Docket: 2002-3680(IT)G

BETWEEN:

FREDERICK WILLIAM BROWN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Determination of a question heard on May 15, 2006,
at Thunder Bay, Ontario,
By: The Honourable Justice M.A. Mogan

Appearances:

Counsel for the Appellant:	Brian R. MacIvor
Counsel for the Respondent:	Jeff Pniowsky & Julien Bedard

ORDER

Pursuant to the Order of the Honourable Justice Gerald J. Rip, dated January 27, 2006, requiring the Court to hold a separate hearing pursuant to *Rule* 58(1)(*a*) of the *Tax Court of Canada Rules (General Procedure)* to determine the question concerning a waiver filed by the Appellant;

It is ordered that the reassessment made by the Minister of National Revenue under the *Income Tax Act* for the 1996 taxation year subsequent to the filing of the waiver under subsection 152(4) of the *Act*, was in accordance with the terms of the waiver.

Costs of the determination are in the cause.

Signed at Ottawa, Canada, this 4th day of July, 2006.

"M.A. Mogan"

Mogan D.J.

Citation: 2006TCC381
Date: 20060704
Docket: 2002-3680(IT)G

BETWEEN:

FREDERICK WILLIAM BROWN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Mogan D.J.

[1] This appeal concerns an income tax assessment for the 1996 taxation year. The Minister of National Revenue (the "Minister") first assessed tax for the Appellant's 1996 taxation year on May 5, 1997; and so the Appellant's normal reassessment period (36 months) expired on May 5, 2000.

[2] In July 1997, the Minister started to review certain transactions between the Appellant and Fred Brown Equipment (1987) Ltd. (the "Corporation") in which the Appellant was a significant shareholder. The transactions were complicated and the review extended over more than two years. In April 2000, the Appellant filed with Canada Revenue Agency ("CRA") a waiver in respect of the normal reassessment period for 1996. The waiver (Exhibit R-1, Tab 5) is dated April 18, 2000 and appears to have been filed with CRA on or about April 28, 2000.

[3] CRA issued to the Appellant a Notice of Reassessment dated March 1, 2001 which added to the Appellant's reported income for 1996 the amount of $296,919 which was described by CRA as a deemed dividend. After the Appellant filed a Notice of Objection, the Minister confirmed the reassessment by notice dated June 29, 2001. The Appellant filed a Notice of Appeal in this Court following the Minister's confirmation.

[4] In the Notice of Appeal, the Appellant has made the following two distinct and separate arguments:

> (i) the waiver signed on April 18, 2000 permits only the reassessment of matters in respect of Part XI.3 and Part XVI of the *Income Tax Act* (the "*Act*"), and does not permit a reassessment of matters under Part I of the *Act*; and
>
> (ii) the transactions in 1996 between the Appellant and the Corporation do not violate the General Anti-Avoidance Rule ("GAAR") provisions (section 245) of the *Act*.

Following a case management conference in January 2006, and with the consent of the parties, this Court ordered that there be a separate hearing to determine whether the waiver filed by the Appellant in accordance with subsection 152(4) of the *Act* precluded the Minister from reassessing the Appellant for 1996 in the manner of the reassessment which is under appeal. There are five other taxpayers having similar but totally unrelated transactions who have signed waivers with terms similar to the Appellant's waiver.

[5] When the Court convened at Thunder Bay on May 15, 2006 for the separate hearing, counsel for the parties agreed that we would hear only the waiver issue as it affects the appeal of Frederick William Brown (Court File 2002-3680(IT)G); and that the other five taxpayers would abide the result of the Brown appeal with respect to the waiver issue. Mr. MacIvor, counsel for the Appellant, drafted the following question which he put before the Court:

> Pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)* ... the Appellant has applied to the Court for the determination of the following question, as framed by the pleadings:
>
>> Did the waiver executed by the Appellant in respect of the 1996 taxation year permit the Minister of National Revenue to reassess the Appellant pursuant to subsection 152(4) of the *Income Tax Act* with respect to the corporate reorganization of Fred Brown Equipment Limited and the capital gains that were reported and the capital gains deduction that was claimed in the 1996 taxation year?

[6] Mr. Pniowsky, counsel for the Respondent, submitted notes of argument in which he stated: "… the Appellant is seeking to have a waiver that he signed declared invalid". Before considering the many documents which were entered as

exhibits on this issue, I will comment on the positions adopted by counsel. With respect to the Respondent's submission, I think it is more accurate to say that the Appellant seeks to have the reassessment declared invalid because it does not conform with the terms of a valid waiver. With respect to the Appellant's question, I think that the waiver (any waiver) does not "permit" the Minister to reassess. The Minister may reassess at any time but, if a particular reassessment is outside the "normal reassessment period", a waiver may relieve the Minister from having the burden of proof upon appeal.

[7] Having heard the evidence and submissions by counsel. I propose to consider the question as being whether the reassessment made by the Minister on March 1, 2001 was in accordance with the terms of the waiver which Frederick William Brown signed on April 18, 2000.

[8] Mr. Brown testified for almost an hour. He has been a logging contractor for many years. Before 1987 he was a sole proprietor but he incorporated his business as the Corporation in 1987. In the late 1970s and again in the early 1980s, he was audited by Revenue Canada. On each occasion, he met with the auditor to ask and answer questions. The Corporation was audited in the late 1990s. A Revenue Canada auditor came to Fort Francis (where the Appellant lived) and called to ask for records. The Appellant's wife delivered certain documents to the Revenue Canada auditor at his hotel but there were no follow-up meetings. When the Appellant was shown the waiver which he signed on April 18, 2000 (Exhibit R-1, Tab 5), he identified his signature but stated that he thought he was signing on behalf of the Corporation. He acknowledged, however, that the name of the Corporation did not appear above his signature as it did on certain other corporate documents.

[9] Raymond Halvorsen is the corporate tax auditor from CRA who reviewed the 1996 transactions between the Appellant and the Corporation. Mr. Halvorsen works out of the Thunder Bay office of CRA. He testified that the Appellant's wife brought the corporate records to him at his hotel in Fort Francis, and that he did not meet with the Appellant. Mr. Halvorsen spoke with Mr. Kelly (the Appellant's accountant) by telephone but did not meet with him. Mr. Halvorsen stated that he dealt with the Appellant's accountant because he assumed that the Appellant would be busy with his logging business.

[10] Mr. Halvorsen wrote a one-page letter to the Appellant on March 4, 1999 (Exhibit R-1, Tab 1) with a copy to the Appellant's counsel, Mr. MacIvor, describing the proposed adjustment to the Appellant's 1996 income and inviting a

submission from the taxpayer. He also identified a five-page letter dated March 13, 2000 (Exhibit R-1, Tab 4) from CRA to the Appellant (copy to Mr. MacIvor) with a more explicit description and explanation of the proposed adjustments to 1996 income. Mr. Halvorsen stated that (i) Mr. MacIvor always acted as if he had authority from the Appellant; (ii) the last proposal letter from CRA dated Match 13, 2000 was sent before the Appellant signed his waiver; (iii) he (Halvorsen) had enough information in March 2000 to reassess without any waiver; (iv) the purpose of the waiver was to give the Appellant more time to make submissions; and (v) the amounts in the reassessment of March 1, 2001 were in fact identical to the amounts set out in the CRA letter of March 13, 2000.

[11] A copy of the waiver is Exhibit A-1, Tab C and Exhibit R-1, Tab 5. It is a standard CRA form having the title "Waiver in Respect of the Normal Reassessment Period". In addition to the Appellant's name, address, SIN and taxation year, the specific words typed on the CRA form for this particular Appellant are as follows:

> WAIVER
>
> The normal reassessment period referred to in subjection 152(4) of the *Income Tax Act*, within which the Agency may reassess or make additional assessments or assess tax, interest or penalties under Part of the *Act* mentioned hereafter is hereby waived for the taxation year indicated above, in respect of:

Part of the *Act*	Waiver in respect of:
Part XI.3 & Part XVI	the personal tax issues of the above noted shareholder with respect to the corporate reorganization of Fred Brown Equipment Limited issues include the capital gains that were reported and capital gains deduction that was claimed in the 1996 taxation year.

[12] The letter from CRA to the Appellant dated March 4, 1999 refers to tax avoidance, and the letter dated March 13, 2000 makes it clear that the proposed reassessment is based on GAAR in section 245 of the *Act* (Part XVI). In the waiver itself, there is a reference to "capital gains" which are taxed only in Part I of the *Act*. Also, the "deemed dividends" which the reassessment (Exhibit R-1, Tab 7) added to the Appellant's 1996 reported income were included under section 84 which is within Part I of the *Act*.

[13] The heart of the Appellant's argument on the waiver issue is the fact that the adjustments to his 1996 income in the reassessment under appeal were made under provisions found in Part I of the *Act*, but Part I is not listed or disclosed in the relevant portion of the waiver. See paragraph 11 above.

[14] The facts do not support the Appellant and neither does the law. For the reasons set out below, I have concluded that there is no merit in the Appellant's argument that the reassessment for 1996 was not made within the terms of the waiver.

The Facts

[15] There would be some merit in the Appellant's argument if it could be said that he was surprised by the adjustments made to his 1996 income in the reassessment under appeal. Having regard to all of the related and concurrent documents, however, I am satisfied that the Appellant could not reasonably have been surprised by the adjustments to his 1996 income made in the reassessment under appeal. Indeed, the amounts set out in the CRA form T7W-C ("explanation of changes") which is Exhibit R-1, Tab 7 are the same amounts which appear on page 5 of the letter dated March 13, 2000 (Exhibit R-1, Tab 5) which CRA sent to the Appellant with a copy to Mr. MacIvor. That letter preceded the signing of the waiver.

[16] When Mr. Halvorsen was concluding his review of the 1996 taxation year, he wrote a letter to the Appellant on March 4, 1999 (Exhibit R-1, Tab 1). That letter speaks of recharacterizing "the nature of the amounts you received to that of dividends" and states the amounts of $76,449 and $161,086. The letter also invites representations from the Appellant. Exhibit R-1, Tab 2 are emails between Mr. Halvorsen and Mr. MacIvor agreeing to a 90-day extension to submit a brief. Exhibit R-2, Tab 3 is a 26-page submission dated August 27, 1999 sent to CRA by Mr. MacIvor.

[17] On March 13, 2000, CRA sent a five-page letter to the Appellant with a copy to Mr. MacIvor (Exhibit R-1, Tab 4) setting out in detail the proposed adjustments to the Appellant's 1996 income. This letter refers to GAAR and section 245 of the *Act*; Mr. MacIvor's submission of August 27, 1999; and certain court judgments dealing with GAAR. On page 5 of the letter, CRA sets out the amounts $76,449 and $161,086 which will be recharacterized "to that of dividend".

This letter of March 13, 2000 was sent about one month before the Appellant signed the waiver on April 18, 2000 (Exhibit R-1, Tab 5).

[18] On June 13, 2000, Mr. MacIvor sent an 11-page submission to CRA (Exhibit R-1, Tab 6) which was, in effect, a response to the CRA letter of March 13, 2000. The Notice of Reassessment for 1996 was issued to the Appellant on March 1, 2001. Exhibit R-1, Tab 7 is the standard CRA form T7W-C containing "an explanation of the changes" to the Appellant's reported income for 1996. The form T7W-C shows how the "Deemed Dividends" are based on the amounts $76,449 and $161,086.

[19] The two letters from CRA to the Appellant (Exhibits R-1, Tabs 1 and 4) and the two submissions from Mr. MacIvor (Exhibits R-1, Tabs 3 and 6) prove that the Appellant and his lawyer, Mr. MacIvor, knew how the Appellant would be reassessed after the "normal reassessment period" if he signed the waiver (Exhibit R-1, Tab 5). The actual reassessment made on March 1, 2001 did not contain any element of surprise to the Appellant or Mr. MacIvor.

The Law

[20] In *Bailey v. MNR*, 89 DTC 416, Judge Rip of this Court described the circumstances in which a waiver may be given. At page 419:

> A waiver is usually given by a taxpayer to the respondent when there is an unresolved dispute over one or more specific matters and the three year time period within which the respondent may reassess is fast approaching. The execution of a waiver avoids a hasty reassessment by the respondent; it provides the taxpayer with further opportunity to consider adjustments proposed by the respondent and to allow him to make further representations to support his claim.

[21] In *Solberg v. The Queen*, 92 DTC 6448, a taxpayer had filed a waiver with respect to his 1979 taxation year, and the waiver referred to Part III of the *Income Tax Act* (the "*Act*"). After the normal reassessment period, the taxpayer was reassessed to increase the amount of a capital gain which he had reported in 1979. Upon appeal, Mr. Solberg argued that his increased capital gain was reassessed under Part I. Madame Justice Reed of the Federal Court Trial Division found that the reference in the waiver to Part III was a mistake; it should have been a reference to Part I. When deciding against Mr. Solberg's argument, Reed J. stated:

At page 6452:

> Having concluded that the reference in the waiver to Part III was an error, I must then consider whether the waiver is invalid for the purposes of reassessing the taxpayer for Part I tax. I am not prepared to so conclude. In my view, the error is a technical defect which does not impair the substance of the waiver. The appropriate approach to the interpretation of the waiver is to seek to ascertain the intention of the parties as expressed in that document together with any relevant circumstances for which evidence is available. …

Also at page 6452:

> … I agree with counsel's argument that, unlike the defect in the *CAL Investments* case the instruction that the relevant Part of the *Income Tax Act* be identified in the waiver is not merely for the Minister's benefit. It is for the benefit of both the Minister and the taxpayer. Nevertheless I cannot conclude that a mistake in this identification results in the waiver being a nullity when it appears from the text of the waiver as a whole and from the surrounding circumstances to the limited extent that evidence of such exists in this case, that both parties knew what was in issue. No prejudice arose to the plaintiff as a result of the mistake.

[22] In *Mitchell v. Canada*, [2003] 2 F.C. 767, the Federal Court of Appeal considered circumstances in which certain taxpayers were co-owners of land which had been expropriated. When they were reassessed with respect to "penalty interest", one of them appealed and the remainder agreed to be bound by the result of the one appeal as a test case. The lawyer for the remaining co-owners reiterated the agreement in a letter to Revenue Canada stating their consent to be reassessed before or after the statue-barred period. The one taxpayer's appeal was successful. Revenue Canada then refused to reassess the remaining co-owners claiming that no waivers had been provided, and the time for filing objections had expired. The remaining co-owners brought an application for judicial review seeking an order directing the Minister of National Revenue to reassess in accordance with the one co-owner's successful appeal. Their application was dismissed in the Federal Court Trial Division, and they went to the Federal Court of Appeal. Upon allowing the co-owner's appeal, Sexton J.A. writing for the Court stated:

> 34 It is further conceded by Revenue Canada that in the past their practice has been to accept as valid waivers, prescribed forms which have been altered, and documents which are not in the prescribed form. Further, it is clear that Revenue Canada has taken the position that there can be a valid waiver even though the waiver may contain vital information which is erroneous. In this connection I refer to the following cases.

[23] Sexton J.A. then proceeded to cite three cases (including *Solberg*) in which errors in waivers concerning the taxation year, property as land or building, and a

particular "Part" of the *Act* did not prevent the waivers from being valid with respect to a subsequent reassessment. In particular, the Federal Court of Appeal approved *Solberg* by stating:

> 37 … The appropriate approach to the interpretation of the waiver is to seek to ascertain the intention of the parties as expressed in that document together with any relevant circumstances for which evidence is available. The Court concluded that the waiver was not a nullity as a result of the mistake because it appeared from surrounding circumstances and from the text of the waiver as a whole that both parties knew what was in issue. This approach taken by the [page781] Court in *Solberg* should be applied to our fact situation.

[24] The following four cases were also cited by counsel for the Respondent as authority for the proposition that an error in a waiver should not be construed rigidly against a subsequent reassessment as being within the terms of the waiver if the intention of the parties could be ascertained:

Placements T.S. Inc. v. Canada, 94 DTC 1302
Charron v Canada, [1997] T.C.J. No. 303
Gaouette v. Canada, [2002] T.C.J. No. 168
Chafatz v. Canada, [2005] T.C.J. No. 618

[25] In substance, the Appellant's argument would characterize a waiver as a unilateral concession with benefits running only in favour of the CRA. By way of contrast, the decided cases view a waiver as providing mutual benefits. The CRA has additional time to review transactions in a particular taxation year without hurrying to issue quick and, perhaps, harsh reassessments. The taxpayer has additional time to make submissions as to why no reassessment is required.

[26] In my opinion, a waiver is not a contract between a taxpayer and Revenue Canada, excluding extrinsic evidence as to its interpretation. Quite the contrary. Relevant surrounding circumstances are important to determine whether a subsequent reassessment falls within the stated terms of a waiver.

[27] Having regard to the facts herein and the decided cases, I am satisfied that the reassessment made by the Minister on March 1, 2001 was in accordance with the terms of the waiver signed by the Appellant on April 18, 2000. On this waiver issue, an Order will be made in favour of the Respondent with costs in the cause.

Signed at Ottawa, Canada, this 4th day of July, 2006.

"M.A. Mogan"

Mogan D.J.

CITATION:	2006TCC381
COURT FILE NO.:	2002-3680(IT)G
STYLE OF CAUSE:	FREDERICK WILLIAM BROWN AND HER MAJESTY THE QUEEN
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APPEARANCES:

Counsel for the Appellant:	Brian R. MacIvor
Counsel for the Respondent:	Jeff Pniowsky & Julien Bedard

COUNSEL OF RECORD:

For the Appellant:

Name:	Brian R. MacIvor
Firm:	Brian MacIvor Law Office

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada