Docket: 2010-1738(IT)G

BETWEEN:

GUY FIETZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 8, 2011 at Winnipeg, Manitoba

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	Mark Wallace
Counsel for the Respondent:	Julien Bédard

JUDGMENT

For the reasons that follow, I have determined that the waiver in respect of the normal reassessment period as executed by the Appellant on February 2nd, 2006, a copy of which is Exhibit G to the affidavit of Sally Yu, filed with this Court on May 31, 2011, is effective to permit the Minister of National Revenue to reassess the Appellant (as he was reassessed on July 28, 2006) pursuant to subparagraph 152(4)(*a*)(ii) of the *Income Tax Act* (the "*Act*") in respect of the 2002 taxation year after the normal reassessment period for that year had elapsed.

The Respondent is entitled to costs, which are payable in any event of the cause.

Signed at Ottawa, Canada, this 20th day of October 2011.

"Wyman W. Webb"

Webb, J.

Citation: 2011TCC493
Date: 20111020
Docket: 2010-1738(IT)G

BETWEEN:

GUY FIETZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The parties made a joint Motion pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*. This Rule provides as follows:

> 58. (1) A party may apply to the Court,
>
> (*a*) for the determination, before hearing, of a question of law, a question of fact or a question of mixed law and fact raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, or
>
> (*b*) to strike out a pleading because it discloses no reasonable grounds for appeal or for opposing the appeal,
>
> and the Court may grant judgment accordingly.

[2] By an Order of this Court dated June 8, 2011, the question that was to be determined was stated as follows:

> Is the waiver in respect of the normal reassessment periods as executed by the appellant on February 2nd, 2006, a copy of which is Exhibit G to the affidavit of Sally Yu, filed, effective to permit the Minister of National Revenue to reassess the appellant pursuant to subparagraph 152(4)(*a*)(ii) of the *Income Tax Act* (the "*Act*") in respect of the 2002 taxation year after the normal reassessment period for that year had elapsed?

[3] The affidavit of Sally Yu is her affidavit that was filed with this Court on May 31, 2011.

[4] Subsection 152(4) of the *Income Tax Act* (the "*Act*") provides in part as follows:

> (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (*a*) the taxpayer or person filing the return
>
> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or
>
> (ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

[5] If a waiver has been filed with the Minister, the Minister may reassess a taxpayer after the expiration of the normal reassessment period without having to establish that there was a misrepresentation as described in subparagraph 152(4)(*a*)(i) of the *Act*[1]. However, the reassessment must relate to the subject matter of the waiver. Subsection 152(4.01) of the *Act* provided in 2002 in part as follows:

> (4.01) Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(*a*) or (*b*) applies in respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,
>
> (*a*) where paragraph (4)(*a*) applies to the assessment, reassessment or additional assessment,
>
> (i) any misrepresentation made by the taxpayer or a person who filed the taxpayer's return of income for the year that is attributable to neglect,

[1] Then Chief Justice Bowman described the onus that is on the Minister when a reassessment is based on a misrepresentation as described in subparagraph 152(4)(*a*)(i) of the *Act* in paragraph 8 of his decision in *Mensah* v. *The Queen*, [2008] T.C.J. No. 302, 2008 DTC 4358.

> carelessness or wilful default or any fraud committed by the taxpayer or that person in filing the return or supplying any information under this Act, or
>
> (ii) a matter specified in a waiver filed with the Minister in respect of the year; and

[6] As discussed below, since a waiver is linked to a reassessment as a result of the provisions of subsection 152(4.01) of the *Act*, the question before me is whether the waiver that was filed permits the Minister to reassess the Appellant as he was reassessed on July 28, 2006. The particular issue related to the waiver is the absence, in the waiver form itself, of a description of the matters being waived. The box in which the matters being waived were to be described was left blank. No other problems or issues in relation to the waiver were identified or discussed.

[7] The Canada Revenue Agency ("CRA") had conducted an audit of the Appellant's 2002 and 2003 taxation years. On May 2, 2005 the auditor for CRA sent a letter to the Appellant in which she indicated that the CRA had conducted a limited review of the Appellant's 2002 income tax return. In the letter the auditor was requesting documentation to support the amounts that the Appellant had reported as capital gains in schedule 3 to his income tax return.

[8] Over the course of the next few months the auditor for the CRA and the Appellant exchanged phone calls or voice mail messages. The Appellant was indicating that he was seeking additional information from his lawyer. The Appellant provided a consent form indicating that his lawyer, Howard Morry[2], was to act as his representative. Following the receipt of the consent, voicemail messages were exchanged between Howard Morry and the auditor. On October 10, 2005 Howard Morry left a voicemail message for the auditor in which he indicated that "he would be gathering the supporting documentation and sending it the following week[3]". The auditor did not receive the supporting documentation that Howard Morry had indicated he would be providing.

[9] On November 18, 2005 the auditor sent to the Appellant a letter (the "Proposal Letter") outlining the proposed adjustments to the Appellant's income and dividend tax credits for 2002 and 2003. The proposed adjustments were:

(a) to increase the taxable amount of dividends received;

---

[2] In the consent form the representative is identified as "Howard Morey".
[3] Paragraph 11 of the Affidavit of Sally Yu.

(b) to increase the taxable amount of deemed dividends received;

(c) the increase the amount of his taxable capital gain;

(d) to increase the amount of his interest income;

(e) to increase the amount of taxable benefits;

(f) to increase the amount of employment income; and

(g) to increase the amount of dividend tax credits.

[10] The adjustments together with the notes related to the adjustments are 3 and one-half pages in length. In the letter it was indicated that the proposed reassessments would be delayed for a period of thirty days from the date of the letter to allow the Appellant to submit additional information or explanations.

[11] Following this letter Howard Morry left a telephone message on December 10, 2005 requesting an extension of time to respond to the Proposal Letter. This request was also made by letter dated December 12, 2005 in which Howard Morry stated, in part, that "[t]his request is being made due to the complexity of the proposed assessments, as well as the coming holiday season. We would like an extension at least to January 18, 2006".

[12] This extension request was granted. On January 18, 2006 Howard Morry sent a letter by fax in which he stated as follows:

> I spent the day in Calgary yesterday gathering additional information for a response to the proposed reassessments of the above captioned taxpayers. We are in the process of reviewing the information and documentation we received and the interviews we held with the taxpayers and their representatives. We will need some additional time to complete our review, however, in the meantime, we do note the following:
>
> 1. With respect to Triton Global Business Services Inc. KPMG has confirmed that they should have added back the net accounting write down of investment in subsidiary of $472,869.00. That was an oversight on their part.
>
> 2. We do not have a copy of any letter which may been sent to Lori Fietz. However, we understand one may have been sent (presumably reducing

> the dividend included in her income in the year 2002). Could you please send a copy of that letter, if any, to our attention.
>
> 3. You indicated in your voicemail that we would have to formally request the application of any capital gains exemption. Please consider this letter a formal request.
>
> We will be getting back to you shortly with our comments on the balance of the proposed reassessments. We appreciate your patience on this matter.

[13] Upon receiving the fax from Howard Morry on January 18, 2006, the auditor for the CRA left a voicemail message for Howard Morry in which she explained that since a part of the income for which the Appellant was reassessed included amounts that had been included in Mrs. Fietz's income, that once his income for 2002 was finalized, that her tax return would be reassessed to reduce her income by the amount that was included in his income.

[14] On January 20, 2006 Howard Morry's assistant, Bobbi Fielding, called the auditor for the CRA to discuss a waiver for the normal reassessment period in relation to Mrs. Fietz. The auditor for CRA indicated that the form for the waiver was available on the CRA's website and that any reassessment issued for Mrs. Fietz in relation to her 2002 taxation year on or after May 23, 2006 would be after the expiration of the normal reassessment period for Mrs. Fietz for that year. The auditor and Bobbi Fielding also discussed the normal reassessment period for the Appellant's 2002 income tax return and the auditor indicated that it expired on May 23, 2006. Later that same day the auditor called Mrs. Fietz back to indicate that the form number for the waiver was T2029.

[15] A copy of the waivers was faxed to the auditor for CRA on February 6, 2006. The auditor reviewed the faxed copy of the waivers that she had received. In the waiver form for the Appellant the section of the waiver for the matters being waived was blank.

[16] On February 13, 2006 Bobbi Fielding called the auditor for the CRA because she wanted clarification with respect to the date on which the normal reassessment period for the Appellant would lapse. The auditor indicated that the normal reassessment period in relation to the Appellant's 2002 taxation year expired on May 23, 2006. The auditor also indicated that once the CRA "received a signed waiver,

the 2002 income tax return year was open for reassessment after the normal reassessment period[4]".

[17] On February 16, 2006 the auditor indicated that the time to respond to the Proposal Letter was extended to February 27, 2006.

[18] On February 16, 2006 Howard Morry, the lawyer for the Appellant, sent a letter to the Auditor for the CRA with the original waiver forms. In this letter Howard Morry stated as follows:

> As requested, we are enclosing herewith the original of the following documentation:
>
> 1. Waiver in Respect of the Normal Reassessment Period signed by Guy Fietz on February 2, 2006;
>
> 2. Waiver in Respect of the Normal Reassessment Period signed by Lori Fietz on February 2, 2006; and
>
> 3. Authorization to Release Information dated January 27, 2006 signed by Lori Fietz.

[19] The letter and the original waiver forms were received by the auditor for the CRA on February 22, 2006. The auditor confirmed the receipt of these documents by calling Bobbi Fielding on February 23, 2006. No extension to the deadline of February 27, 2006 to respond to the Proposal Letter was discussed at that time.

[20] On April 10, 2006 the auditor for the CRA called Gordon Ellison. She indicated to Gordon Ellison that she had not heard anything from Howard Morry's office since February 23, 2006. The auditor asked if Howard Morry had any additional information to submit and he indicated that he would contact Mr. Morry.

[21] On April 14, 2006 another request to extend the deadline to respond to the Proposal Letter was made by Bobbi Fielding. A further extension was granted to April 26, 2006. The auditor also asked Bobbi Fielding to have Howard Morry call her on May 1, 2006. On May 1, 2006 and May 4, 2006 the auditor left voicemail messages for Howard Morry to call her. Voicemail messages were exchanged between Bobbi Fielding and the auditor on May 8, 2006. On May 9, 2006 Bobbi Fielding called the auditor to say that Mr. Morry was sick. A time was set for May 11, 2006 for Howard Morry and the auditor to discuss the file. On May 11,

[4] Paragraph 16 of the Affidavit of Sally Yu.

2006 Howard Morry and the auditor discussed the file and he indicated that he would send their response to the Proposal Letter on May 12, 2006.

[22] On May 17, 2006 a letter was received from Howard Morry. This letter, which was dated May 12, 2006 stated as follows:

> We are writing further with respect to the proposed reassessment of Guy Fietz:
>
> 1. With respect to Note 1, if you do not accept the separate dividends, we would ask you to make the corresponding adjustment for Lori Fietz.
>
> 2. With respect to Notes 2 and 3, Mr. Fietz maintains that the consideration taken back from Triton Global Business Services Inc. ("TGBSI") on the sale of his shares of Triton Global Communications Inc. had the value attributed to them in his filings. As further evidence, the 2,775,000 shares of TGBSI taken back have been exchanged for shares of a publicly traded company called NeoMedia Technologies Inc. (none of which shares have been sold), the value of which are $374,000 U.S., which is a fraction (30%) of the $1,248,750 value you are attributing to the shares. He further maintains that he held half the shares for his wife Lori's benefit. If however you do not accept his representations, then we would again ask that you apply the capital gains deduction against Mr. Fietz's capital gain and that you adjust Lori Fietz's return accordingly. Finally we assume that Mr. Fietz's 2,775,000 shares taken back by Mr. Fietz on the transaction will have an adjusted cost base of CDN $1,940,932, notwithstanding the PUC grind. Please confirm.
>
> 3. With respect to Note 4, the interest was not paid and therefore should not be included in Mr. Fietz's income. However if it is included, we would ask that you make a corresponding reduction in TGBSI's income.

[23] The Appellant was subsequently reassessed for 2002 and 2003. The only change from the proposed reassessment as set out in the Proposal Letter was an amount that was allowed for the capital gains deduction. In all other respects the reassessment reflected the proposed reassessment as set out in the Proposal Letter.

[24] The Appellant argued that the waiver was invalid based on the wording of the waiver form. The T2029 form states in part that:

> In order for a Waiver to be valid, the matter(s) being waived must be specified in the space provided …

[25] The Appellant argued that since no matters were specified in the T2029 form that was filed, the waiver is not valid. However it seems to me that the validity or invalidity of the waiver is to be decided based on the provisions of the *Act* and the

caselaw and not based on what is written on the form. The words on a form could not change the *Act* or the caselaw and cannot make an otherwise valid waiver invalid or vice versa.

[26] The Appellant also submitted an argument based on the following comments of Justice Sheridan in *Holmes* v. *The Queen*, 2005 TCC 403, 2005 DTC 985, [2005] 4 C.T.C. 2280:

> 19 … under the scheme of the Income Tax Act, where the authority and duty to prescribe the form of the waiver, to determine whether its subject matter had been properly set out and whether to accept it as "filed" rests exclusively with the Minister…. Had Mr. LeDuc rejected the waiver in its amended form, for example, Mrs. Holmes would have been powerless to require the Minister to receive it.

[27] The argument of the Appellant was as follows:

> Mr. Fietz respectfully submits that Ms. Yu had to determine if the subject matter on the Waiver was properly set out. Mr. Fietz further submits that as the subject matter of the waiver was blank, Ms. Yu had no reasonable alternative but to find the subject matter of the Waive *[sic]* was not <u>properly</u> set out. Ms. Yu's only reasonable course of action was to reject the Waiver as it was invalid.

[28] In *Mitchell* v. *The Queen*, 2002 FCA 407, 2002 D.T.C. 7502, [2003] 1 CTC 194, Justice Sexton, writing on behalf of the Federal Court of Appeal stated that:

> 40 It seems to me that Revenue Canada is obliged to treat any document as a waiver, providing it contains the necessary information. Revenue Canada does not have an option as to whether or not to accept a waiver. A waiver is a privilege which a taxpayer has, and, if sent, Revenue Canada cannot disregard it.

[29] Following the cross examination of the auditor for CRA by counsel for the Appellant (a copy of the transcript of which was submitted during the hearing), counsel for the Respondent asked a few questions which included the following exchange:

> Q Earlier he asked you if you reviewed the waiver and asked you if called Bobby *[sic]* or Howard to advise them that the waiver was incomplete, and you said no. Can you tell us why?
>
> A Well, because the form was completed by a lawyer, so I didn't anticipate that it was invalid. When I receive the waiver, I check the names of the taxpayer, the social insurance number, the taxation year. Those information were correct. Plus it was signed by the taxpayer or his legal representative, and dated.

> Q Thank you. When you received the waiver, what did you think was being waived?
>
> A All the adjustments stated on my proposal letters.

[30] It seems to me that the auditor for the CRA had simply assumed that since the waiver was sent to her by the lawyer for the Appellant that it was being submitted as a valid waiver and that the matters that the Appellant was waiving were the matters as set out in the Proposal Letter. It seems to me that it is important to determine the intentions of the parties in relation to the waiver.

[31] In the *Holmes* case the auditor for the CRA had prepared a waiver form but the accountants for the Appellant made some amendments. The issue was whether the reassessment (which was made after the expiration of the normal reassessment period) was related to the matter that was specified in the waiver. As noted by Justice Sheridan:

> 16 In considering the scope of a waiver, it is appropriate to ascertain the intention of the parties.

[32] There was a footnote reference to *Solberg* v. *The Queen*, [1992] 2 C.T.C. 208 (Fed. T.D.). In *Solberg*, the issue was whether a waiver that referred to Part III of the *Act*, could justify a reassessment that was issued under Part I of the *Act*. Justice Reed stated that:

> 13 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. This is consistent with the approach taken in interpreting taxing statutes themselves, see, for example, *Stubart Investments Ltd.* v. *The Queen*, [1984] 1 S.C.R. 536, [1984] C.T.C. 294, 84 D.T.C. 6305, at pages 315–16 C.T.C. (D.T.C. 6323).

[33] The Federal Court of Appeal approved this approach in *Mitchell*, above. Justice Sexton, writing on behalf of the Federal Court of Appeal stated that:

> 37 Thirdly, in Solberg v. R., [1992] 2 C.T.C. 208, 92 D.T.C. 6448 (Fed. T.D.), the taxpayer signed a waiver of the four-year time limit for reassessment for the taxation year 1979 pursuant to subparagraph 152(4)(a)(ii) of the Income Tax Act, but later

> objected to reassessment because the waiver only covered tax under Part III of the act, while the reassessment concerned Part I. The Federal Court, Trial Division held in Solberg that the reference to Part III in the waiver was inserted by mistake, but was a technical defect only and did 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. 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 court in Solberg should be applied to our fact situation.

[34] Therefore the appropriate approach is to determine if the intention of the parties can be determined from the form and the surrounding circumstances. The position of the Appellant is that nothing should be read into the waiver in relation to the matter for which the normal reassessment period was being waived and therefore the Appellant did not waive the application of the normal reassessment period in relation to any matter. This would mean that the Appellant would be in the same position as if no waiver had been filed which would render the document dated February 2, 2006 meaningless. However, it seems to me that the Appellant must have intended to waive the application of the normal reassessment period in relation to a proposed reassessment with respect to some matter. Since the auditor for the CRA only provided the form number to Bobbi Fielding, the Appellant or someone on his behalf, located the form and inserted his name, address, social insurance number, relevant taxation year (2002) and the date. It appears that the Appellant signed the form (although the signature is not clear the first letter appears to be a "G") and the form was sent to the auditor for the CRA by the lawyer for the Appellant. It does not seem to me that in taking all of these steps the Appellant intended to file a meaningless document with the CRA.

[35] In this case, it seems clear to me that the intention of the Appellant was to file a waiver in relation to the proposed reassessment as set out in the Proposal Letter. There were numerous voice mail messages and communications between the CRA auditor and a representative of the Appellant related to the request by the CRA auditor for additional information in relation to the proposed reassessment. Almost all of the communication related to the repeated requests for additional time to respond to the proposed reassessment that were made by Howard Morry and his assistant Bobbi Fielding, who were representing the Appellant.

[36] No evidence was presented with respect to the intentions of Howard Morry, Bobbi Fielding or the Appellant in relation to the waiver. None of these individuals

testified during the hearing nor were any affidavits of any of these individuals filed at the hearing.

[37] In *Bernardi (c.o.b. Bruno's Pizzeria & Main Street Billiards)* v. *Guardian Royal Exchange Assurance Co.*, [1979] O.J. No. 553, Justice Blair, writing on behalf of the Ontario Supreme Court – Court of Appeal, stated that:

> 28 … Where a party has an evidentiary burden of establishing an issue, his failure, in certain circumstances, to call necessary evidence to support his case justifies a court in drawing the inference that the evidence of the witness who might have been called would have been unfavourable to him. The broad principle on which the rule is based is stated in Wigmore on Evidence, (3rd ed.) Vol. II, p. 162, as follows:
>
> > The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

[38] The above passage from an earlier edition of *Wigmore on Evidence* was cited with approval by Justice Rothstein (as he then was) in *Milliken & Co.* v. *Interface Flooring Systems (Canada) Inc.*, 251 N.R. 358, [2000] F.C.J. No. 129 (FCA).

[39] In the *Law of Evidence in Canada*, third edition, by Justice Lederman, Justice Bryant and Justice Fuerst of the Superior Court of Justice for Ontario, it is stated at p. 377 that:

> **§6.449** In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.*
>
> **§6.450** An adverse inference should be drawn only after a *prima facie* case has been established by the party bearing the burden of proof.*

> (* denotes a footnote reference that is in the original text but which has not been included.)

[40] As noted in *Solberg*, above, the Minister has the onus of proving that the Appellant signed a waiver in relation to the matters that were the subject of the reassessment in issue[5]. In this case, the Crown did establish a *prima facie* case that the intention of the parties was that the subject matter of the waiver was intended to be all of the matters addressed in the Proposal Letter. If the Appellant should then allege that the intention of the Appellant was different, the onus of establishing this different intention would rest with the Appellant. It seems to me that an adverse inference can be drawn in this case. The adverse inference is that the Appellant's intention in signing the waiver was to execute the waiver in relation to all of the matters addressed in the Proposal Letter. Since the Proposal Letter was 3 and one-half pages in length, it seems to me that I can also conclude, as an adverse inference, that the omission in relation to the specific matters was simply inadvertent and occurred because of an uncertainty of how to summarize the three and a half pages and the Appellant still intended to waive the normal reassessment period in relation to the matters as set out in the Proposal Letter.

[41] Counsel for the Appellant argued that even if something could be read into the waiver, it should only be in relation to the matters referred to in the voice mail message that the auditor for the CRA had left for Howard Morry shortly before the waiver was signed and the matters discussed between the CRA auditor and Bobbi Fielding immediately before the waiver was signed. These discussions related to the amount of income that Mrs. Fietz had reported but which the CRA was proposing to include in the Appellant's income. This was only part of the proposed reassessment. However, the Appellant did not call Bobbi Fielding as a witness nor did the Appellant introduce a transcript of any of the voice mail messages that the CRA auditor left for Howard Morry. It does not seem to me that brief telephone conferences or voice mail messages in relation to one particular subject matter should be interpreted to mean that the CRA was no longer pursuing the other matters as set out in the Proposal Letter.

---

[5] In paragraph 7 of *Solberg*, Justice Reed stated that:

> 7 I accept counsel for the plaintiff's argument that the onus of proving that the plaintiff signed a waiver which encompasses tax payable as a result of an increase of capital gain pursuant to Part I of the Act lies with the defendant.

The defendant in that case was The Queen.

[42] As well on May 12, 2006 (which was almost three months after Howard Morry sent the original waiver forms to the CRA), Howard Morry wrote to the CRA "*with respect to the proposed reassessment of Guy Fietz*" and specifically referred to "Note 1", "Notes 2 and 3" and "Note 4". These references to the "Notes" would be references to the Notes as set out in the Proposal Letter. Of theses it appears that Note 4 does not relate to the income that had been reported by Mrs. Fietz and therefore it is clear that Howard Morry understood that all of the matters that had been raised in the Proposal Letter were still being considered for a proposed reassessment of the Appellant.

[43] This argument is also based on an assumption (not established facts) that the Appellant was influenced by the voice mail message and the discussions between the auditor for the CRA and Bobbi Fielding and therefore that the Appellant only intended that the waiver be in relation to the income that had been reported by Mrs. Fietz and which the CRA was proposing to include in his income. As noted above, it is necessary to ascertain the intention of the parties and therefore unless the Appellant intended to limit the waiver to these matters, this argument cannot succeed. As noted above, it seems to me that an adverse inference can be drawn since the Appellant, Howard Morry and Bobbi Fielding did not testify and the adverse inference is that the Appellant's intention in signing the waiver was not to restrict the waiver to the reallocated income but his intention was to execute the waiver in relation to all of the matters addressed in the Proposal Letter.

[44] Paragraph 152(4.01)(*a*) of the *Act* provides that the reassessment must be limited to the matters specified in the waiver *filed* with the Minister in respect of the particular year. As Justice Sheridan had noted in *Holmes*:

> 4….Although the Act prescribes the form of the waiver, it does not prescribe the manner in which, or otherwise define how filing is to be achieved; accordingly, whether a waiver has been "filed" will depend on the evidence presented.

[45] The Proposal Letter in the circumstances of this case should be considered to have been filed with the Minister as this letter was written and sent by the CRA auditor. Therefore it seems to me that the waiver in this case consists of two parts – the waiver form that was filed in February 2006 and the Proposal Letter. Since both of these parts were filed with the Minister, the Minister could reassess pursuant to subparagraph 152(4)(*a*)(ii) of the *Act* in relation to the matters addressed in the Proposal Letter. Since the reassessment that was issued on July 28, 2006 did relate to these matters with the only exception being an additional deduction favourable to the

Appellant (which the Appellant had requested) the reassessment issued on July 28, 2006 can reasonably be regarded as relating to the matter specified in the waiver filed by the Appellant in this matter.

[46] The question that was posed did not link the waiver to the reassessment issued on July 28, 2006. As a result of the provisions of subsection 152(4.01) of the *Act*, it seems to me that it is necessary to compare a specific reassessment to the matters that were waived. Therefore it seems to me that the question as posed cannot be answered without referring to a specific reassessment since it is necessary to determine if a specific reassessment can reasonably be regarded as relating to a matter specified in a waiver. The question as posed (which does not identify a particular reassessment) could be a valid question if the Appellant had waived his right to have any matter specified and therefore the Minister could reassess for any matter related to 2002. This would be analogous to signing a blank cheque. This would raise the issue of whether the provisions of subsection 152(4.01) of the *Act* which limit the right of the Minister to reassess after a taxpayer's normal reassessment period to matters specified in the waiver, are for the benefit of the taxpayer. It seems to me that this limitation on the matters that may be reassessed by the Minister based on a waiver (which would be matters that would be detrimental to a taxpayer[6]) would be for the benefit of the taxpayer as presumably the CRA would prefer an unlimited discretion to reassess a particular year and a taxpayer would prefer that only specific matters could be reassessed. Therefore the questions would be whether the Appellant could waive this limitation and whether he did waive it in this case[7]. Since this issue was not raised and since it is not necessary to address this issue to answer the question that was posed, I will leave this issue for another case.

[47] The Appellant also referred to the decision of the Federal Court of Appeal in *Honeywell Ltd.* v. *The Queen*, 2007 FCA 22, 2007 DTC 5073, [2007] 3 C.T.C. 7. In that case Justice Noël, writing on behalf of the Federal Court of Appeal stated that:

> 32 A waiver when given by a taxpayer and accepted by the Minister gives rise to a bargain of sorts. The taxpayer foregoes the benefit of the normal prescription period for the particular year with respect to the matter specified in the waiver, and the Minister, relying on the waiver, acquires the right to reassess outside the normal assessment period,

---

[6] Subsection 152(4.2) of the *Act* allows a taxpayer to request a reassessment that would be beneficial to the taxpayer. Therefore no waiver would be required if the reassessment would be beneficial to the taxpayer.

[7] In *Johnston et al.* v. *The Queen*, 2009 TCC 327, at paragraphs 22 to 25 I reviewed some of the texts and decisions related to the waiver of statutory obligations.

> but only with respect to the matter specified in the waiver. Just as the taxpayer cannot alter the waiver once given, the Minister cannot issue a reassessment that does not reasonably relate to the matter specified in the waiver. As pointed out by Bowman C.J., this is made clear by the language of subparagraph 152(4.01)(a)(ii) which provides that when relying on a waiver the Minister may reassess, "but only to the extent that, [the reassessment] can reasonably be regarded as relating to, ... a matter specified in a waiver filed by the Minister in respect of the year, ...". Accordingly, where a reassessment has been issued pursuant to a waiver, the reference to a "reassessment" in subsection 152(4) can only mean a reassessment as permitted by the waiver.

[48] Since in my opinion, the waiver in this case consists of two documents – the T2029 form signed by the Appellant and the Proposal Letter - the Minister could reassess in relation to the matters as set out in the Proposal Letter.

[49] As a result I find that the waiver in respect of the normal reassessment period as executed by the Appellant on February 2nd, 2006, a copy of which is Exhibit G to the affidavit of Sally Yu, filed with this Court on May 31, 2011, is effective to permit the Minister of National Revenue to reassess the Appellant (as he was reassessed on July 28, 2006) pursuant to subparagraph 152(4)(*a*)(ii) of the *Income Tax Act* (the "*Act*") in respect of the 2002 taxation year after the normal reassessment period for that year had elapsed.

[50] The Respondent is entitled to costs, which are payable in any event of the cause.

Signed at Ottawa, Canada, this 20th day of October 2011.

"Wyman W. Webb"

Webb, J.

CITATION:	2011TCC493
COURT FILE NO.:	2010-1738(IT)G
STYLE OF CAUSE:	GUY FIETZ AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	September 8, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	October 20, 2011

APPEARANCES:

Counsel for the Appellant:	Mark Wallace
Counsel for the Respondent:	Julien Bédard

COUNSEL OF RECORD:

For the Appellant:

Name:	Mark Wallace
Firm:	Pitblado, LLP Winnipeg, Manitoba

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada