Docket: 2009-2703(IT)G

BETWEEN:

BOLTON STEEL TUBE CO. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on October 16, 2013 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	W. Ross MacDougall Peter H. Baek
Counsel for the Respondent:	Carol Calabrese

AMENDED ORDER

UPON Revised Notice of Motion dated March 18, 2013, the Appellant requested, among other things, an Order varying the May 22, 2007 reassessment of the Appellant's 1996 taxation year by adding only $403,219 to the Appellant's reported income, increasing its taxable income from $1,260,074 to $1,663,393 and referring the reassessment to the Minister of National Revenue for reconsideration on that basis;

AND UPON a Memorandum of Fact and Law of the Appellant dated October 3, 2013, the Appellant further requested, among other things, an Order declaring the August 31, 2012 reassessment of the Appellant's 1996 taxation year to be void;

AND UPON hearing submissions of the parties on October 16, 2013 at Toronto, Ontario, the Appellant's motion was allowed, with costs, by an Order signed and dated March 26, 2014, in accordance with Reasons for Order attached thereto (the "Original Order");

AND UPON further submissions by letters dated April 2, 2014, April 4, 2014 and April 8, 2014, the Appellant requested certain amendments to the Original Order;

AND UPON further submissions by letters dated April 3, 2014 and April 8, 2014, the Respondent interpreted the Original Order as achieving the result sought by the Appellant and, therefore, did not believe those amendments were necessary;

AND UPON consideration of those further submissions, and to provide greater clarity to the Original Order, it is in the interests of justice that the Appellant's request to amend the Original Order be granted, as follows:

UPON Motion by the Appellant for an Order:

1. vacating the **August 31,** 2012 reassessment **of the Appellant's 1996 taxation year**; and

2. varying the May 22, 2007 reassessment of the Appellant's 1996 taxation year in accordance with the Minutes of Settlement dated June 21, 2012 by adding $403,219 to the taxpayer's reported income of $1,260,074, thereby increasing its taxable income to $1,663,393 for that year, and referring the reassessment to the Minister of National Revenue for reconsideration and reassessment on this basis;

AND UPON hearing submissions of the parties;

IT IS ORDERED THAT:

The Appellant's motion is allowed, with costs, in accordance with the attached **Amended** Reasons for Order.

This Amended Order, together with the attached Amended Reasons for Order, is issued in substitution of the Original Order dated March 26, 2014. Save and except consequential amendments to the attached Amended Reasons for Order, the Reasons for the Original Order remain unchanged.

Signed at Ottawa, Canada, this **9th** day of **April** 2014.

"Diane Campbell"

Campbell J.

Citation: 2014 TCC 94
Date: 2014**0409**
Docket: 2009-2703(IT)G

BETWEEN:

BOLTON STEEL TUBE CO. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR ORDER

Campbell J.

[1] This is a motion brought by the Appellant requesting an Order that would require the Minister of National Revenue (the "Minister") to vacate a reassessment **dated August 31, 2012** in respect to the Appellant's 1996 taxation year **(the "2012 Reassessment")** and to vary instead the prior reassessment dated May 22, 2007 (the "2007 Reassessment") which the Appellant contends would be in accordance with a settlement agreement dated June 21, 2012. The Appellant argued that its reported income of $1,260,074 for the 1996 taxation year should be increased by the settlement offer of $403,219 for a total income of $1,663,293.

[2] The Respondent's position is that the **2012 Reassessment** is a valid reassessment, which was issued in accordance with the settlement agreement. As such, the Minister added the settlement offer of $403,219 to $1,863,072, being the total amount of income for which the Minister had reassessed the Appellant's 1996 taxation year pursuant to the 2007 Reassessment.

[3] This motion arises because of different interpretations which each party has applied in respect of the settlement agreement and, consequently, the two very

disparate amounts which each contends is the Appellant's "income" for the 1996 taxation year, to which the amount of $403,219 is to be added.

Background

The 2007 Reassessment

[4] In 2007, the Minister reassessed the Appellant for its 1994, 1995, 1996 and 1997 taxation years for which the Appellant reported net business income in the amounts of $224,534, $413,085, $1,260,074 and $1,599,580 respectively. The Minister determined that the Appellant had failed to report income in each of these taxation years and, for the 1996 taxation year, the Appellant's income was increased by an amount of $602,998, that is, from the reported income for that year of $1,260,074 to $1,863,072. This adjustment to the Appellant's income was based on the Minister's assumption that the Appellant had not reported income from sales to United States customers, which in the 1996 taxation year, totalled $602,998 (Canadian dollars). The Minister based this determination on photocopies of cancelled cheques allegedly deposited to U.S. bank accounts. The cheques were provided to the Minister by Randall Sullivan, a former sales manager of the Appellant. Mr. Sullivan had allegedly obtained these cheques from another former employee of the Appellant, who is now deceased.

[5] The Appellant filed an appeal on August 21, 2009 in respect to this 2007 Reassessment.

[6] In February, 2011, during examinations for discovery, Donald Lee-Poy, the Minister's representative, admitted that cheques totalling $199,779 (Canadian dollars) should not have been included as unreported income for the 1996 taxation year because notations on the back of those cheques indicated that they had been deposited to Canadian, not U.S., bank accounts. The maximum amount, therefore, that the Minister could have added as unreported income for the Appellant's 1996 taxation year was $403,219 (Canadian dollars) and not $602,998.

[7] On May 28, 2013, the Respondent filed a Reply to the Notice of Appeal and, at paragraph A(2)(d), admitted that the amount of $403,219, referred to at paragraph 14 of the Notice of Appeal, was the maximum amount in dispute for the 1996 taxation year in accordance with the 2007 Reassessment.

The Settlement Offer/Acceptance

[8] On June 15, 2012, the Appellant delivered to the Respondent an offer to settle the appeal in respect to the 2007 Reassessment. In this offer, the Appellant proposed, among other things, to settle on the basis that:

> 1. a. vary the reassessment of Bolton's 1996 taxation year in order to add $403,219 to Bolton's income under subsection 9(1) of the *Income Tax Act* (the "Act"). This amount would be subject to the penalty under subsection 163(2) of the Act;
>
> b. vacate the reassessments (including all taxes and penalties) of Bolton's 1994, 1995 and 1997 taxation years;
>
> […]
>
> (Appellant's Motion Record, Tab A)

[9] On June 19, 2012, the Respondent accepted the Appellant's offer, without any intervening negotiations or other communications between the parties.

[10] On June 21, 2012, the parties executed Minutes of Settlement, which are attached to the within reasons as Schedule "A". Essentially, the Minister agreed to vacate the Appellant's 2007 Reassessment with respect to the 1994, 1995 and 1997 taxation years (which the parties agree is in accordance with the terms of the settlement) and to add the amount of $403,219 to the Appellant's "income" for the 1996 taxation year (the parties disagree on whether this calculation reflects the terms of the settlement).

[11] On August 31, 2012, the Minister issued the 2012 Reassessment, which calculated the Appellant's taxable income for the 1996 taxation year to be $2,266,291. The Minister calculated this amount by adding $403,219 to the Minister's 2007 Reassessment amount of $1,863,072, which effectively added $1,006,217 to the Appellant's reported income in 1996 of $1,260,074.

The Position of the Parties

[12] The Appellant brought this motion and submitted that the 2012 Reassessment is void for three reasons:

(a) it is not supportable based on the facts and the law;

(b) it violates the principle that the Minister cannot appeal its own assessment; and

(c) it is made without the Appellant's consent as required pursuant to subsection 169(3) of the *Income Tax Act* (the "*Act*").

If the 2012 Reassessment is void, the Appellant further submitted that the 2007 Reassessment should be varied in accordance with the Minutes of Settlement to add $403,219 to the Appellant's reported income of $1,260,074 for 1996.

[13] The Respondent argued that the 2012 Reassessment has been validly issued in accordance with the facts and the law. Since the Minister calculated the Appellant's 1996 income to be $1,863,072 and not its reported income of $1,260,074, the Minister's interpretation of the settlement offer correctly allows the amount of $403,219 to be added to the total income amount assessed for that year.

[14] In addition, the Respondent contends that the 2012 Reassessment is not an appeal of the Minister's own assessment because it is not a consent to judgment pursuant to subsection 152(5) of the *Act* and was instead settled in accordance with subsection 169(3) which entitled the Minister to issue a reassessment for an amount higher than a prior reassessment. The settlement agreement specifically referenced subsection 169(3) and the Appellant did provide its consent in accordance with this provision.

[15] Finally, the Respondent, as an alternative argument, raised the validity of the settlement agreement as an issue and argued that, if the 2012 Reassessment is found to be void, then there was no "meeting of minds" of the parties respecting the settlement agreement and it would not be valid. Therefore, the 2007 Reassessment is still valid and remains before the Court in its entirety.

The Issues

[16] The issues in this motion are as follows:

(1) Should the 2012 Reassessment be vacated?

(2) If the 2012 Reassessment is vacated, is the settlement agreement enforceable?

(3) If the 2012 Reassessment is vacated and the settlement agreement is enforceable, should the 2007 Reassessment be varied by way of this motion?

Issue #1: Is the 2012 Reassessment void?

[17] My short answer to this first issue is that the 2012 Reassessment should be vacated based on all three arguments advanced by the Appellant.

[18] First, the principle against compromise settlements has been well established in the jurisprudence. Therefore, although an appeal may be settled on consent of the parties, nevertheless there must be a legal basis for the resulting reassessment. In *Galway v M.N.R.*, 74 DTC 6355 (FCA), the leading case for this proposition, the Federal Court of Appeal held that the Minister may not settle an appeal based upon a compromise settlement that is unsupported by the facts and the law. At paragraph 7 of *Galway*, Jackett C.J. stated:

> … the Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it. It follows that he cannot assess for some amount designed to implement a compromise settlement and that, when the Trial Division, or this Court on appeal, refers an assessment back to the Minister for re-assessment, it must be for re-assessment on the facts in accordance with the law and not to implement a compromise settlement.

[19] The decision in *Galway* against compromise settlements has been reaffirmed in subsequent decisions of the Federal Court of Appeal (*Huppe v The Queen*, 2010 TCC 644, 2011 DTC 1042, *Softsim Technologies Inc and Barada Consulting Inc v The Queen*, 2012 TCC 181, 2012 DTC 1187 and *1390758 Ontario Corporation v The Queen*, 2010 TCC 572, 2010 DTC 1385). Most recently, in *CIBC World Markets Inc v The Queen*, 2012 FCA 3, [2012] FCJ No. 30, Stratas J.A. stated the following, at paragraphs 20 to 21:

> 20. … Can the Minister accept an offer of settlement that requires him to issue a reassessment that cannot be supported on the facts and the law? Put another way, does the Minister have the power to issue reassessments on the basis of compromise, regardless of the facts and the law before him?
>
> 21. I answer these questions in the negative.

Consequently, a reassessment will be void if it is divorced from the facts and the law that are relevant to that particular tax dispute.

[20] The Appellant argued that there is no factual or legal basis upon which the Minister could reassess the 1996 taxation year for total income in the amount of $2,266,291, where its reported income for that year was $1,260,074 and where the Minister, in the 2007 Reassessment, added $602,998 in unreported income to the reported income amount for a total of $1,863,072. The Appellant further submitted that the maximum amount in dispute in that year is $403,219, not $602,998 as originally assessed for unreported income by the Minister, because four of the relevant cheques in the total amount of $199,779 were actually accounted for and deposited to Canadian, not U.S., bank accounts. Consequently, according to the Appellant, the offer to settle, which added $403,219 to its reported income in 1996, was a principled amount in accordance with the facts and the law.

[21] The Respondent acknowledged that a tax issue may not be settled unless it can be justified under and in conformity with the *Act*. However, the Respondent contended that its interpretation of the term "income" in the settlement offer to mean the income of $1,863,072, as determined by the Minister in the 2007 Reassessment, entitled it to add the amount of $403,219 to $1,863,072 as further unreported income for that year. According to the Respondent, such a settlement is supported by the relevant facts and law.

[22] At paragraphs 43 and 44 of the Respondent's Written Representations, the Respondent offered the following comments to support its position that the 2012 Reassessment reflects a principled settlement:

> 43. By accepting the Settlement Offer in which Bolton proposed that its income for its 1996 taxation year be increased and the additional income added by the Minister for the other three years under appeal be deleted, the Minister was acknowledging that Bolton was in a position to provide information about the years when the sales to which the cheques related were made. The respondent accepted, for purposes of settlement, that Bolton's income for its 1996 taxation year had been underestimated by the Minister and its income for its 1994, 1995 and 1997 taxation years had been overestimated.
>
> 44. The Minister is permitted to accept representations made by a taxpayer as to facts and is entitled to reassess in accordance with those facts provided the *Act* is properly applied.

[23] In oral argument, the Respondent contended that it was reasonable to interpret the settlement offer in such a way that meant that the Appellant's 1996 income was actually higher than the amount the Minister assessed in the 2007 Reassessment and

that the Appellant offered this additional amount of $403,219 in exchange for the remaining three taxation years being vacated. At page 52 of the transcript, the Respondent stated:

> … Those are representations that the Minister was permitted to accept.
>
> The Minister wasn't required to look behind what it believed to be clear representations in this offer to decide that it shouldn't accept it. …

[24] Of course, this statement would be correct provided that the Appellant's representations are clear and that the Respondent's interpretation of the settlement offer is actually supported in fact and law. However, that is not the reality in this motion. This so-called "exchange" or "deal", which the Respondent sees mirrored in the settlement offer, is simply divorced from the relevant factual and legal considerations. It is an example of that very thing that well-established jurisprudence does not permit: a compromise settlement. There is no factual or legal basis to support the Respondent's contention that the Appellant's income for the 1996 taxation year could be $2,266,291. The Respondent's argument that: "the Appellant offered more, so we accepted it" is without merit and it is precisely that which the Minister is precluded from doing in settling tax disputes.

[25] In contrast, the Appellant's explanation for the basis of its offer to add $403,219 to its reported income in 1996 is supported by the facts and, consequently, it is a principled amount. It represented the value of the total cheques in dispute ($602,998) minus the value of those cheques that had been reported and deposited to Canadian bank accounts ($199,779). Therefore, the maximum amount in dispute for this taxation year was $403,219. This was admitted by the Respondent in the pleadings. Paragraph 14 of the Appellant's Notice of Appeal, dated March 18, 2013, states:

> 14. The maximum amount in issue for 1996 is $403,219. The amount of assumed unreported sales in the Appellant's 1996 taxation year of $602,998 minus the amount of $199,779 excluded as Canadian bank deposits is equal to $403,219.

The Respondent admits this allegation in its Reply to the Notice of Appeal, at paragraph A.2.(d):

> (d) with respect to paragraph 14 of the Notice of Appeal, admits the allegations of fact contained therein but clarifies that the amount of $403,219 referred to was the maximum amount in dispute for the 1996 taxation year in accordance with the reassessment issued on May 22, 2007, which was

> superseded by the reassessment issued on August 31, 2012, in accordance with the Settlement;

[26] Therefore, the $403,219 amount is not some random figure; both parties were in agreement with this figure. The Respondent's interpretation of the settlement offer would mean that this amount was being offered as additional unreported income for the 1996 taxation year over and above the amount of $1,863,072 that the Minister had initially assessed in the 2007 Reassessment. There is nothing to support this interpretation and nothing to support the Respondent's further contention that the Appellant offered this amount in exchange for other years to be vacated. The Respondent is unable to offer any interpretation based on a principled settlement that could support the 2012 Reassessment of income in the amount of $2,266,291. It is an arbitrary amount that simply adds $403,219 to a 2007 Reassessment of $1,863,072 where the Minister had determined that the Appellant had not included in income U.S. cheques totalling $602,998. Of course, the Respondent subsequently admitted that the amount of $602,998 incorrectly included an amount of $199,779, being cheques accounted for in Canadian accounts.

[27] I am left with the unanswered question of how a settlement offer of $403,219, which both parties agreed in the pleadings is the maximum amount in dispute pursuant to the 2007 Reassessment, could in any way be interpreted to be an invitation by the Appellant to add this additional unreported income amount to the original assessed amount of $602,998 that the Minister had added to the reported income in 1996. This would amount to an offer by the Appellant which would equate to a double-counting of the amount of $403,219. From the Appellant's perspective, there is no justification for making such an offer. The Respondent's proposition is unsupported by both the facts and the law and, even if both parties consented to settling in this manner, it could not be permitted.

[28] The Respondent contended that the offer provided no explanation as to the origin of the amount offered or the basis for vacating the other taxation years. I do not believe the offer required an addendum with an explanation. It appears clear where the $403,219 amount originated on its face and, even if this was not as apparent as I have concluded, the Respondent could have requested such information prior to accepting the offer or it could have made a counter-offer. That is part of the art of negotiation. It did neither and should not be heard now to claim that the Appellant had some type of onus to explain the offer to the Respondent.

[29] For these reasons, the 2012 Reassessment is void and should be vacated because it amounts to an arbitrary reassessment that is not supported by the factual

matrix or the law. On this basis alone, the Minister would not be permitted to issue the 2012 Reassessment.

[30] Since both parties presented submissions on the additional two arguments respecting the validity of the 2012 Reassessment, I want to address each of them briefly. The Appellant's second argument was that the 2012 Reassessment was tantamount to the Minister appealing its own reassessment. Neither the Appellant nor the Respondent disputed the well-settled principle that the Minister cannot appeal its own assessment. Pursuant to the 2007 Reassessment, the Minister added $602,998 to the Appellant's 1996 reported income. The 2012 Reassessment added $1,006,217 to the Appellant's reported income ($602,998 + $403,219). Appellant Counsel correctly argued that the Minister had no authority to add more than $602,998 to the 1996 reported income because otherwise the quantum, originally reassessed by the Minister in 2007, has been increased. This amounts to an appeal of the Minister's own reassessment making the 2012 Reassessment void.

[31] In *Skinner Estate et al v The Queen*, 2009 TCC 269, 2009 DTC 1358, at paragraph 30, Sheridan J. made the following observation:

> [30] …the governing factor in determining the Court's jurisdiction is not who is seeking the order or the nature of the remedy sought, but rather, whether the ultimate result would be an increase in the quantum assessed in the assessment under appeal. If that question is answered in the affirmative, the "effect" is, by definition, to permit the Minister to appeal his own assessment and the Court is without authority to make such an order. As shown by both *Pedwell* and *Petro-Canada*, the Court stands in no better position than the Minister where the order granted results in an increase in the taxpayer's assessment. The effect of an order vacating that assessment is still to increase the tax assessed in that year, an outcome beyond the Court's power to impose. …

[32] In oral submissions, Respondent Counsel agreed that "…had this matter gone to court this is not a result that could have been reached in an appeal." (Transcript, p. 54). The Respondent also agreed that this appeal could not have settled in the manner proposed in the 2012 Reassessment if it had been issued in accordance with a consent to judgment (Transcript, p. 55). The Respondent further submitted that Justice Sheridan's remarks in *Skinner* can be distinguished because that case dealt with the Court's authority to enforce consents to judgment where the effect would be an increase in the quantum of a taxpayer's income in a given year. According to the Respondent's argument, the present appeal does not involve a consent to judgment and, instead, has been settled pursuant to subsection 169(3) of the *Act*. This provision specifically excludes the operation of section 152:

> **169(3) Disposition of appeal on consent.** Notwithstanding section 152, for the purpose of disposing of an appeal made under a provision of this Act, the Minister may at any time, with the consent in writing of the taxpayer, reassess tax, interest, penalties or other amounts payable under this act by the taxpayer.
> (Emphasis added)

The Respondent argued that subsection 169(3) permits the parties to enter into settlements that would increase the tax which the Minister could not otherwise validly do pursuant to either a consent to judgment or one which this Court could issue. Since subsection 152(5) is the operative provision that prevents the Minister from increasing an assessment of tax, then according to the Respondent, parties settling an appeal pursuant to subsection 169(3), as in the present appeal, are not bound by 152(5). Therefore, the 2012 Reassessment would not be void simply because it increased the tax owing from the 2007 Reassessment.

[33] Although I am not aware of any jurisprudence that considers the validity of subsequent reassessments issued pursuant to subsection 169(3), where the quantum of tax owing is increased, it appears that the principle, that the Minister may not increase tax from a previous reassessment, is a general limitation placed on the Minister's ability, as well as the Court's, to increase an assessment of tax. For example, in *Abed Estate v The Queen*, 82 DTC 6099, the Federal Court of Appeal, at page 6103, held the following:

> … Moreover, the Court could not, in my view, render a judgment which could, for certain of the years under consideration, result in a higher assessment than the assessment under attack. …

[34] I do not accept the distinction that Respondent Counsel proposed between subsections 152(5) and 169(3) respecting the Minister's ability to increase its own tax assessment. According to the remarks of the Federal Court of Appeal in *Abed*, as well as a host of other jurisprudence acknowledging the general principle, this Court is unable to enforce a reassessment which would result in an increased assessment of tax beyond the amount in the assessment which is in issue. This would be the case regardless of the provision relied upon.

[35] For these reasons, the 2012 Reassessment offends the general well-established principle that the Minister cannot appeal its own assessment. The Court has no authority to enforce such an assessment. As a result, the 2012 Reassessment is void based on this argument.

[36] The Appellant's final argument, in support of its position that the 2012 Reassessment is void, was that it was not made in accordance with subsection 169(3) because this provision requires the written consent of the taxpayer to issue a reassessment. The Appellant stated that, because it did not consent to the increase of $1,006,217 in unreported income pursuant to the 2012 Reassessment, the Reassessment is void.

[37] Subsection 169(3) provides that the Minister may, for the purpose of disposing of an appeal, reassess tax, interest and penalties for an otherwise statute-barred year, with "the consent in writing of the taxpayer." Without this consent, the Minister is precluded from reassessing under this provision. There was no evidence to support the addition of $1,006,217 to the Appellant's reported 1996 income, in either the Minister's T20 Audit Report, which proposed an adjustment of $602,998, or in the Appellant's settlement offer or the Minutes of Settlement. There were no settlement negotiations or discussions but, at the time that the Appellant made the offer and it was accepted by the Respondent, the amount of $403,219 was the maximum amount of unreported income. The facts do not support a conclusion that the Appellant would have consented to any additional amount beyond the $403,219 amount, even if I had concluded that the Minister could have increased its own assessment of tax.

[38] The Appellant contended that the application, of the principles of contractual interpretation to the facts, supports a conclusion that the Appellant did not consent to the issuance of the 2012 Reassessment. The Appellant relied on the rules of contractual interpretation cited and relied upon by the Ontario Court of Appeal in *3869130 Canada Inc. v I.C.B. Distribution Inc.*, 2008 ONCA 396 ("*I.C.B.*"). At paragraph 31, quoting *Ventas, Inc v Sunrise Senior Living Real Estate Investment Trust* (2007), 85 OR (3d) 254, the Court summarized those rules as follows:

> Broadly stated … a commercial contract is to be interpreted,
>
> (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),

> (d) in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

[39] The Court in *I.C.B.* went on to state, at paragraph 22 of its reasons:

> … where the language of a written contract is unambiguous, extrinsic evidence is not admissible to alter, vary, interpret or contradict the words used in the contract … Regardless of any ambiguity, however, as noted above, the courts may always have regard to the context and to the objective evidence of the surrounding circumstances underlying the negotiations. (Emphasis added).

[40] In *Costco Wholesale Canada Ltd. v The Queen*, 2009 TCC 134, Justice C. Miller, at paragraph 28, noted that, in interpreting a commercial contract, a court must address the queries: Why was this done? What were the circumstances? Quoting Lord Wilberforce in *Reardon Smith Line v Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.) at p. 574, Justice Miller noted:

> ... No contracts are made in a vacuum: there is always a setting in which they have to be placed. …

[41] In addition, jurisprudence has established that a party's subjective belief as to the meaning of a contract will be irrelevant and inadmissible (*General Motors of Canada Ltd. v The Queen*, 2008 FCA 142, and *Eli Lilly & Co. v Novopharm Ltd.*, [1998] 2 SCR 129).

[42] The ambiguity in this motion arose from the use of the word "income" used in clause 3 of the settlement without any descriptive facts as to its precise meaning. In such circumstances, jurisprudence and the principles of contractual interpretation direct that I consider the circumstances in which the settlement offer was made, including the facts that were known to both parties at the time the Minutes of Settlement were executed, as well as those facts that were reasonably capable of being known by the parties at such time. The subjective intent must be ignored.

[43] The term "income" to which the amount of $403,219 is to be added can have only two possible meanings in the circumstances of this motion. It means either the Appellant's reported income in 1996 ($1,260,074) or the income as determined by the Minister in the 2007 Reassessment ($1,863,072). The factual matrix surrounding the settlement offer and acceptance is absent any negotiations between the parties prior to or during the process. Where there is ambiguity, this Court is entitled to consider extrinsic evidence pertaining to the surrounding circumstances prevalent at

the time. The Respondent suggests that the language of the settlement is clear and unambiguous and that the Minister's belief that the offer, to add $403,219 to the 2007 Reassessment amount of $1,863,072, was a factual representation upon which the Minister was entitled to rely. However, none of the surrounding circumstances supports this belief and I conclude this was a subjective belief on the part of the Minister which is therefore inadmissible.

[44] I agree with the Appellant's submission that the factual matrix, surrounding the settlement offer and acceptance, supports that the term "income" used in the settlement was meant to mean the Appellant's reported 1996 income. The offer of an amount of $403,219 was no coincidence. It was a principled amount that reflected the Appellant's theory of the dispute and which could be supported by the factual matrix. The original amount that was in dispute in 1996 was $602,998. During the discovery process, based on admissions by the Minister's representative, the Appellant believed it was entitled to reduce the $602,998 amount by $199,779. Consequently, it offered to settle for the addition of $403,219 to the amount it had reported as its income for that year. This was a principled amount supported by extrinsic objective circumstances. There is no realistic argument that would support the Respondent's contention that the Appellant would offer to add $403,219 to income as determined by the Minister in the 2007 Reassessment. After all, the Appellant had appealed this reassessment. Why would the Appellant agree to not only accept the Minister's 2007 Reassessment, which already included the $403,219 amount supported by the cheques and the $199,779 amount that could not be supported, and then also agree to add an additional amount of $403,219? This simply does not accord with common sense or good business practice. Even if I could find some support for this conclusion, which I have not, I would in effect be sanctioning the very thing which this Court is unable to do: a compromise settlement.

[45] The Respondent also argued that the Appellant offered something different from that which it actually intended to offer. According to the Respondent, the Appellant intended to offer a reduction of $199,779 from the 2007 Reassessment amount but what was offered instead was to "add to its income", income that had been determined by the Minister. The Respondent argued that it was entitled to interpret that as a representation that there was further undeclared income in 1996 and that they had over-estimated the amounts in other years. However, as Appellant Counsel correctly submitted, the subjective intent and belief of a party to a contract, or what the other party surmises it to be, are both irrelevant and inadmissible. In addition, I have no extrinsic evidence that would support such a theory.

[46] For these reasons, I conclude that, based on the Appellant's third argument, the 2012 Reassessment is void because the Appellant never consented, either expressly or implicitly, as required by subsection 169(3), to the Minister adding $1,006,217 to the 1996 reported income.

Issue #2: Is the settlement agreement enforceable?

[47] The Respondent's alternative argument was that, if the settlement agreement is ambiguous, there is no "meeting of minds" between the parties as required for a valid contract. Therefore, the settlement is void, with the result that the 2007 Reassessment remains validly before this Court and all of the four taxation years remain in dispute. I must reject the Respondent's alternative argument as well and, consequently, I conclude that the settlement agreement is an enforceable one. In this regard, I believe that my conclusion finds support in comments made in *The Law of Contracts*, S.M. Waddams, 6th ed. (Canada Law Book, 2010) at page 65:

> It sometimes happens that words intended in one sense are reasonably understood in another. Generally if the promissee's understanding was reasonable, it will be held that the promisor ought to have known of it, and the promissee's understanding will prevail. There are cases, however, where even a reasonable expectation may be defeated. An obvious example is the case where the promisor's message is altered in transmission by one for whose conduct the promisor is not responsible. Another case is that of ambiguity. If one promisor knew or ought to have known of an ambiguity he may be held to the promisee's understanding. Conversely, if the promisee has reason to know of the ambiguity he cannot simply "accept" the more favourable version knowing that the promisor may well intend the less favourable. The difficulty arises where neither party has reason to know the other's meaning, …

A contract will be found to validly exist where the party accepting the offer could reasonably be expected to know the other party's meaning even where it is not specifically communicated. As stated at page 66 of *The Law of Contracts*:

> … If either party had reason to know of the other's meaning, that meaning should prevail. Only if neither had reason to know the other's meaning will there be no contract. … (Emphasis added)

In the present circumstances, I have concluded that the extrinsic factual matrix supports the Appellant's interpretation of the settlement agreement while in no way supporting the Respondent's interpretation. Consequently, the Appellant's understanding and interpretation, which is reasonably supported by the factual matrix and law, ought to have been known to and considered by the Respondent when

accepting the Appellant's settlement offer. Where this is evident, then that party's understanding, the Appellant's in this motion, will prevail.

Issue #3: Should the 2007 Reassessment be varied in the context of a motion?

[48] Given my conclusion that the 2012 Reassessment is void and that the settlement agreement is validly enforceable, I also conclude that this Court does have the jurisdiction to vary the 2007 Reassessment pursuant to the motion before me. The Federal Court of Appeal decision in *Lornport Investments Ltd. v The Queen*, [1992] FCJ No. 201, is authority in support of the proposition that, where I have concluded that the 2012 Reassessment is void and must be set aside, then the 2007 Reassessment remains a valid appeal before this Court. At paragraph 8 of that decision, Justice Stone concluded that an invalidly issued subsequent reassessment did not supersede or nullify the preceding reassessment. Where no discontinuance has been filed respecting the appeal of the 2007 Reassessment and where I have concluded the 2012 Reassessment is void, the validity of the 2007 Reassessment remains before this Court for consideration on this motion.

[49] Jurisprudence supports that this Court has the authority to dispose of a reassessment issued pursuant to a settlement under subsection 169(3) and pursuant to a motion. In *Softsim*, at paragraph 9, Justice D'Auray, in addressing the Court's authority to enforce subsection 169(3) settlement agreements on a motion, made the following comments:

> [9] The parties submitted that this Court has the jurisdiction to hear the present motion. I agree. What the respondent is seeking is an order allowing the appeals and referring the reassessments to the Minister for reconsideration and reassessment in accordance with the settlement agreements under subsection 169(3) and pursuant to paragraph 171(1)(*b*) of the Act. This remedy falls within the exclusive jurisdiction of this Court.

Justice D'Auray relied on the conclusions reached in both *Huppe* and *1390758 Ontario*. In each case, the Court concluded that it had jurisdiction to enforce a settlement reached pursuant to subsection 169(3) by allowing the appeal or varying the assessment and referring it back to the Minister for reconsideration and reassessment. Following the case of *Huppe*, this can be done in the context of a motion.

[50] The Respondent argued that the relevance of the admissions of the Minister's representative on discovery should be determined by a trial Judge and not by a motions Judge. However, the Minister, at paragraph A.2.(d) of the Reply to the

Notice of Appeal admitted that $403,219 was the maximum amount in dispute for the 1996 taxation year. That amount is the most that can be added to the Appellant's 1996 income. Since I have concluded that the settlement agreement is enforceable and must be interpreted to have meant that $403,219 is to be added to the Appellant's 1996 reported income, it is within this Court's jurisdiction pursuant to the motion to enforce the settlement between the parties in this manner by varying the 2007 Reassessment, as I have done.

[51] In conclusion, since I have determined that the 2012 Reassessment is void and should be set aside and that the settlement agreement is validly enforceable, the 2007 Reassessment survives and, according to the Minister's own admission, the amount of $403,219 will be added to the Appellant's reported income of $1,260,074 for the 1996 taxation year in accordance with the Minutes of Settlement dated June 21, 2012.

[52] The Appellant's motion is therefore allowed, with costs, in accordance with my reasons.

Signed at Ottawa, Canada, this **9th** day of **April** 2014.

"Diane Campbell"

Campbell J.

SCHEDULE "A"

OUT OF COURT SETTLEMENT
pursuant to subsection 169(3)
of the *Income Tax Act*

BETWEEN:

WINSTON PENNY

and

BOLTON STEEL TUBE CO. LIMITED

and

MINISTER OF NATIONAL REVENUE

MINUTES OF SETTLEMENT

WHEREAS Winston Penny has appealed to the Tax Court of Canada in file bearing n° 2009-2700(IT)G, regarding his 1994 and 1996 taxation years.

WHEREAS Bolton Steel Tube Co. Limited has appealed to the Tax Court of Canada in file bearing n° 2009-2703(IT)G, regarding its 1994, 1995, 1996 and 1997 taxation years

WHEREAS the parties, without making any admissions as to their respective submissions, wish to settle this appeal.

THE PARTIES HEREBY AGREE AS FOLLOWS:

1. The Minister of National Revenue will vacate the reassessments issued against Winston Penny for his 1994 and 1996 taxation years.

2. The Minister of National Revenue will vacate the reassessments issued against Bolton Steel Tube Co. Limited for its 1994, 1995 and 1997 taxation years.

3. The Minister of National Revenue will issue a reassessment against Bolton Steel Tube Co. Limited for its 1996 taxation year in order to add an amount of $403,219 to its income for that taxation year. The additional tax payable will be subject to the penalty under subsection 163(2) of the *Income Tax Act* (Canada).

4. Upon signing this agreement Winston Penny and Bolton Steel Tube Co. Limited shall provide to the Minister of National Revenue's counsel duly signed Notices of Discontinuance.

5. The Notices of Discontinuance herein mentioned will be held in trust by the Minister of National Revenue's counsel who undertakes not to file them with the Tax Court of Canada before 30 days after the reassessments, implementing paragraphs 1, 2 and 3 of these minutes, have been issued by the Minister of National Revenue.

6. Winston Penny and Bolton Steel Tube Co. Limited waive their right of objection or appeal from the reassessments, implementing paragraphs 1, 2 and 3 of these minutes, in accordance with subsections 165(1.2) and 169(2.2) of the *Income Tax Act* (Canada).

7. Each party assumes its own costs.

TORONTO, JUNE 21, 2012

Per: _____
Peter H. Baek
Counsel for Winston Penny

TORONTO, JUNE 21, 2012

Per: _____

Peter. H. Baek
Counsel for Bolton Steel Tube Co. Limited

MONTREAL, June 21, 2012

MYLES J. KIRVAN
Deputy Attorney General of Canada
Solicitor for the Minister of National Revenue

Per: _____

Benoit Mandeville
Counsel

CITATION:	2014 TCC 94
COURT FILE NO.:	2009-2703(IT)G
STYLE OF CAUSE:	BOLTON STEEL TUBE CO. LTD. and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 16, 2013
REASONS FOR **ORDER** BY:	The Honourable Justice D. Campbell
DATE OF **ORDER**:	March 26, 2014
DATE OF AMENDED ORDER:	**April 9, 2014**

APPEARANCES:

Counsel for the Appellant:	W. Ross MacDougall Peter H. Baek
Counsel for the Respondent:	Carol Calabrese

COUNSEL OF RECORD:

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