

**Date: 20080109**

**Docket: A-524-06**

**Citation: 2008 FCA 5**

**CORAM: RICHARD C.J.  
SHARLOW J.A.  
RYER J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**CANWEST MEDIAWORKS INC.  
(successor by amalgamation to CanVideo Television Sales (1983) Limited)**

**Respondent**

Heard at Ottawa, Ontario, on January 8, 2008.

Judgment delivered at Ottawa, Ontario, on January 9, 2008.

**REASONS FOR JUDGMENT BY:**

**RYER J.A.**

**CONCURRED IN BY:**

**RICHARD C.J.  
SHARLOW J.A.**

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(successor by amalgamation to CanVideo Television Sales (1983) Limited)**

**Respondent**

**REASONS FOR JUDGMENT**

**RYER J.A.**

[1] This is an appeal from a decision of Mr. Justice Campbell Miller of the Tax Court of Canada (the “TCC”) (2006 TCC 579) allowing the appeal of Canwest Mediaworks Inc. (the “taxpayer”) against a reassessment (the “Reassessment”) of its income tax liability for its 1997 taxation year (the “Taxation Year”) pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “ITA”). The TCC held that while the Reassessment was issued on a timely basis, having regard to a waiver of the normal reassessment period under the ITA that had been provided by the taxpayer, the Reassessment was nonetheless invalid because it was made beyond a five year limitation period that

was prescribed by Article XXVII(3) (the “Limitation Provision”) of the *Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital* (the “Treaty”).

[2] In the Reassessment, the Minister included \$659,974 into the income of the taxpayer on the basis that such amount constituted previously unreported foreign accrual property income (“FAPI”), within the meaning of subsection 95(1) of the ITA, of the taxpayer for the Taxation Year.

[3] The Minister justified the Reassessment on the basis that the Limitation Provision is inapplicable by virtue of the provisions of Article XXX(2) (the “FAPI Provision”) of the Treaty.

[4] The inter-relationship of those provisions of the Treaty is the issue in this appeal. They read as follows:

XXVII(3)

3. A Contracting State shall not, after the expiry of the time limits provided in its national laws and, in any case, after five years from the end of the taxable period in which the income concerned has accrued, increase the tax base of a resident of either Contracting State by including therein items of income which have also been charged to tax in the other Contracting State. This paragraph shall not apply in the case of fraud, wilful default or neglect.)

XXX(2)

2. Nothing in this Agreement shall be construed so as to prevent Canada from imposing its tax on amounts included in the income of a resident of Canada according to section 91 of the Canadian Income Tax Act.

[5] For the reasons that follow, I am of the view that the TCC erred in concluding that the Limitation Provision invalidated the Reassessment and I would allow the appeal.

## **BACKGROUND**

[6] The taxpayer is a resident of Canada that is the successor, by way of two amalgamations, to CanVideo Television Sales (1983) Limited (“CanVideo”). Throughout the Taxation Year, which ended on April 30, 1997, CanVideo was a resident of Canada. In these reasons, a reference to the taxpayer shall be a reference to CanVideo and each of its successors, as applicable.

[7] CanWest International Communications Inc. (“CICI”) was an international business corporation formed under the laws of Barbados in 1991. At all relevant times, CICI was a resident of Barbados under the *Barbados Income Tax Act* (the “Barbados ITA”), a non-resident of Canada for the purposes of the ITA and a controlled foreign affiliate, within the meaning of subsection 95(1) of the ITA, of CanVideo.

[8] During its taxation year that ended on August 31, 1996, CICI received interest from the Royal Bank of Canada in the amount of \$659,974. That amount was included in its income under the Barbados ITA.

[9] CanVideo did not include any amount of FAPI in the computation of its income for the Taxation Year.

[10] The normal reassessment period, as defined in subsection 152(3.1) of the ITA, in respect of the Taxation Year ended on December 18, 2001. On November 6, 2001, the taxpayer executed a waiver of the limitation periods under the ITA in respect of a number of issues in relation to the Taxation Year, including the issue of whether the taxpayer may have had any FAPI that should have been included in its income for the Taxation Year.

[11] On August 16, 2004, the Minister issued the Reassessment pursuant to which \$659,974 was included into the income of the taxpayer for the Taxation Year on the basis that such amount constituted FAPI of the taxpayer for that year. As a result of the delivery of the waiver, the Reassessment was issued before the expiry of the limitation periods contained in the ITA but after the limitation period contained in the Limitation Provision.

[12] The taxpayer objected to the Reassessment, the Minister confirmed it and the taxpayer launched an appeal to the TCC.

## **THE TCC JUDGMENT**

[13] The TCC held that the FAPI Provision did not override the Limitation Provision and, accordingly, the Limitation Provision applied to invalidate the Reassessment. In doing so, the TCC held that the Limitation Provision did not prevent Canada from imposing its tax on the FAPI of the taxpayer. Instead, Canada was “precluded from imposing tax by its own actions of not imposing tax on a timely basis”.

[14] The TCC further held that because of the words “shall be construed so as to” in the FAPI Provision, that provision was only applicable to or in respect of Articles of the Treaty that required interpretation. On that basis, according to the TCC, the FAPI Provision did not apply in relation to the Limitation Provision because the Limitation Provision required no interpretation.

[15] In allowing the taxpayer’s appeal, the TCC concluded that the FAPI Provision could not be interpreted as overriding the Limitation Provision, as to do so would render the Limitation Provision “meaningless”.

## **ANALYSIS**

[16] The parties made a number of arguments at the hearing of the appeal. In my view, it is necessary to deal only with the argument that the Limitation Provision is inapplicable in respect of the Reassessment by virtue of the FAPI Provision.

[17] The Limitation Provision provides a procedural limitation in relation to the time period within which the Government of one of the countries may increase the tax base of a resident of either country by including therein items of income which have also been charged to tax in the other country. That provision contains no language which indicates that it does or does not have paramountcy in relation to any other Article in the Treaty.

[18] The FAPI Provision stipulates that the ability of Canada to tax FAPI inclusions in the income of Canadian residents is to be unfettered by any provision of the Treaty. The language of the

FAPI Provision is unqualified and demonstrates that the FAPI Provision is intended to prevail over every other potentially contrary provision of the Treaty. There is no indication in the FAPI Provision or elsewhere in the Treaty that this paramountcy is to be applicable only in respect of other provisions of the Treaty that may contain interpretational uncertainties. Moreover, as indicated, nothing in the language of the Limitation Provision indicates that it is to be exempted from the application of the FAPI Provision.

[19] The conclusion that the FAPI Provision overrides the Limitation Provision in respect of a FAPI reassessment does not render the Limitation Provision “meaningless”. The Limitation Provision will still be applicable with respect to items of income other than FAPI that have been added to the income of a resident of Canada for the purposes of the ITA.

[20] In my view, the imposition of tax under the ITA on the FAPI income inclusion of the taxpayer that was the subject of the Reassessment will be prevented if the Limitation Provision can be invoked by the taxpayer to invalidate the Reassessment. That result is contrary to the clear meaning and purpose of the FAPI Provision and therefore that result cannot be permitted.

## **DISPOSITION**

[21] For these reasons, I would allow the appeal, with costs in this Court as well as in the TCC.

“C. Michael Ryer”

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J.A.

“I agree.  
J. Richard C.J.”

“I agree.  
K. Sharlow J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-524-06

**(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED OCTOBER 24,  
2006 IN DOCKET 2005-469(IT)G)**

**STYLE OF CAUSE:** HER MAJESTY THE QUEEN  
Appellant  
and  
CANWEST MEDIAWORKS INC.  
(successor by amalgamation to  
CanVideo Television Sales (1983)  
Limited)  
Respondent

**PLACE OF HEARING:** Ottawa

**DATE OF HEARING:** January 8, 2008

**REASONS FOR JUDGMENT BY:** RYER J.A.

**CONCURRED IN BY:** RICHARD C.J.  
SHARLOW J.A.

**DATED:** January 9, 2008

**APPEARANCES:**

Mr. Donald Gibson  
Mr. Pascal Tétrault  
FOR THE APPELLANT

Mr. Ian S. MacGregor  
Ms. Kimberley J. Wharram  
FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Ottawa, Ontario  
FOR THE APPELLANT

Osler, Hoskin & Harcourt LLP  
Ottawa, Ontario  
FOR THE RESPONDENT