

FEDERAL COURT OF APPEAL

BETWEEN:

TOTAL ENERGY SERVICES INC.

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F I L E D	FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE
29 Feb 2024	
Frank Fedorak	
VAN	-1-

Appellant

– and –

HIS MAJESTY THE KING

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant. The relief claimed by the Appellant appears on page 3 herein.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard at the City of Calgary, in the Province of Alberta.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Court Rules* and serve it on the Appellant's solicitor, or where the Appellant is self-represented, on the Appellant, WITHIN 10 DAYS of being served with this notice of appeal.

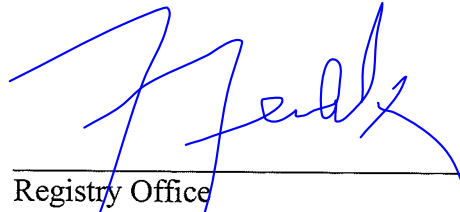
IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Court Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Court Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

DATED at the City of Calgary, in the Province of Alberta this 29th day of February, 2024.

Issued by:



Registry Office
Federal Court of Appeal
Third Floor
635 – 8th Avenue S.W.
Calgary, Alberta
T2P 3M3
Telephone: 403.292.5555
Facsimile: 403.292.5329

TO: **His Majesty the King**
c/o The Deputy Attorney General of Canada
Shalene Curtis-Micallef

Attention: Matthew Turnell
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National Litigation Sector
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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the judgment of the Honourable Mr. Justice Pizzitelli of the Tax Court of Canada, dated February 2, 2024, File Number 2016-367(IT)G, in which the appeal by the Appellant of reassessments of its 2010 and 2011 taxation years made under the *Income Tax Act* (Canada), R.S.C. 1985 (5th Supp.), c.1 (the "ITA") was dismissed in accordance with the reasons for judgment also dated February 2, 2024.

All references are to the ITA unless otherwise noted.

THE APPELLANT ASKS that:

1. the appeal be allowed and the reassessments of the Appellant's 2010 and 2011 taxation years be vacated;
2. the Respondent pay the Appellant's costs in this Honourable Court and in the Tax Court of Canada; and
3. such further and other relief as this Honourable Court deems appropriate in the circumstances.

THE GROUNDS OF APPEAL are as follows:

1. The Honourable Tax Court Judge made an extricable error of law by applying the wrong test to conclude that the Appellant had misused or abused subsection 111(5) or any similar provision of the ITA for purposes of subsection 245(4).
2. Further, the Honourable Tax Court Judge made palpable and overriding errors of fact in concluding that the Appellant had, for purposes of subsection 245(4), abused the object, spirit and purpose of subsection 111(5) or any similar provision of the ITA, including finding that:
 - (a) The reporting issuer status of Biomerge Industries Ltd. ("**Biomerge**") was not utilized by the Appellant, and instead Total Energy Services Trust's ("**Total**") reporting issuer status was substituted therefore;

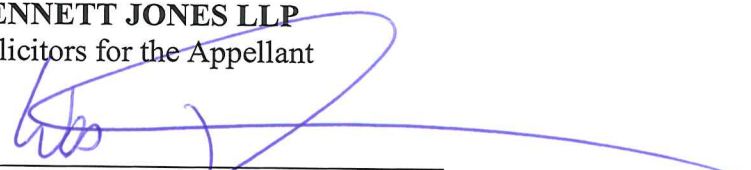
- (b) the agreement referred to by the Honourable Tax Court Judge as the Investment Agreement did not effectively terminate once the CCAA restructuring plan was completed;
 - (c) the terms of the Investment Agreement entitled Nexia Biotechnologies Ltd. (“Nexia”) to appoint the directors and officers of Xillix Biotechnologies Ltd. (“Xillix”);
 - (d) there was an unwritten agreement between the original shareholders of Xillix with regards to Nexia's involvement with Xillix; and
 - (e) Total had complete control of the transactions referred to by the Honourable Tax Court Judge as the Total Conversion series of transactions.
3. The Honourable Tax Court Judge made an extricable error of law in his determination, or lack of determination, of the object, spirit and purpose of the SIFT conversion rules in subsections 85.1(7), (8) and 88.1(2) and his determination that there was an abuse or misuse of that object, spirit and purpose for purposes of subsection 245(4).
4. Further, the Honourable Tax Court Judge made palpable and overriding errors of fact in concluding that the Appellant had, for purposes of subsection 245(4), abused the object, spirit and purpose of the SIFT conversion rules in subsections 85.1(7), (8) and 88.1(2).
5. The Honourable Tax Court Judge made palpable and overriding errors of fact in concluding that the primary purpose of the Total Conversion series of transactions (or any transaction therein) was to access tax attributes, such that that series of transactions included an avoidance transaction or transactions for purposes of section 245, including finding that:
- (a) There was no urgency for Total to convert to a corporation; and
 - (b) The reporting issuer status of Total was utilized by the Appellant.

6. Such further and other grounds as the Appellant may advance and as this Honourable Court may permit.

Dated at the City of Calgary, in the Province of Alberta, this 29th day of February 2024.

BENNETT JONES LLP
Solicitors for the Appellant

Per: _____


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COURT FILE NO.

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