

# GOLINI AND SHAREHOLDER BENEFITS

## OVERVIEW

In 2008, as a result of a series of transactions in which a shareholder [Golini] acquired a \$6 million loan and his company acquired a life insurance policy, Golini claimed (i) \$6 million additional paid-up capital on his shares, and (ii) deductible interest and guarantee fees on his loan.

However, Golini was *never on the hook* for the \$6 million loan or the related capitalized interest that he claimed gave rise to the \$6 million paid-up capital addition and capitalized interest deductions.

The Tax Court of Canada's July 19, 2016 decision concluded that Golini's loan interest is deductible up to a reasonable rate of interest, but since his debt and capitalized interest are limited in recourse to the life insurance policy and annuity (both during his lifetime in the event of loan default and at death when those amounts come due) those amounts constituted an immediate taxable shareholder benefit.<sup>1</sup>

The Court made clear that the Golini transactions are unlike leveraged insured annuity arrangements or 10/8 type leveraged insurance structures.<sup>2</sup>

Golini's appeal was discontinued on February 22, 2018.



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## Transactions

See attached appendix illustrating the series of transactions described in the decision.<sup>3</sup>

## Shareholder Benefit

Holdco paid \$6 million for an annuity on Golini that funds a \$6 million life insurance policy that **solely** pays Golini's \$6 million loan plus capitalized interest.

The Court stated, "...*immediate access to \$6,000,000 tax-free, with only the obligation of a guarantee fee of \$40,000 for 15 years, is a benefit, a benefit arising from [Golini's] position as a shareholder, and a benefit conferred by Holdco, given the inadequacy of the guarantee fee and the foregoing by Holdco of retaining the insurance proceeds.*"<sup>4</sup>

The Court observed, "...*the legal obligations arising under the ... loan, guarantee and assignments clearly establish there is a benefit to [Golini]: Holdco is using its assets to pay his debt. Just because the documents would allow him to behave in an irrational way to forego that benefit is insufficient for me to find there is no benefit.*"<sup>5</sup>

In the absence of any arguments regarding the value of the shareholder benefit, the Court concluded that the value of the shareholder benefit was \$5,400,000, representing Holdco's \$6 million cost of the annuity and life insurance policy less Golini's \$600,000 guarantee fee commitment.<sup>6</sup>

## Sham

The Crown argued that the entire series of transactions was a sham and should be set aside, resulting in a \$6 million deemed dividend and no deductible interest.<sup>7</sup>

The Court spends sixteen paragraphs analyzing the sham argument in detail,<sup>8</sup> ultimately rejecting the Crown's sham argument and concluding that it can rely on the contractual arrangements of the transactions.<sup>9</sup>

## Interest Deductibility

The Court concluded that the loan interest was deductible in respect of money

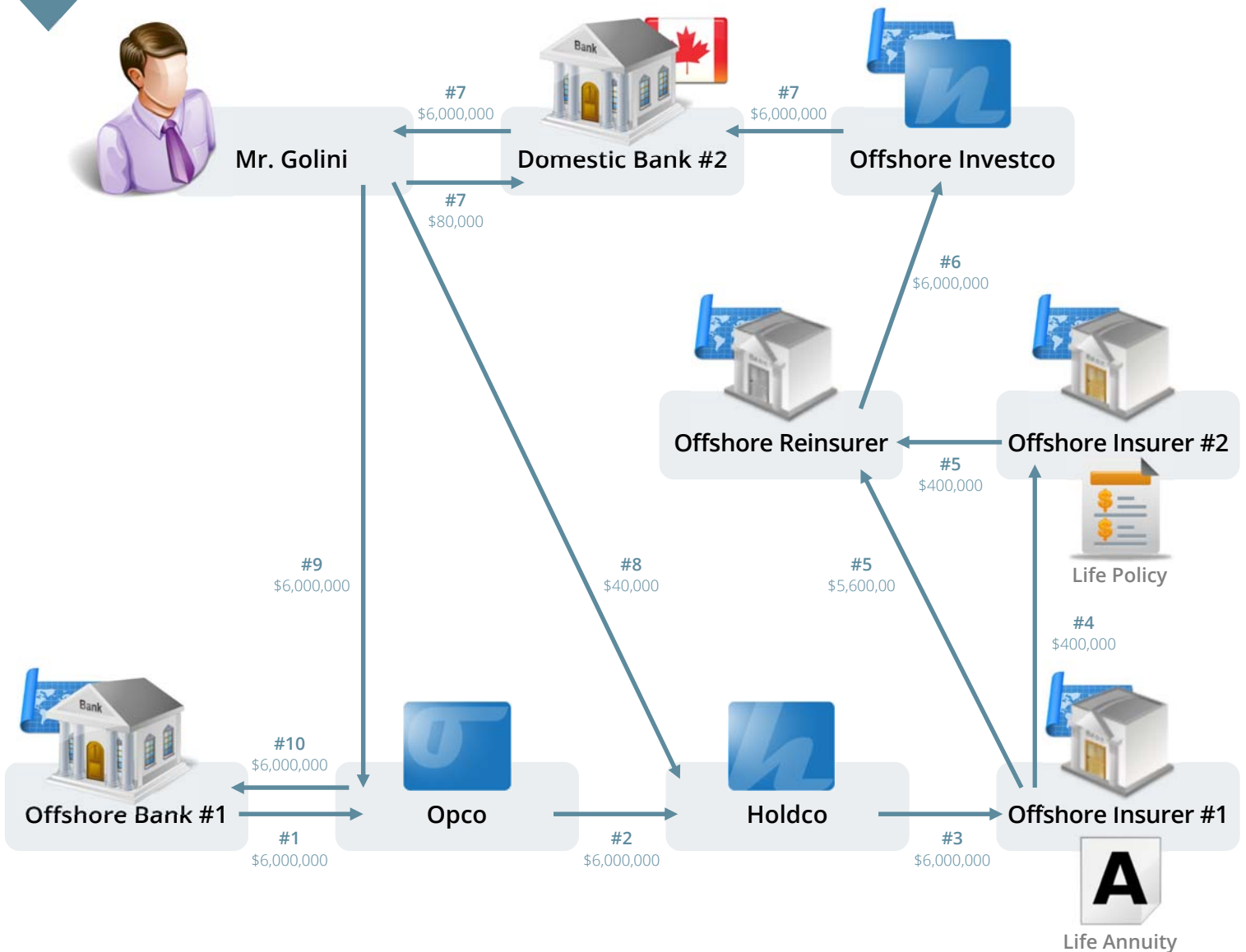
borrowed to acquire dividend bearing shares, subject to a reasonable rate of interest. The Court also concluded that Golini receives an offsetting taxable benefit for all the deductible capitalized interest that will only ever be paid by Holdco's life insurance and annuity. Thus, the Court concluded Golini's net deduction is the interest actually paid on the loan, being \$80,000 annually.<sup>10</sup>

The Court rejected Golini's interest rate reasonableness arguments, concluding that the 8% rate (i) is not a third party commercially negotiated rate,<sup>11</sup> (ii) is not "close enough" to the Crown's proposed 5.5% reasonable rate,<sup>12</sup> and (iii) is not comparable to loan interest rates on leveraged insured annuities and 10/8 type plans at the time.<sup>13</sup> The Court accepted the Crown's arguments that 5.5% was a reasonable rate because Golini was unable to advance any counter arguments.

## GAAR

The Court did not have to rely on GAAR for its decision. However, the Court concluded that GAAR would apply as the transactions are an abuse of subsection 84(1) of the Act, which it says is designed to place "a limitation on returns to shareholders on a tax-free basis to only the shareholder's tax paid investment in a corporation, where such investment creates an equivalent increase in the company's assets or decrease in its liabilities." The transactions increased Golini's paid-up capital by \$6 million but the company showed no increase in assets or decrease in liabilities as a result of the transactions, because the \$6 million annuity and life insurance policy were absolutely assigned to the repayment of Golini's debt.<sup>14</sup>

1. 2016 TCC 174	7. Paragraphs 113 and 124
2. Paragraphs 82 and 135	8. Paragraphs 105 - 125
3. Summarized from the steps described in paragraphs 23 - 76	9. Paragraph 105
4. Paragraph 91	10. Paragraphs 129 and 131
5. Paragraph 97	11. Paragraph 133
6. Paragraphs 103 - 104	12. Paragraph 134
	13. Paragraph 135
	14. Paragraph 139



1. Offshore Bank #1 loaned \$6 million to Opco;
2. Opco transferred \$6 million to Holdco as a redemption of shares;
3. Holdco paid \$6 million to Offshore Insurer #1 to buy a term certain annuity that pays \$6 million in 15 equal annual payments of \$400,000;
4. Holdco acquired a life insurance policy on Golini from Offshore Insurer #2, with a guaranteed premium schedule of \$400,000 annually for 15 years with an initial death benefit of \$6 million and indexed to increase annually in conjunction with the accrued loan balance;
5. Offshore Insurers #1 and #2 transferred \$6 million to Offshore Reinsurer as a reinsurance premium;
6. Offshore Reinsurer transferred \$6 million to Offshore Investco to buy a term deposit that credits interest at 8% annually;
7. Offshore Investco loaned \$6 million to Golini via Domestic Bank #2 at 8% annually, with \$80,000 payable annually in cash and the \$400,000 annual remainder capitalized, limited in recourse to a guarantee from Holdco that is in turn limited in recourse to a collateral assignment of the annuity and the life insurance policy, and due upon the death of Golini;
8. Golini agreed to pay Holdco an annual guarantee fee of \$40,000 for 15 years, totaling \$600,000 and representing 10% of the \$6,000,000 guarantee;
9. Golini acquired \$6 million of Class D preferred shares of Opco with an 8.25% cumulative dividend rate;
10. Opco repaid Offshore Bank #1 with 8% interest.