I. Introduction

[1] Subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), provides that when a tax debtor transfers property to a person with whom they are not dealing at arm's length, both become jointly and severally liable for the tax debt. However, the transferee's liability is limited. It is restricted to the difference between the fair market value of the property received and the fair market value of what the transferee gave in exchange: *Eyeball Networks Inc. v. Canada*, 2021 FCA 17 at para. 2.

[2] The issue in this appeal is whether Harvard Properties Inc. gave fair market value consideration for the purposes of section 160 when it sold a shopping mall through a holding company rather than directly, even though either approach would have left Harvard in the same net after-tax position.

[3] The Tax Court ruled that Harvard gave no consideration at all and that section 160 applied: 2024 TCC 139 (the TCC Decision). With respect, I disagree. So, I would allow the appeal and dismiss the cross-appeal.

II. Background

[4] Harvard Properties Inc.—hereafter Harvard—owned a 50% undivided interest in the mall, and four other co-owners jointly held the other 50% interest. In 2005, Abacus Capital Corporation approached the co-owners to purchase the mall.

[5] Abacus offered \$89.8 million for the mall but wanted to purchase it through a share sale transaction. To determine the amount that it would pay the co-owners for the shares of a corporation to be set up for that purpose, Abacus calculated the net after-tax amount that the co-owners would receive from a direct sale of the mall: Appendix B of the TCC Decision, Appeal Book at 133.

[6] For Harvard, a direct sale of the mall would have resulted in a net after-tax amount of approximately \$14.8 million, calculated as follows:

Description	Amount
50% of \$89,800,000	\$44,900,000
Mortgage	\$(25,506,329)
Other Indebtedness	\$(163,506)
Pre-Tax Equity	\$19,230,165
Estimated Federal and Provincial Taxes	\$(4,400,000)
After-Tax Result	\$14,830,165

Section 85 Asset Purchase Agreement between Harvard and Newco (Appeal Book at 3341), regarding the mortgage and other indebtedness; Share Price Calculation dated June 8, 2005

(Appeal Book, p. 5149), showing federal tax of \$3,261,380 and provincial tax of \$1,139,261, for a total tax liability of \$4,400,641.

[7] Working backwards, Abacus determined that it would need to pay approximately \$17 million for the shares to leave the co-owners with the same after-tax position of \$14.8 million: Appendix B of the TCC Decision, Appeal Book at 135.

[8] Abacus' proposal was analyzed by the co-owners' accountant. In his memorandum to the co-owners, the accountant wrote "Abacus is able to pay a premium [...] because they have some form of shelter/deductions such that Abacus would not pay any tax on the underlying sale of the [mall]": Appendix B of the TCC Decision, Appeal Book at 133.

A. *The Transactions*

[9] In June 2005, the parties finalized a Share Purchase Agreement, which set out the plan for the transactions: Share Purchase Agreement dated June 10, 2005, Appeal Book at 2413–547.

[10] The key transactions (rounded to the nearest \$100,000) were as follows:

- 1) Harvard (the other co-owners did the same) sold its 50% interest in the mall to its newly incorporated subsidiary, Newco, for \$44.9 million: para. 6.14a of the Further Amended Reply, Appeal Book at 289.
- 2) In exchange for Harvard's interest in the mall, Newco:
 - a) Assumed the \$25.6 million debt related to the mall;

- b) Issued and delivered to Harvard 8,746,234 non-voting preferred shares redeemable for an amount \$1 per share and having a fair market value of \$8.7 million; and
- c) Issued and delivered to Harvard voting shares having a fair market value of \$10.5 million;

Para. 6.14b of the Further Amended Reply, Appeal Book at 289.

- 3) For tax purposes, Harvard did not recognize the full \$44.9 million consideration it received. Instead, as the *Income Tax Act* permits, it elected to recognize proceeds of disposition of \$25.6 million, equal to the mall-related debt assumed by Newco. As a result, Harvard paid no tax on the disposition of its interest in the mall: para. 6.14b of the Further Amended Reply, Appeal Book at 289.
- 4) Harvard sold its voting shares in Newco to NH Properties, a subsidiary of Abacus, for \$7.9 million. In return, NH Properties issued a promissory note for \$6.92 million and paid \$1 million in deposits, including a cheque for \$700,000: paras. 6.15, 6.16 of the Further Amended Reply, Appeal Book at 289; Letters dated July 20, August 12 and September 2, 2005, Appeal Book at 2566, 2580 and 2726.
- 5) Newco sold its interest in the mall to a third-party purchaser, Bentall Investments Management Limited Partnership, for \$44.9 million. The other co-owners carried out the same transaction through their own newly incorporated corporations. As a result, Bentall acquired the entire mall for \$89.8 million: paras. 6.23 of the Further Amended Reply, Appeal Book at 290.

- 6) At the direction of NH Properties and Newco, \$6,920,098 of the proceeds from the sale to Bentall was paid to Harvard to satisfy the promissory note: para. 6.26a) of the Further Reply, Appeal Book at 291; Direction from NH Properties, Appeal Book at 4197–99; Direction from Newco (1192484 Alberta Ltd.) and other corporations, Appeal Book at 4462–63; Letter from MLT dated October 11, 2005, Appeal Book at 4472.
- 7) Harvard sold its preferred shares in Newco to NH Properties for \$8.7 million. In return, NH Properties paid \$7.98 million by cheque, held back \$500,000 and paid a commission of \$267,500 to Colliers: paras. 6.24, 6.28 of the Further Amended Reply, Appeal Book at 290–91; Cheque of \$7,978,733.50, Appeal Book at 4751; Direction from Newco (1192484 Alberta Ltd.) and other corporations, Appeal Book at 4745–46; Letter from MLT dated October 12, 2005, Appeal Book at 4787.

B. *Assessments and bifurcation*

[11] Harvard Properties paid \$1.8 million in tax on the sale of its shares in Newco: Read-in, Appeal Book at 5463.

[12] In 2015, the Minister reassessed Newco’s successor and disallowed certain losses Newco had used to offset the tax on the capital gain it realized when it sold the mall to Bentall.

[13] On January 11, 2017, the Minister assessed Harvard under section 160 in respect of Newco’s tax liability. By then, that liability totalled \$6,492,962, consisting of \$3,287,785 in federal tax, plus interest and penalties.

[14] In assessing Harvard, the Minister assumed that the fair market value of all the shares of Newco that Harvard sold to NH Properties was nil. On that basis, the Minister further assumed that Harvard had received \$15.6 million of the \$16.6 million share sale proceeds through three transfers: \$6.92 million and \$700,000 for the voting shares (transactions 4 and 6 at paragraph [10]), and \$7.98 million for the preferred shares (transaction 7), without giving any consideration in return: paras. 6.88, 6.89, 6.93, 6.94, 7.14, 7.15, 7.16 of Further Amended Reply, Appeal Book at 302, 306.

[15] The Minister later argued that, if section 160 did not apply to the three transfers, the General Anti-Avoidance Rule in section 245 of the *Income Tax Act* nevertheless supported the assessment.

[16] Both Newco and Harvard appealed their assessments. In 2021, the Tax Court bifurcated the proceedings so that Newco's tax liability, a condition for section 160 to apply, would be determined separately from Harvard's appeal.

[17] As a result, the issue before the Tax Court in the case now before us was whether the remaining three conditions for section 160 to apply were met. Specifically, the Tax Court had to decide whether:

- 1) Newco, the alleged tax debtor, transferred property to Harvard;
- 2) Newco and Harvard dealt at arm's length; and

- 3) the fair market value of the property transferred by Newco to Harvard at the time it was transferred exceeded the fair market value, at that time, of the consideration given for the property by Harvard:

TCC Decision at paras. 124–25

[18] The Tax Court also had to decide whether the General Anti-Avoidance Rule supported Harvard's assessment if section 160 did not apply.

III. The Tax Court Decision

[19] The Tax Court dismissed Harvard's appeal. It found that section 160 applied. Alternatively, it found that the General Anti-Avoidance Rule supported the assessment.

A. *Preliminary matters*

[20] Before turning to the Tax Court's decision, it is helpful to note that the Tax Court's approach differed from the Minister's in three significant respects.

[21] First, unlike the Minister, the Tax Court did not accept that the mall had a fair market value of \$89.8 million and therefore that Harvard's 50% interest in the mall was worth \$44.9 million. This issue is central to the outcome of the appeal and is discussed below.

[22] Second, the Tax Court reviewed all three assessed transfers totalling \$15.6 million (\$6.92 million and \$700,000 for the voting shares and \$7.98 million for the preferred shares), even

though the Minister conceded that the \$700,000 transfer was not subject to section 160: Respondent's Amended Memorandum of Fact and Law in file A-382-24 at paragraph 21, footnote 28. These reasons address only the remaining two transfers.

[23] Third, while the notice of assessment makes clear that the Minister assessed Harvard on the basis that *Newco* was the tax debtor, the Tax Court identified NH Properties as the tax debtor in its order and in various paragraphs of the reasons: TCC Decision at p. 1, paras. 151, 225–27. The Minister cross-appeals this finding. Because I conclude below that the parties were at arm's length and that Harvard gave fair market value consideration for the two transfers in issue, it is unnecessary to decide that issue. I would therefore dismiss the cross-appeal.

[24] However, it should also be noted that, before this Court, the Minister argues that NH Properties became jointly liable for Newco's tax liability under subparagraph 160(1)(e)(ii) because Newco transferred to NH Properties the cash used to make the transfers in issue to Harvard and because NH Properties provided no consideration for that cash. The Minister further argues that NH Properties was therefore a debtor when it made the transfers in issue to Harvard. On that basis, the Minister says that section 160 applies to those transfers: Respondent's Amended Memorandum of Fact and Law in file A-382-24 at paragraphs 27, 88 and 89. There is no doubt that section 160 can apply where property is transferred in two steps: first from a tax debtor to a first transferee, and then from that transferee to a second transferee, who thereby becomes liable under that provision: *Jurak v. Canada*, 2003 FCA 58 at para. 1, leave to appeal to SCC refused, 29685 (10 July 2003). That said, section 160 does not apply to the transfers in issue.

B. *The Tax Court Concluded Section 160 Applied*

(1) The Tax Court identified two transfers of property

[25] As noted above, the Tax Court considered three transfers of property to Harvard, although only two are in issue on this appeal. The Tax Court identified those transfers as: (1) NH Properties' payment of \$6.92 million to satisfy the promissory note it issued to Harvard when it purchased the Newco voting shares (transaction 6 at paragraph [10]); and (2) NH Properties' payment of \$7.98 million by cheque when it purchased the Newco preferred shares from Harvard (transaction 7): TCC Decision at para. 150.

(2) The Tax Court found that the parties were not dealing at arm's length

[26] The Tax Court concluded that, throughout the closing process, Harvard and the Abacus group of companies were not dealing at arm's length: TCC Decision at paras. 9, 159–62, 165, 224. This conclusion was premised on the Tax Court's view that Harvard received a premium in excess of the mall's fair market value. In the Tax Court's view, the premium was funded by the tax Newco did not pay on the sale of the mall because it used losses to offset the resulting gain. Although the Tax Court said it was unable to determine the amount of the premium, it found the premium to be so "clearly out of whack with [...] a fair market value price" that it indicated that the parties were not dealing at arm's length: *Ibid.* at paras. 74, 123p), 123q), 123t), 143–44, 155, 165, 186.

[27] The Tax Court also found that Harvard was “wilfully blind” because it made no inquiries as to how the Abacus group would “deal with” Newco’s tax liability: TCC Decision at paras. 63, 123a), 123b), 123h), 123o), 123u), 138, 165.

- (3) The Tax Court concluded that Harvard did not give fair market value consideration for the transfers

[28] The Tax Court concluded that the third condition for section 160 to apply was met because the cash transfers of \$6.92 million and \$7.98 million from NH Properties to Harvard exceeded the fair market value of the shares that Harvard gave in return: TCC Decision at paras. 9, 224. The Tax Court reached that conclusion because it did not accept that the mall’s fair market value was \$89.8 million, the price paid by the third-party purchaser, Bentall. In the Tax Court’s view, Abacus paid Harvard a premium above fair market value to enrich Harvard: *ibid.* at paras. 74, 123p), 123q), 123s), 186.

[29] From there, the Tax Court found that Harvard had failed to provide evidence of the mall’s value, and, by the same token, of the amount a third-party purchaser would have paid for the voting and preferred shares of Newco: TCC Decision at paras. 123t), 166, 175, 185. The Court said that evidence of the mall’s fair market value, such as a valuation of the mall, “could have fully absolved [Harvard] of any potential section 160 liability” because it would have shown that Harvard had not received a premium above the fair market value of its interest in the mall: *Ibid.* at paras. 14, 123t), 181, 186. In the absence of such evidence, the Court concluded that Harvard had not demolished the Minister’s assumption that the voting and preferred shares of Newco had a fair market value of nil because, shortly after the transfers, Newco would have no assets and no

business: *Ibid.* at paras. 174, 176, 183. For the same reason, it found that the promissory note also had a fair market value of nil: TCC Decision at paras. 171–72, 185.

[30] Finally, the Tax Court found that the promissory note had a fair market value of nil for another reason: it had value only to a person protected by the directions, escrow arrangements and trust accounts through which payment on the note would be made, namely Harvard: TCC Decision at paras. 13, 105, 116, 123b), 123k), 123r), 170.

[31] Because it found that the promissory note and the preferred shares had a fair market value of nil, the Tax Court concluded that Harvard gave no consideration in exchange for the cash transfers of \$6.92 million and \$7.98 million: *Ibid.* at paras. 176, 179.

C. *The Tax Court Concluded that the General Anti-Avoidance Rule Applied*

[32] In the alternative, the Tax Court held that, even if the series of transactions fell outside section 160, the General Anti-Avoidance Rule in section 245 of the *Income Tax Act* would apply and supported the assessment: TCC Decision at para. 10.

IV. Issues

[33] The main appeal raises two issues:

- 1) Did the Tax Court err in concluding that section 160 applies?
- 2) Did the Tax Court err in concluding that the GAAR applies?

[34] The cross-appeal raises the issue of whether the Tax Court erred in identifying NH Properties as the tax debtor.

V. Standard of Review

[35] The Tax Court decision is subject to the appellate standards of review: *Housen v. Nikolaisen*, 2002 SCC 33. Questions of law are subject to correctness review. Questions of fact are reviewable for palpable and overriding error. Finding of mixed fact and law, absent an extricable error of law, are reviewable for palpable and overriding error. How these standards apply in the context of a General Anti-Avoidance Rule analysis is discussed in Section VI.C below.

VI. Analysis

A. *The Tax Court erred in law and proceeded in a manner that was procedurally unfair*

(1) The pleadings, the evidence and the parties' positions

[36] In assessing Harvard, the Minister assumed that, on the same day that it acquired the mall, Newco sold it to Bentall, "a third party [sic] purchaser" for \$89.8 million: Further Amended Reply at para. 6.23, Appeal Book at p. 290. At trial, the Minister made clear, on more than one occasion, that it did not dispute that \$89.8 million was the mall's fair market value and

that the evidence provided no basis for a different conclusion. The following excerpts from the Tax Court hearing illustrate that position:

[Minister Counsel]: So we went to this trial on the assumption that whatever price Bentall paid because they were a third party would have been the price that Bentall was comfortable paying, and we had no indication that that 90 million was somehow a sham in the sense that there would have been other side deals that we weren't aware of. We never raised that as an issue.

Transcript, Appeal Book at 2034 line 17 to line 23.

[...]

[Tax Court]: [I]s the issue of the fair market value of the shopping centre as an asset an issue in dispute before the court right now?

[Minister Counsel]: No.

[Tax Court]: No.

[Minister Counsel]: As an asset, no, it's not an issue that was raised by the Crown.

[Tax Court]: So that you're comfortable with the [89.8]-point-whatever-it-is?

[Minister Counsel]: Comfortable in the sense that that's what the evidence disclose (*sic*), that's what the parties said. The Crown never brought any evidence to dispute that value. It wasn't the focus of our case. So given the evidence that transpired at trial, I don't see on what basis the Crown would be arguing before you that you cannot accept the Appellant's numbers. That's not an argument we're putting forward because the evidence, there's no evidence to suggest otherwise.

Transcript, Appeal Book at 2035 line 17 to 2036 line 6.

[37] At the hearing, the Tax Court itself acknowledged that the fair market value of the mall was not in dispute, telling Harvard's counsel:

[Tax Court]: I don't think you have to worry about me going there, because both parties told me not to go to the big picture, high-level was the shopping centre worth what Bentall paid for it.

Transcript, Appeal Book at 2265 line 3 to line 6.

- (2) The Tax Court's departure from the pleadings, the evidence and the parties' positions

[38] Despite telling Harvard that it would not dispute that the \$89.8 million paid by Bentall reflected the mall's fair market value, the Tax Court rejected that value: TCC Decision at paras. 74, 123q), 123s), 186. The Tax Court said that Harvard knew that the fair market value was in dispute (*Ibid.* at para. 15) and faulted Harvard for failing to provide evidence of the mall's fair market value *Ibid.* at paras. 123s), 123t). The Tax Court added that such evidence would have shown that Harvard did not receive a premium above fair market value and therefore was not liable under section 160: *Ibid.* at paras. 123t), 186.

[39] The situation would be different if the Tax Court had told the parties, more particularly Harvard, that it was not prepared to accept that \$89.8 million represented the mall's fair market value and had given Harvard an opportunity to present evidence on that issue, such as a valuation of the mall: *Graham v. Toronto (City)*, 2022 ONCA 149 at paras. 9–13; *Mason Homes Ltd. v. Woodford*, 2014 ONCA 816 at para. 15–18.

[40] But that is not what the Tax Court did.

[41] In my respectful view, the Tax Court “committed an error of law, and proceeded in a manner that was procedurally unfair, by deciding the case on a basis that was not ‘anchored in the pleadings, evidence, positions or submissions of any of the parties’”: *Marketology Media Inc. v. DGA North American Inc.*, 2024 ONCA 799 at para. 29; *Rodaro v. Royal Bank of Canada*,

2002 CanLII 41834 at para. 62. This warrants this Court's intervention, particularly because the error of law tainted both the Tax Court's assessment of the evidence and its analysis.

[42] In some cases, errors of this nature warrant sending the matter back for a new trial. That may be appropriate where both parties were denied procedural fairness or where the record does not inevitably lead to a particular outcome: *Rodaro* at paras. 21–22; *Marketology Media* at paras. 36–37.

[43] That is not the case here.

[44] First, the Tax Court's actions denied procedural fairness to Harvard, not to the Minister. The Minister neither relied on the value of the mall before the Tax Court nor relies on it before this Court: Transcript, Appeal Book at 2035 line 24 to 2036 line 6; Further Amended Reply, Respondent's Amended Memorandum of Fact and Law in file A-382-24 and further written submissions.

[45] Second, there is one inevitable conclusion about the mall's fair market value: it was \$89.8 million. That was the price Bentall, a third-party purchaser, paid for the mall at the same time Harvard disposed of its shares, whose value was derived from the value of the mall. In *Canada (Attorney General) v. Nash*, 2005 FCA 386 at para. 29, this Court adopted the statement in *Chiu v. Commissioner of Internal Revenue*, 84 T.C. 72 (U.S. T.C. 1985) at 2960, that "[i]n determining the fair market value of property, little evidence could be more probative than the

direct sale of the property in question.” This is particularly so here, where the Minister does not challenge that value and maintains that nothing in the evidence contradicts it.

[46] The Tax Court’s decision rests primarily, if not entirely, on the existence of a premium, namely the difference between the \$89.8 million Bentall paid for the mall and its lower, though unknown, fair market value. Given the mall’s fair market value of \$89.8 million, it is tempting to end the analysis here and allow the appeal. However, for completeness, and because the Minister’s position does not depend on the mall being worth less than \$89.8 million, the following paragraphs explain why section 160 does not apply in this case, even taking into account the mall’s fair market value of \$89.8 million and other relevant factors.

B. *Section 160 does not apply to the present case*

(1) Harvard and the Abacus group of companies dealt at arm’s length

[47] The Tax Court’s finding that Harvard and the Abacus group of companies were not dealing at arm’s length was based on its conclusion that Harvard received a premium that exceeded the mall’s fair market value, was funded by Newco’s unpaid tax debt, and was “clearly out of whack [...] with a fair market value price”: see paragraph [26] above. The Court likened the circumstances to those considered by this Court’s in *Canada v. Microbjo Properties Inc.*, 2023 FCA 157: TCC Decision at paras. 8, 137–38, 141–44.

[48] In *Microbjo*, five corporations, including Microbjo, indirectly held an interest in a parcel of land that they had agreed to sell to an arm's length purchaser. Before the sale, the corporations and Wilshire Technology Corporation agreed to a plan under which each corporation transferred its interest to a newly incorporated subsidiary, which then sold the interest in the land to the arm's length purchaser. Wilshire purchased the shares of each subsidiary for \$3.3 million. This exceeded the shares' after-tax value of \$2.7 million, calculated as \$4 million less \$1.3 million in tax. The plan depended on the subsidiaries not paying their \$1.3 million tax liabilities. Instead, the corporations and Wilshire shared the funds that would otherwise have been used to pay those liabilities, with 46% of the \$1.3 million going to the corporations (\$600,000) and 54% (\$700,000) going to Wilshire: *Microbjo* at paras. 13, 64. In this way, the corporations and Wilshire enriched themselves by "splitting amounts earmarked to pay [the subsidiary's] tax liability": *Ibid.* at para. 81.

[49] This Court found that two factors pointed to a non-arm's length relationship between the corporations and Wilshire: Wilshire paid more than the after-tax value of the subsidiary shares, and the excess came from unpaid taxes that the parties agreed to share: *Microbjo* at paras. 84–89. The Tax Court concluded that the same reasoning applied in the present case: TCC Decision at paras. 143–44.

[50] However, given the evidence that \$89.8 million represented the mall's fair market value, there was no basis to conclude that Harvard received a premium. Further, unlike in *Microbjo*, there is no evidence that Harvard and Abacus agreed to share any amount that would otherwise

have been used to satisfy Newco's tax liability. The Tax Court therefore erred in treating the alleged premium as indicative of a non-arm's length relationship.

[51] The Tax Court's finding that Harvard was "willfully blind" because it made no inquiries into how the Abacus group would deal with Newco's tax liability was likewise based on the conclusion that Harvard received a premium above the mall's fair market value and that the premium came from Newco's unpaid tax liability: TCC Decision at paras. 123h), 123u), 165. Again, once it is accepted that there was no premium and no evidence that the parties would share the benefit of Newco's unpaid tax liability, there is no basis for concluding that Harvard was willfully blind, and thereby knowingly participated in Abacus' tax planning, such that the parties were not dealing at arm's length: *Ibid.* at para. 165. Instead, this is the type of situation the Tax Court itself described as one in which "otherwise arm's length parties do not have a duty to verify their counterparty's tax planning or compliance to remain at arm's length": *Ibid.* at para. 165.

[52] It is also worth noting that the Tax Court expressly stated that it was not saying that Newco's plan to offset its tax liability with losses was "questionable, ineffective [or] did not work". Nor was it saying that Harvard should have known "that the tax plan was ineffective or even questionable": *Ibid.* at para. 144 and footnote 9.

[53] Finally, the Minister relies on the Tax Court's conclusion that Harvard and the Abacus group of companies did not deal at arm's length because both Harvard and NH Properties directed Newco's role in the transactions: Respondent's Amended Memorandum of Fact and

Law in file A-382-24 at para. 47. However, the Tax Court said that this is common in commercial transactions and “should not on its own make otherwise arm’s length persons non-arm’s length”. Yet again, the Tax Court found Harvard’s and NH Properties’ control of Newco problematic only because of the premium: TCC Decision at para. 165.

[54] Considering the foregoing, I find that the Tax Court committed a palpable and overriding error of fact and an error of law in finding that, as in *Microbjo*, Harvard received a premium above the mall’s fair market value and that the premium came from Newco’s unpaid tax liability. The error was palpable because it was made without regard to the evidence of the mall’s \$89.8 million fair market value, the pleadings and the parties’ positions: *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at para. 62. It was overriding because, without it, the Tax Court would have had to find that Harvard and the Abacus group of companies were dealing at arm’s length with the result that section 160 did not apply to Harvard: *Ibid.* at para. 64.

[55] Because section 160 does not apply to transfers between arm’s length parties, that palpable and overriding error is sufficient to dispose of this issue. Nevertheless, the following paragraphs explain how the Tax Court’s error regarding the mall’s fair market value, together with other errors of law, led it to incorrectly conclude that Harvard provided no consideration for the two transfers at issue. Those errors independently show that section 160 does not apply.

(2) Harvard Properties provided fair market value consideration for the two transfers

(a) *Harvard derived no monetary advantage from selling shares to NH Properties instead of selling its interest in the mall*

[56] Section 160, more precisely subparagraph 160(1)(e)(i), imposes joint and several liability on the person who receives a transfer from a tax debtor “limited to the excess of the fair market value of the transferred property over the fair market value of the consideration given [by the transferee]”: *Canada v. Csak*, 2025 FCA 60 at para. 4. The use of the words “consideration given [by the transferee]” reflects Parliament’s intention to limit the derivative liability of a transferee to the monetary advantage that it derives from the transfer: *Microbjo* at para. 95.

[57] In the present case, Harvard derived no monetary advantage from selling Newco shares to NH Properties rather than selling its interest in the mall directly to a third party. The share sale left Harvard in essentially the same position as a direct sale of its interest in the mall.

[58] As shown at paragraph [6] and in the calculation below, given the mall’s fair market value of \$89.8 million, a direct sale of Harvard’s interest would have generated after-tax proceeds of approximately \$14.8 million:

Description	Amount in million
Proceeds for a 50% interest in mall	\$44.9
Mortgage	\$(25.5)
Other indebtedness	\$(0.164)
Pre-Tax Equity	\$19.2
Estimated federal and provincial taxes	\$(4.4)
After-Tax Result	\$14.8

[59] The calculation below shows that the share sale also generated net after-tax proceeds of approximately \$14.8 million:

Description	Amount in million
Newco voting share sale proceeds	\$7.92
Newco preferred share sale proceeds	\$8.75
Pre-Tax Share Sale Proceeds	\$16.66
Estimated federal and provincial taxes	\$(1.8)
After-Tax Result	\$14.8

(b) *Harvard provided fair market value consideration for the transfers*

[60] As noted above, the Tax Court failed to consider the pleadings, the evidence, and the parties' positions, all of which pointed to the mall's fair market value of \$89.8 million. As a result, it concluded that Harvard had not adduced evidence of the mall's value or, consequently, the amount a third-party purchaser would have paid for the shares of Newco. On that basis, the Tax Court held that Harvard had not demolished the Minister's assumption that the voting and preferred shares had a fair market value of nil because, shortly after the transfers, Newco would have no assets and no business: TCC Decision at paras. 174, 176, 183. For the same reason, it found that the promissory note Harvard relinquished when NH Properties paid the \$6.92 million debt owing under the note also had a fair market value of nil: *Ibid.* at paras. 171–72, 185.

[61] In my view, it was not open to the Tax Court to assess the consideration Harvard gave, namely the shares of Newco and the promissory note, by reference to events occurring after the transfers. As this Court previously held, the adequacy of consideration "must be measured against the value of the property transferred by way of a 'snapshot' taken at the point in time when the transfer takes place": *Eyeball Networks* at para. 58. Where the value of the

consideration may fluctuate, “it is the value of the consideration as it stands in the hands of the transferee at the time of the transfer that governs”: *Ibid.* at para. 67.

[62] The Minister advances two reasons why this Court should nevertheless conclude that the promissory note and the preferred shares had a fair market value of nil.

[63] The first reason is that the Tax Court did follow *Eyeball Networks* because it also considered the fair market value of the promissory note at the precise time when NH Properties satisfied the \$6.92 million debt owing under the note. The Tax Court concluded that the note had a fair market value of nil at that precise time because it had value only to a person protected by the directions, escrow arrangements and trust accounts through which payment on the note would be made, namely Harvard: see paragraph [30] above.

[64] Respectfully, the Tax Court’s conclusion does not align with this Court’s decision in *Eyeball Networks*. That case makes clear that “the payment of a *bona fide* debt cannot trigger the application of subsection 160(1)”: *Ibid.* at para. 63. NH Properties did exactly that when it paid the \$6.92 million debt owing to Harvard under the promissory note. In *Eyeball Networks*, this Court also said that “it is the value of the consideration as it stands in the hands of the transferee at the time of the transfer that governs”: *Ibid.* at para. 67. Here, it is difficult to see how the promissory note could have had a value other than \$6.92 million in Harvard’s hands when Harvard relinquished it in exchange for payment of that amount.

[65] The second reason advanced by the Minister relates to the preferred shares. The Minister says that these shares had a fair market value of nil when NH Properties purchased them and gave a cheque for \$7.98 million as partial payment. In the Minister's view, Newco's only asset at that time was cash, and all of that cash was subject to directions, escrow arrangements and trust accounts designed to ensure that Harvard would be paid for the promissory note and the preferred shares. As a result, no other party could benefit from that "locked-up cash" and therefore no third party would have been willing to purchase the preferred shares: Respondent's Amended Memorandum of Fact and Law in file A-382-24 at paras. 65 and 67.

[66] I disagree.

[67] Recall that "it is the value of the consideration as *it stands in the hands of the transferee* at the time of the transfer that governs": *Eyeball Networks* at para. 67 (emphasis added). The directions, escrow arrangements, and trust accounts relied on by the Minister were intended to ensure that Harvard would be paid when it disposed of the preferred shares. It is therefore difficult to see how those same arrangements could have reduced the value of the shares in Harvard's hands.

[68] In these circumstances, I find that the Tax Court erred in law by failing to follow this Court's guidance in *Eyeball Networks: Apotex Inc. v. Pfizer Canada Inc.*, 2014 FCA 250 at para. 62. As a result, it failed to recognize that Harvard provided consideration equal in value to the transfers of \$6.92 and \$7.98 million from NH Properties.

(c) *Harvard was not enriched within the meaning of Microbjo*

[69] As mentioned, the Tax Court likened the present case to *Microbjo*, where the parties shared money that would have otherwise been used to satisfy a tax liability. Unlike *Microbjo*, however, the Tax Court could not identify any premium, that is, any amount allegedly shared between Harvard and Abacus: TCC Decision at para. 186.

[70] The Minister says that the premium amount was approximately \$2 million, being the difference between the \$16.6 million paid by NH Properties for Harvard's voting and preferred shares in Newco and the \$14.6 million that a third party would have paid for these shares. The Minister arrives at that later figure by (a) assuming that Harvard's pre-tax equity in the mall was \$19 million, representing a \$44.9 million interest in the mall less related indebtedness of approximately \$25.9 million; and (b) deducting Newco's \$4.4 million tax liability. The Minister further says that the flow of funds at closing confirms that Harvard received the \$2 million premium: Further written submissions of the Crown at paras. 8, 9, 11–18.

[71] The Minister's argument is problematic for two reasons.

[72] First, Harvard's pre-tax equity in the mall was \$19.2 million, not \$19 million: Section 85 Asset Purchase Agreement between Harvard and Newco, Appeal Book at 3341. The \$200,000 discrepancy arises from closing adjustments between Abacus and Bentall, which are irrelevant to the value of Harvard's pre-tax equity in the mall: Statement of Adjustments between NH Properties, BIM North Hill Inc. and WPL North Hill Inc., Appeal Book at 4921. Accordingly, even accepting the Minister's approach, any premium would have been limited to \$1.8 million, not \$2 million.

[73] Second, and more importantly, the Minister's argument overlooks the fundamental differences between this case and *Microbjo*. There, the corporations not only agreed with Wilshire to sell the shares in their subsidiaries for a price exceeding their after-tax value and to share in funds that would otherwise have been used to satisfy the subsidiaries' tax liability, but also structured the transactions so as to eliminate the tax capital gains that would otherwise have arisen on the disposition of their shares: *Damis Property Inc. v. The Queen*, 2021 TCC 24 at para. 305. Put differently, the corporations in *Microbjo* both reaped the benefit of their subsidiaries' unpaid tax liabilities and avoided paying tax on their own share dispositions.

[74] By contrast, there is no evidence of an arrangement between Harvard and Abacus to share an amount that would otherwise have been used to satisfy Newco's tax liability. Nor does the Minister's flow-of-funds analysis demonstrate that Harvard received the benefit of such an amount. Further, Harvard paid \$1.8 million of tax on the disposition of the Newco shares. Accordingly, the rationale underlying *Microbjo* is simply not engaged in this case.

[75] In any event, even if *Microbjo* were applicable, the \$1.8 million premium identified by the Minister would not be subject to section 160. Harvard paid \$1.8 million in tax on the disposition of the Newco share. As a result, it did not retain any economic benefit corresponding to the premium allegedly arising from Newco's unpaid tax liability.

[76] It is worth adding, as Harvard points out, that the Minister's calculations acknowledge that Newco held \$19.2 million (see paragraphs [70] and [72]) following the sale of the mall to Bentall and that \$6.92 million of that amount was first used to repay Harvard under the

promissory note: Further Written Submissions of the Crown, paras. 13, 16. Newco therefore held approximately \$12.3 million when NH Properties transferred a cheque for \$7.98 million to Harvard as partial payment for the \$8.7 million preferred shares. Since those shares were redeemable for \$8.7 million and ranked in priority to other interests, they could not have been worth less than \$7.9 million, being the amount remaining in Newco after accounting for the \$4.4 million tax liability (\$12.3 million – \$4.4 million = \$7.9 million). Accordingly, even if *Microbjo* were applicable and the \$1.8 million in taxes paid by Harvard were disregarded, any deficiency in the consideration received by Harvard would be approximately \$98,000 (\$7.98 million less \$7.9 million).

(3) Observations and conclusion

[77] A few observations are warranted before concluding on the application of section 160.

[78] It is difficult to understand why the Minister argued, and the Tax Court accepted, that Harvard received \$14.9 million (\$6.92 million + \$7.98 million) in exchange for nothing. Section 160 is, of course, a technical provision. It applies objectively at specific points in time rather than looking at the transaction's overall economic result. There is also no dispute that Harvard bore the burden of proof. To avoid the application of section 160, Harvard had to establish that it provided fair market value consideration for the transfers, not merely that it provided some consideration: TCC Decision at paras. 177–79 citing *Jefferson v. Her Majesty the Queen*, 2022 FCA 81 at paras. 19–27.

[79] But the Minister accepted that the mall's fair market value was \$89.8 million and that Harvard's net interest in it was worth at least \$19 million: see paragraphs [70] and [72] above. And the Minister did not dispute that Harvard disposed of that interest. In these circumstances, it is difficult to reconcile these acknowledgments with the Minister's position that Harvard received \$14.9 million without providing anything of value in return. Even in *Jefferson*, the case on which the Tax Court relied, the "some consideration" provided by the transferee was taken into account in reducing the transferee's liability under section 160: *Jefferson* at para. 8.

[80] As for the premium in excess of the mall's fair market value, the Tax Court appears to have inferred its existence from the reference to a "premium" in the tax accountant's memorandum to Harvard and the co-owners which is referred to at paragraph [8] above. That memorandum is the only document in the 5877-page record before this Court that mentions a premium. At trial, the accountant explained that by "premium", he meant the "highest quality offer", not that the Abacus group of companies was paying Harvard "anything for their share value—or their losses": Transcript, Appeal Book at 1778. The Tax Court's premium theory rests on rejecting the accountant's explanation.

[81] Yet there is simply no evidence that Harvard received any premium. It could not come from the mall being worth less than \$89.8 million because the pleadings, the evidence and the parties' positions all confirm that value. Nor could it have come from Harvard getting a portion of the funds that would otherwise have been used to pay Newco's tax debt because there is no evidence of any such arrangement. Indeed, Harvard ended up in the same after-tax position that

it would have occupied had it sold its interest in the mall directly. Finally, Harvard provided fair market value consideration for the transfers it received.

[82] In this context, and for the reasons set out above, section 160 does not apply in this case.

C. *General Anti-Avoidance Rule*

(1) The Tax Court's reasons for finding that the GAAR applies

[83] The General Anti-Avoidance Rule (GAAR) in section 245 of the *Income Tax Act* has three requirements. First, there must be a tax benefit. Second, there must be an “avoidance transaction”, meaning one that is not undertaken primarily for a *bona fide* non-tax purpose. Third, the avoidance transaction must be abusive: *Deans Knight Income Corp. v. Canada*, 2023 SCC 16 at paras. 4, 51.

[84] Here, the Tax Court found that a tax benefit existed, namely the tax that would otherwise have been payable under section 160 absent the avoidance transactions: TCC Decision at para. 200. The Tax Court identified the avoidance transactions as the creation and sale of voting shares intended to cause Harvard to lose control of Newco so that it would be at arm’s length with Newco and NH Properties when Newco sold the mall to Bentall: *Ibid.* at paras. 198, 206–07. Finally, the Tax Court considered these transactions abusive because they were designed to prevent the application of section 160: *Ibid.* at para. 206.

[85] Relying on subsection 245(2) and paragraph 245(5)(d), the Tax Court held that the reasonable way to deny the tax benefit was to apply section 160 “to the extent of the shortfall of consideration given” by Harvard for the two transfers from NH Properties: *Ibid.* at para. 208.

(2) Standard of review

[86] Whether a tax benefit results from a transaction or a series of transactions, and whether a transaction was undertaken primarily for a *bona fide* non-tax purpose, are generally questions of fact: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at paras. 19, 27–29, but see *Canada v. Bank of Montreal*, 2020 FCA 82 at para. 24. Accordingly, the Tax Court’s findings on these issues can be overturned only if they are tainted by a palpable and overriding error: *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 at para. 34; *Canada Trustco Mortgage* at para. 46.

[87] The standard of review for a finding of misuse or abuse depends on the stage of the abuse analysis being challenged. If a party challenges the lower court’s determination of the object, spirit and purpose of the provision at issue, the standard is correctness: *Deans Knight* at para. 78; 3295940 *Canada Inc. v. Canada*, 2024 FCA 42 at para. 43. If the party challenges the determination of whether the transaction in issue is abusive, the appellate court may intervene only if the lower court committed a palpable and overriding error or an extricable error of law: *Deans Knight* at para. 121; 3295940 *Canada Inc.* at para. 43.

(3) The GAAR does not apply

(a) *These reasons assume the existence of a tax benefit*

[88] Arguably, Harvard derived a tax benefit from the transactions: it paid \$1.8 million of taxes rather than the \$4.4 million it would have paid had it sold its interest in the mall directly. But that is not the tax benefit identified by the Tax Court. Instead, the Tax Court identified the avoidance of joint liability under section 160 for Newco's tax debt as the tax benefit, even though the Tax Court acknowledged that it has yet to be determined whether Newco owes any tax debt: TCC Decision at para. 209. These reasons will assume that the tax benefit identified by the Tax Court existed.

(b) *The alleged avoidance transactions were only partially effective*

[89] That brings us to the tax avoidance transactions. The Tax Court identified them as the creation and sale of the Newco voting shares. According to the Tax Court, those transactions were intended to cause Harvard to lose control of Newco so that it would be at arm's length with Newco and NH Properties and thereby avoid the application of section 160. That conclusion is puzzling.

[90] It is true that a person who controls a corporation is related to it and therefore does not deal with it at arm's length: s. 251(2)(b)(i) of the *Income Tax Act*. However, control is only one basis on which parties may be found not to deal at arm's length. Indeed, the Tax Court found that the parties were not at arm's length because they were not dealing at arm's length as a matter of fact, a situation captured by paragraph 251(1)(c) of the *Income Tax Act*, although the Tax Court did not refer to that provision: see paragraphs [26] and [27] above.

[91] In that context, it is difficult to see how the creation and sale of the Newco voting shares are avoidance transactions within the meaning of subsection 245(3), namely transactions that, “but for [the GAAR], would result, directly or indirectly, in a tax benefit”. On their own, those transactions did not lead to a finding that Harvard and Abacus were dealing at arm’s length. As a result, they did not result in avoiding liability under section 160. Simply put, transactions that do not produce the alleged tax benefit can hardly be said to have resulted in that benefit.

[92] If Harvard’s objective was to avoid a finding of not being at arm’s length with the Abacus group of companies, as the Tax Court found, one would expect Harvard to have taken steps to avoid a finding that it was not dealing at arm’s length with Abacus as a matter of fact. Yet no such steps were available because, as determined above, Harvard was in fact dealing at arm’s length with the Abacus group of companies.

[93] Given the foregoing, the Tax Court committed a palpable and overriding error in finding that the creation and sale of the voting shares were avoidance transactions within the meaning of subsection 245(3) of the *Income Tax Act*.

(c) *There was no misuse or abuse*

[94] Even if the creation and sale of the voting shares qualified as avoidance transactions, the GAAR would not apply because these transactions did not result in a misuse or abuse of section 160.

[95] As this Court has repeatedly affirmed, subsection 160(1) was enacted to “protect the tax authorities against any vulnerability that may result from a transfer of property between non-arm’s length persons for a consideration that is less than the fair market value of the transferred property” (*Microbjo* at para. 80, citing *Eyeball Networks* at para. 44, citing *Canada v. 9101-2310 Québec Inc.*, 2013 FCA 241 at para. 60; see also *Canada v. 594710 British Columbia Ltd.*, 2018 FCA 166 at para.3.

[96] Here, Harvard and the Abacus group of companies were dealing at arm’s length. In addition, Harvard provided full consideration for the transfers of \$6.92 and \$7.98 million that it received from NH Properties. Accordingly, the creation and sale of the Newco voting shares cannot be said to have resulted in a misuse or abuse of section 160.

D. *Cross-Appeal*

[97] Since neither section 160 nor the GAAR applies, the merits of the cross-appeal are moot and need not be considered.

VII. Conclusion

[98] I would allow Harvard’s appeal in file A-382-24, with costs in this Court and in the Tax Court. I would set aside the Tax Court’s judgment and, rendering the judgment that it should have rendered, allow Harvard’s appeal from the notice of assessment dated January 11, 2017 and

vacate the assessment. I would also dismiss the Minister's cross-appeal in file A-388-24, with costs.

"Nathalie Goyette"

J.A.

"I agree.

Anne L. Mactavish J.A."

"I agree.

Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-382-24 (lead file) and A-388-24
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STYLE OF CAUSE:	HARVARD PROPERTIES INC. v. HIS MAJESTY THE KING
AND DOCKET:	A-388-24
STYLE OF CAUSE:	HIS MAJESTY THE KING v. HARVARD PROPERTIES INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 23, 2026
REASONS FOR JUDGMENT BY:	GOYETTE J.A.
CONCURRED IN BY:	MACTAVISH J.A. ROUSSEL J.A.
DATED:	AUGUST 27, 2026

APPEARANCES:

Al Meghji
David Jacyk
Theo Stathakos

FOR THE APPELLANT
HARVARD PROPERTIES INC.

Justine Malone
Rosemary Fincham
Andrea Ryer

FOR THE RESPONDENT
HIS MAJESTY THE KING

SOLICITORS OF RECORD:

Osler, Hoskin & Harcourt LLP
Toronto, Ontario

Marie-Josée Hogue
Deputy Attorney General of Canada

FOR THE APPELLANT
HARVARD PROPERTIES INC.

FOR THE RESPONDENT
HIS MAJESTY THE KING