

Supreme Court Refuses to Hear Break Fee Appeal

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Reprinted from *Tax Notes Int'l*, May 6, 2013, p. 504

COUNTRY DIGEST

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The Supreme Court of Canada on April 25 refused to hear a taxpayer's application for leave to appeal the decision of the Federal Court of Appeal (FCA) in *Morguard Corp. v. The Queen* (2012 FCA 306). The FCA had confirmed the decision of the Tax Court of Canada, holding that the break fee (an amount paid on the termination of a merger and acquisition agreement) received by the taxpayer was fully taxable as normal income. (Prior coverage of Morguard's application to appeal: *Tax Notes Int'l*, Feb. 4, 2013, p. 428; prior coverage of the Court of Appeal's decision: *Tax Notes Int'l*, Dec. 3, 2012, p. 890.)

The Tax Court denied Morguard's request for tax relief on the ground that Morguard had "adopted a business strategy of acquiring controlling interests in real estate companies" and had carried out numerous transactions to that effect.

On appeal, the FCA also sided with the Canada Revenue Agency, concluding that the Tax Court's findings were reasonable and that it was open to the Tax Court to conclude, as it did, that Morguard had received the break fee as business income.

Because a final appeal to the Supreme Court of Canada is generally permitted in tax cases only if the Court chooses to grant permission and hear the case, Morguard was required to seek leave to appeal from the Court. Its dismissal of Morguard's application means that the FCA's decision is final.

The facts of the case and the Tax Court's findings of fact were somewhat unique, however, because in most cases, M&A transactions are clearly outside the scope of a taxpayer's ordinary business. It is therefore likely that there will continue to be uncertainty about the tax treatment of break fees despite the finality of *Morguard*. ◆

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