Federal Court  Cour fédérale

Date: 20190327

Docket: T-2489-14

Citation: 2019 FC 377

Ottawa, Ontario, March 27, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

KERRY (CANADA) INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Kerry (Canada) Inc. (Kerry Canada), seeks judicial review of a decision (Decision) of the Minister of National Revenue denying Kerry Canada's request that she reassess its 2002 and 2003 taxation years. Kerry Canada requested the reassessments in order to give effect to a favourable decision of the Canadian Competent Authority (CCA) issued in September 2013. The application for judicial review is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1983, c F-7 (*Federal Courts Act*).

[2] For the reasons that follow, the application will be allowed.

I. Background

[3] This application centres on the assessment and reassessment by the Canada Revenue Agency (CRA) of certain transactions among three related companies in 2001, 2002 and 2003. The companies are:

- Kerry Canada, a Canadian resident corporation for purposes of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (*ITA*);
- Kerry Inc. (Kerry US), a corporation resident in the United States and non-resident in Canada for purposes of the *ITA*;
- Kerry Group Services International Limited (KGSI), a corporation resident in Ireland and also non-resident in Canada for purposes of the *ITA*.

[4] The Kerry group of companies provides technology-based ingredients and solutions for the food, beverage and pharmaceutical markets.

[5] During the years in question, Kerry Canada manufactured and sold to Kerry US a product referred to as "Daritone C5994". Also during those years, Kerry Canada paid a royalty to KGSI for the use of the Kerry trade name and other intangible assets.

[6] On February 6, 2007, the CRA issued Notices of Reassessment (Part I Reassessments) to Kerry Canada for the taxation years ended December 31, 2001, 2002 and 2003. The Part I Reassessments related to transfer pricing in respect of the following transactions:

(i) The transfer price charged by Kerry Canada to Kerry US for the sale of Daritone C5994. The result of the reassessment was to increase the income attributed to

> Kerry Canada as a result of such sales in respect of each of the subject taxation years; and
>
> (ii) The royalties paid by Kerry Canada to KGSI for the use of the Kerry name. The result of the reassessment was to disallow Kerry Canada's deductions from income for the royalties paid in each of the subject taxation years.

[7] In October 2006, in advance of the Part I Reassessments, Kerry Canada had filed with the CRA a waiver of the normal reassessment period for the 2001 taxation year pursuant to subsection 152(4) of the *ITA*. The CRA's subsequent reassessment of Kerry Canada's 2001 taxation year is not at issue in this application.

[8] On May 3, 2007, Kerry Canada filed Notices of Objection (Part I Objections) in respect of the Part I Reassessments, arguing that the CRA had erred in adjusting the transfer price for sales of Daritone C5994 to Kerry US and in disallowing the deduction from income of the royalty payments made to KGSI. Kerry Canada requested that the Part I Objections be held in abeyance pending a resolution or decision by the CCA of these issues:

> Kerry Canada is planning on requesting Competent Authority assistance to resolve the two issues that are the subject of these Notices of Objection and therefore requests that the Notices of Objection be held in abeyance pending resolution of the issues through the Competent Authority Process.

[9] The amounts at issue were set out in the Part I Objections as follows:

Taxation Year	**Increase Income on Sales of Daritone C5994**	**Disallow Royalties Paid to KGSI**	**Total Increase to Kerry Canada's Taxable Income**
2003	$536,882	$1,688,520	$2,225,402
2002	$226,672	$1,468,977	$1,695,649
2001	$2,676,366	$1,303,177	$3,979,543

[10] On September 26, 2007, Kerry Canada filed two requests for assistance with the CCA, a division of the CRA: the first in respect of the adjustment to the transfer price for sales of Daritone C5994 (First CA Request); and, the second in respect of the disallowance of the deduction from Kerry Canada's income of the royalty payments to KGSI (Second CA Request). In each of its requests to the CCA, Kerry Canada listed the statute-barred years as 2001, 2002, and 2003. In addition, the requests referred to the Part I Objections and informed the CCA of Kerry Canada's request that the objections be held in abeyance pending resolution of the two issues through the Competent Authority process. Copies of the Part I Objections were filed with the First and Second CA Requests.

[11] On September 28, 2010, the CCA issued its response (First CA Decision) to Kerry Canada's First CA Request. The CCA stated that it had conferred with the U.S. Competent Authority and had agreed to reverse in its entirety the CRA income adjustment with respect to sales of Daritone C5994 from Kerry Canada to Kerry US for the 2001, 2002 and 2003 taxation years.

[12] In June 2012, Kerry Canada received a letter from Mr. Ronald Young, Acting Chief of Appeals, CRA, stating that the Part I Objections were allowed in part. The letter noted that the basis of Kerry Canada's objections was twofold: the Daritone C5994 transfer pricing issue and the deduction of royalty payments to KGSI. The proposed adjustments to Kerry Canada's income as a result of the First CA Decision were set out as follows:

> Further to our advice from the Competent Authority, the Taxpayer's income for 2001 will be reduced by $2,676,366, income for 2002 will be reduced by $226,672, and income for 2003 will be reduced by $536,381.

[13] The letter indicated that Notices of Reassessment for each of the taxation years would follow under separate cover. The letter stated that, if Kerry Canada disagreed with the decision, it could, within 90 days of the date of the Notices of Reassessment, appeal to the Tax Court of Canada (section 169 of the *ITA*) or file Notices of Objection (section 165 of the *ITA*).

[14] On June 11, 2012, the CRA issued Notices of Reassessment (Second Reassessments) for the three taxation years reflecting the First CA Decision and decreasing the Part I and Part I.3 taxes payable by Kerry Canada. The Notice of Reassessment in respect of the 2003 taxation year contained a summary of adjustments made to the 2001, 2002 and 2003 years and stated that the "total balance does not include amounts for which you have filed Notice(s) of Objection".

[15] On December 12, 2012, the CRA sent an email to Kerry Canada regarding a collections issue that had arisen as a result of the issuance of the Second Reassessments (Stall Issue). The email stated that, in order to reinstate the stall (or stay) and stop collections action, Kerry Canada had to file new Notices of Objection.

[16] On September 5, 2013, the CCA issued its response (Second CA Decision) to the Second CA Request regarding the royalties paid by Kerry Canada to KGSI. The CCA stated that it had "decided to reverse the entirety of the adjustments made by the Canada Revenue Agency with respect to royalties paid by Kerry (Canada) Inc. to a related company, Kerry Group Services International for taxation years 2001, 2002 and 2003".

[17] In November 2013, Kerry Canada was informed that the CRA Appeals Division was unable to process the Second CA Decision and refund the balance owing for the 2001-2003 taxation years because they were statute-barred under the *ITA* as the Second Reassessments closed the Part I Objections filed in 2007.

[18] By way of letter dated December 31, 2013, Kerry Canada requested that the CRA implement the Second CA Decision to eliminate double taxation and respect the provisions of the Canada-Ireland tax treaty:

> Kerry Canada respectfully requests the Minister consider its case in the context of the principles of fairness and the guidance provided by the CRA in IC07-1 [Information Circular IC07-1 – *Taxpayer Relief Provisions*], and allow the Competent Authority settlement to be processed, as is within its power under subsection 115.1(1) and 220(3.1) and of the ITA.

[19] Kerry Canada sent a second letter to the CRA on May 26, 2014. The letter refers to the "inadvertent dispatch" of the Part I Objections and requests that the CRA treat the September 26, 2007 letter to the CCA as a waiver pursuant to paragraph 152(4)(c) of the *ITA*.

[20] On October 27, 2014, the CRA denied Kerry Canada's requests that the Minister issue Notices of Reassessment for its 2002 and 2003 taxation years. The October 27, 2014 letter is the Decision under review in this application.

II. Summary of Timeline

[21] A summary of the lengthy timeline of events in this matter is as follows:

October 2, 2006:	Kerry Canada filed a waiver for the 2001 taxation year allowing the year to remain open for reassessment.
February 6, 2007:	CRA issued Notices of Reassessment for the 2001, 2002 and 2003 taxation years (Part I Reassessments).
May 3, 2007:	Kerry Canada filed the Part I Objections and requested that the objections be held in abeyance until resolution of the issues before the CCA.
September 26, 2007:	Kerry Canada submitted to the CCA the First CA Request (Daritone C5994 transfer pricing adjustments) and Second CA Request (denial of royalty payment deductions).
September 28, 2010:	CCA issued the First CA Decision reversing the CRA's Daritone C5994 transfer pricing adjustments.
June 2012:	Kerry Canada received a letter from the CRA Appeals Division stating that the Part I Objections had been allowed in part.
June 11, 2012:	Kerry Canada received the Second Reassessments reflecting the First CA Decision.
September 5, 2013:	CCA issued the Second CA Decision reversing the CRA's denial of royalty payment deductions.
November 2013:	Kerry Canada was informed that the 2001, 2002 and 2003 taxation years could not be reassessed as statute-barred.
December 31, 2013 & May 26, 2014:	Kerry Canada requested that the CRA recognize its waiver for the 2002 and 2003 years and reassess the years to reflect the Second CA Decision.
October 27, 2014:	Decision under review.

III. Decision under Review

[22] In the Decision, Mr. Peter Nicotera, International Tax Auditor, CRA, acknowledged that Kerry Canada had filed a valid waiver in respect of its 2001 taxation year and agreed to process the Second CA Decision as requested for that year.

[23] With respect to the 2002 and 2003 taxation years, Mr. Nicotera first addressed Kerry Canada's argument regarding section 115.1 of the *ITA*. He stated that, if the Minister has no legal authority under the *ITA* to process a Competent Authority decision, section 115.1 could not

otherwise grant that authority. The CRA was unable to reassess the 2002 and 2003 taxation years in the absence of a valid waiver as they were statute-barred.

[24] Mr. Nicotera then addressed the issue of whether Kerry Canada had provided an implied waiver of the limitation period for reassessment:

> Our review of the facts and circumstances of the case has resulted in our conclusion that CRA has no legal basis on which to reassess the 2002 and 2003 years beyond their respective statute-barred dates as per section 152(4)(c) of the *Income Tax Act*.

IV. Issues

[25] Kerry Canada submits that the Decision was unreasonable and that its right to procedural fairness was breached by the Minister's refusal to reassess its 2002 and 2003 taxation years. In my view, Kerry Canada's arguments regarding procedural fairness and legitimate expectations are substantive in nature and are best characterized as arguments questioning the reasonableness of the Decision and not the process followed in arriving at the Decision.

[26] Kerry Canada's arguments in support of this application rest primarily on the assertion that it provided a waiver to the Minister in respect of the limitation periods for reassessment of the 2002 and 2003 taxation years. In the alternative, Kerry Canada argues that the Minister could and should have applied the Part I Objections to the Second Reassessments. The Respondent submits that this Court does not have jurisdiction to consider the alternative argument as it is, in substance, an argument that Kerry Canada has valid, outstanding objections to the Second Reassessments. The Respondent argues that the Tax Court of Canada has exclusive jurisdiction to hear appeals relating to objections to the assessment and reassessment of a taxpayer's income.

[27] The issues arising in this application are:

1. Does this Court have jurisdiction to consider Kerry Canada's application?
2. Was the Decision reasonable?

V. Jurisdiction of the Federal Court

[28] As stated above, Kerry Canada argues that the Decision was unreasonable for two reasons. The parties agree that the primary issue of whether the Minister unreasonably concluded that Kerry Canada did not provide waivers of the statutory reassessments periods for its 2002 and 2003 taxation years falls within the competence of this Court.

[29] I agree with the parties. In considering an application for judicial review of matters arising in relation to the *ITA*, I must be satisfied that judicial review is available pursuant to sections 18 and 18.1 of the *Federal Courts Act* and that this Court's jurisdiction is not excluded by virtue of section 18.5. In addition, the application must state "a ground of review that is known to administrative law or that could be recognized in administrative law" (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 70 (*JP Morgan*)).

[30] Sections 18 and 18.1 of the *Federal Courts Act* focus on the Federal Court's jurisdiction and the timelines and available remedies in an application for judicial review. In this case, Kerry Canada's request that the Decision be set aside and the matter referred back to the Minister for redetermination is a remedy within the jurisdiction of the Court. Further, its primary argument regarding waiver rests on the substantive unacceptability of the Decision, a recognized ground of

review in administrative law (*JP Morgan* at para 70). Kerry Canada argues that the Minister misapprehended the facts and disregarded evidence before her in concluding that Kerry Canada had not provided waivers to the CRA for the 2002 and 2003 taxation years (see *Mitchell v Canada (Attorney General)*, 2002 FCA 407 (*Mitchell*)). In my opinion, this argument raises a recognized administrative law claim and this Court has jurisdiction to hear and decide the application (*Anthony v Canada (National Revenue)*, 2016 FC 955 at paras 11-13 (*Anthony*)), subject to certain constraints which I next address.

[31] Kerry Canada's alternative argument in support of this application is that the Minister had discretion to treat the Part I Objections as continuing in effect and applicable to the Second Reassessments, despite the fact that the Part I Objections were superseded by the Second Reassessments by normal operation of the *ITA*. This alternative argument and the remedies requested by Kerry Canada based on the argument are problematic in terms of the jurisdiction of this Court.

[32] Section 18.5 of the *Federal Courts Act* provides that judicial review is not available to the extent that a matter may be appealed by statute:

Exception to sections 18 and 18.1	**Dérogation aux art. 18 et 18.1**
18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in	18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour

Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[33] It is well established that appeals relating to the assessment of income tax and the correctness of income tax assessments are reserved exclusively to the Tax Court of Canada pursuant to the *Tax Court of Canada Act*, RSC 1985, c T-2, and the *ITA*. The Federal Court has no jurisdiction to hear and decide such matters (*JP Morgan* at para 27). I am mindful of the Supreme Court of Canada's statement in *Canada v Addison & Leyen Ltd.*, 2007 SCC 33 at paragraph 11, that a reviewing court should be cautious in undertaking judicial review in circumstances that touch on the system of tax assessment and appeals established by Parliament:

> [11] Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and the structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[34] I agree with the Respondent that this Court has no jurisdiction to consider Kerry Canada's alternative argument. I have reviewed the alternative argument with a view to understanding its essential character (*Canada (National Revenue) v Sifto Canada Corp*, 2014 FCA 140 at para 25). Substantively, Kerry Canada is asserting that the Part I Objections are valid, subsisting objections to the Second Reassessments for purposes of the *ITA*. As the Respondent states in her Memorandum, the argument "assumes that the existing reassessments are incorrect and that [Kerry Canada] has a valid objection, matters which are at the heart of the Tax Court's jurisdiction."

[35] At the hearing before me, counsel for Kerry Canada conceded that the issue of whether the Part I Objections are valid objections to the Second Reassessments is within the jurisdiction of the Tax Court of Canada. She stated that Kerry Canada's argument in this regard was not its central argument and that judicial review of the Decision by the Court remained the appropriate recourse.

[36] The question of whether Kerry Canada provided a waiver to the CRA pursuant to subparagraph 152(4)(a)(ii) or paragraph 152(4)(c) of the *ITA* in respect of the reassessment of its 2002 and 2003 taxation years is the determinative issue in this application. As the continued validity of the Part I Objections is a question beyond the jurisdiction of this Court, I will limit my analysis to the issue of waiver in assessing whether the Decision was reasonable. Further, I will not consider the declaratory relief requested by Kerry Canada in paragraph 66(iii) of its Memorandum as such relief is dependent on the resolution of the alternative argument.

VI. Standard of Review of the Decision

[37] The parties submit that the Decision must be reviewed against the standard of reasonableness, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 (*Dunsmuir*). I agree, as the Decision involves the exercise of discretion by a delegate of the Minister and addresses questions of mixed law and fact (*Anthony* at para 19; *Dunsmuir* at para 53). The Court will only interfere if the Decision lacks justification, transparency or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the facts of this case and in law (*Dunsmuir* at para 47).

VII. Was the Decision Reasonable?

1. The Parties' submissions

[38] Kerry Canada submits that the Minister has the authority to reassess its 2002 and 2003 taxation years because valid waivers were in place for those years. Kerry Canada acknowledges that the Minister is generally precluded from issuing reassessments outside of the statutory limitation periods, commonly referred to as the normal and extended reassessment periods, but submits that there is an exception where a taxpayer has provided the Minister with a waiver of the limitation period pursuant to subparagraph 152(4)(a)(ii) and/or paragraph 152(4)(c) of the *ITA*. While the provisions stipulate that a waiver should be in prescribed form, it is accepted that a waiver may be provided in another form as long as it contains all of the necessary information and is intended to act as a waiver (*Mitchell* at paras 30-31, 34). The proper approach is to ascertain the intention of the party as expressed in the document in question, together with all of the surrounding circumstances.

[39] Kerry Canada argues that the statements regarding abeyance contained in the Part I Objections and the Second CA Request established valid waivers, whether express or implied. The documents reflect a clear indication on its part that the 2002 and 2003 years be reassessed in accordance with both the First and Second CA Decisions. Kerry Canada also argues that there is no basis to interpret the requests for abeyance as limited to the normal reassessment period. Kerry Canada submits that there is no prejudice to the CRA in acting on the waivers, that the CRA had notice of all the relevant information, and that the CRA understood Kerry Canada's continued intention to pursue resolution of the royalty adjustment by virtue of its Second CA Request.

[40] Finally, Kerry Canada submits that the Minister failed to provide adequate reasons in the Decision. In its view, the Decision sets out no basis or explanation for the conclusion that Kerry Canada did not provide waivers for the 2002 and 2003 taxation years. Kerry Canada infers from documents in the record that the Decision was based first on the fact that it made no explicit statement regarding waiver of the normal or extended reassessment period and, second, on the premise that the Second Reassessments discharged the Part I Objections. However, Kerry Canada argues that the issuance of the Second Reassessments in no way changed its pre-existing intention to keep the taxation years open in anticipation of the Second CA Decision.

[41] The Respondent submits that Kerry Canada did not waive the statutory reassessment periods for the 2002 and 2003 taxation years. Citing *Mitchell*, the Respondent acknowledges that while a waiver need not be filed in prescribed form, it must contain all of the information required in the prescribed waiver form. It must also be clear from the evidence that the parties

intended that the taxpayer would forego the benefit of the normal or extended reassessment period for the particular year(s). The Respondent argues that there cannot be an implicit waiver as the Federal Court of Appeal rejected the concept of categories of waiver in *Mitchell* (at para 24). In the Respondent's opinion, it was not sufficient that Kerry Canada asked that the Part I Objections be held in abeyance pending resolution of the issues before the CCA.

[42] With respect to the content of the Decision, the Respondent submits that this Court must consider not only the Decision but also the deliberations of the Minister and her delegate contained in the record, specifically the documents produced by the CRA pursuant to Rules 317 and 318 of the *Federal Courts Rules*, SOR/98-106 (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (*Newfoundland Nurses*); *Hi-Tech Seal Inc. v Canada (Attorney General)*, 2009 FC 901 (*Hi-Tech Seals*); *Sherry v Canada (National Revenue)*, 2011 FC 1208 (*Sherry*)). The Respondent argues that the record demonstrates the Minister gave thorough consideration to Kerry Canada's arguments regarding waiver.

2. Statutory provisions and jurisprudence

[43] By way of brief background, the Minister is generally required to reassess a taxpayer's taxation year within the normal and extended reassessment periods set out in subsections 152(3.1) and (4) of the *ITA*, subject to the receipt of a waiver from the taxpayer waiving the reassessment period in accordance with subparagraph 152(4)(a)(ii) or paragraph 152(4)(c):

Assessment and reassessment	**Cotisation et nouvelle cotisation**

152(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	152(4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :
(a) the taxpayer or person filing the return	a) le contribuable ou la personne produisant la déclaration :
[…]	[…]
(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;	(ii) soit a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période normale de nouvelle cotisation applicable au contribuable pour l'année;
[…]	[…]
(c) the taxpayer or person filing the return of income has filed with the Minister a waiver in prescribed form within the additional three-year period referred to in paragraph (b) or (b.1);	c) le contribuable ou la personne produisant la déclaration de revenu a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période additionnelle de trois ans mentionnée aux alinéas b) ou b.1);

[44] Although subparagraph 152(4)(a)(ii) and paragraph 152(4)(c) of the *ITA* refer to a waiver in prescribed form, the Federal Court of Appeal in *Mitchell* (at para 40) stated that the CRA is required to treat any document as a waiver as long as it contains the necessary information. In *Mitchell*, a group of taxpayers received Notices of Assessment from Revenue Canada, as it then was, in which penalty interest from the expropriation of land was taxed as income. The taxpayers objected to the assessment and, following a meeting with Revenue Canada, it was agreed that a test case would proceed to the Tax Court of Canada and that the other taxpayers would be reassessed in accordance with the outcome of the test case. Mr. Nichols, the taxpayers' representative, wrote to Revenue Canada regarding the agreement to reassess in accordance with the results of the test case, stating (*Mitchell* at para 15):

> On behalf of each taxpayer we confirm that they will not object to such subsequent reassessment, regardless of whether it is before or after the statute-bar period so as to allow the "penalty interest" amount to be reassessed as non-taxable. If this does not suffice, perhaps you can let me know your thoughts on whether or not waivers should be provided.

[45] Revenue Canada did not respond to the letter. Subsequently, the taxpayer in the test case was successful. When asked to honour the agreement to reassess the other taxpayers accordingly, Revenue Canada refused. The trial judge found that Revenue Canada had agreed to reassess the taxpayers based on the results of the test case but no agreement had been reached as to whether waivers would be required. The trial judge opined that waivers could be in three forms: the prescribed form, an implied waiver, and a constructive waiver. The trial judge concluded that Revenue Canada was not required to treat Mr. Nichols' letters as waivers notwithstanding they contained virtually all of the required information.

[46] On appeal, Justice Sexton reversed the trial judge's finding. He stated that the trial judge erred in focussing on different types of waiver. The sole issue to be determined was whether the taxpayers had provided an effective waiver. Justice Sexton found that the letters did constitute valid waivers as it was clear that "[Mr. Nichols'] intention was to waive the limitation period so that there could be reassessment 'regardless of whether it is before or after the statute bar'" (*Mitchell* at para 33). Justice Sexton concluded (*Mitchell* at para 40):

> [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.

[47] Justice Sexton noted that the respondent was unable to demonstrate any prejudice caused by the actions of the taxpayers and that Revenue Canada had been on notice of all relevant and necessary facts from the outset. He stated that the parties were aware it was quite possible, if not probable, that the matter to be litigated would take considerable time. In other words, the parties were aware that the normal reassessment period may be an issue (*Mitchell* at para 46):

> [46] It seems to me very arguable that it was implicit in this agreement that there was a waiver. It is difficult to think that Revenue Canada's agreement was that it would only reassess provided the test case was finally concluded within the time bar period. The only reasonable conclusion is that agreement in itself made the provision of a formal waiver unnecessary.

[48] Kerry Canada cites the cases of *Fagan v Canada*, 2011 TCC 523 (*Fagan*), and *Noran West Developments Ltd. v Canada*, 2012 TCC 434 (*Noran*). The issue in these cases was not whether the taxpayers in question had provided a waiver to the CRA. The cases centred on the scope of the taxpayers' intention as reflected in waivers which had been provided. Therefore, the cases are not directly on point for purposes of this case but they support the premise that, in

establishing a party's intention in its interactions with the CRA in the context of a waiver of rights, all relevant circumstances must be taken into account (*Fagan* at para 34; *Noran* at paras 73-74).

3. Analysis - Waiver

[49] I now turn to my analysis of the evidence in this case against the principles established by the Federal Court of Appeal in *Mitchell*.

[50] In the Part I Objections of May 3, 2007, Kerry Canada wrote:

> Kerry Canada is planning on requesting Competent Authority assistance to resolve the two issues that are the subject of these Notices of Objection and therefore requests that the Notices of Objection be held in abeyance pending resolution of the issues through the Competent Authority Process.

[51] In the First CA Request, Kerry Canada referred to the 2001-2003 taxation years and the Part I Objections and stated:

> Kerry Canada has requested that these Notices of Objection be held in abeyance pending resolution of the issues through the Competent Authority Process. Please refer to Appendix 2 & 3 for copies of these Notices of Objection.

[52] In the Second CA Request, Kerry Canada wrote:

> Kerry Canada has filed Notices of Objection on May 3, 2007 objecting to the Notices of Reassessment issued on February 6, 2007 in respect of the company's 2001-2003 fiscal years. Kerry Canada has requested that these Notices of Objection be held in abeyance pending resolution of the issues through the Competent Authority Process. Please refer to Appendix 4 for a copy of these Notices of Objection.

[53] On September 28, 2010, the CCA issued the First CA Decision, reversing the CRA income adjustment with respect to sales of Daritone C5994 from Kerry Canada to Kerry US for the 2001-2003 taxation years. On June 11, 2012, five years after Kerry Canada's First and Second CA Requests, the CRA issued the Second Reassessments for the three taxation years, decreasing the Part I and Part I.3 taxes payable by Kerry Canada as a consequence of the First CA Decision.

[54] On September 5, 2013, the CCA issued the Second CA Decision, reversing the adjustments made by the CRA with respect to royalties paid by Kerry Canada to KGSI for the taxation years 2001-2003. In November 2013, Kerry Canada was informed by the CRA that it would not process the Second CA Decision because the years were statute-barred.

[55] The question before me is whether the Minister could reasonably conclude that Kerry Canada had not waived the normal and extended reassessment periods for its 2002 and 2003 taxation years. Having regard to the principles established in *Mitchell*, I must consider Kerry Canada's written documentation, the intentions of Kerry Canada and the CRA, and their course of conduct with regards to the years in question and the ongoing Competent Authority process. It is also important to bear in mind that the CCA is part of the CRA and that the Appeals Division of the CRA was aware of the two issues before the CCA from the outset.

[56] Kerry Canada's written documentation consists of the Part I Objections and the Second CA Request. In *Mitchell*, the letters written by Mr. Nichols referred specifically to the fact that the taxpayers wished to be reassessed in accordance with the outcome of the test case, whether

the test case was concluded within or outside of the limitation period for reassessment. Kerry Canada made no such explicit statement in the documentation listed above. However, the statements in the Part I Objections and Second CA Request expressed a clear intention that the three taxation years be reassessed in accordance with both the First and Second CA Decisions. There is no indication in the record that Kerry Canada's abeyance requests were intended to function only within the statutory reassessment periods.

[57] I find that the absence of an explicit reference to the normal and extended reassessment periods under the *ITA* was not fatal to Kerry Canada's position. A waiver of the protection of the statutory limitation periods was implicit in its requests for abeyance. The documentation contained the information necessary to alert the CRA to Kerry Canada's intention that the years in question be reassessed whenever the issues before the CCA were resolved. In addition, the specific issues Kerry Canada was willing to subject to late reassessment were adequately identified.

[58] The CRA's Audit Manual recognizes implied waivers:

> **Implied Waiver**
>
> When a waiver has not been filed in the prescribed form, the CRA will accept a written request for adjustment as being an **implied** waiver for the purpose of subparagraph 152(4)(a)(ii) of the ITA provided:
>
> - the requested adjustment favours the taxpayer;
> - the delay in processing the request for adjustment was not attributable to the taxpayer; and
> - the essential information required in the prescribed waiver is included.

[59] In my opinion, the statements by Kerry Canada in the Part I Objections and Second CA Request fall within the parameters of the Audit Manual.

[60] Information Circular IC 71-17R5 - *Guidance on Competent Authority Assistance under Canada's Tax Conventions* (IC 71-17R5), addresses the implementation of CCA decisions and the issue of waiver as follows:

> 42. If the Appeals Branch confirms or varies the (re)assessment of a return for which there is no valid waiver in place, implementation of any subsequent decision by the Canadian Competent Authority will be limited by the statute-barred date for the return (unless an appeal is filed with the Tax Court, and the Tax Court has agreed to hold the appeal in abeyance). … Note, however, that if the Notice of Objection is held in abeyance while the case is under competent authority consideration, a decision of the Canadian Competent Authority can be implemented by the Appeals Branch as a resolution to the Notice of Objection notwithstanding that there is no waiver for the return and the statute-barred date for the return has passed.
>
> [Emphasis added.]

[61] IC 71-17R5 supports Kerry Canada's position. A waiver is not required for the CRA to implement a CCA decision for a statute-barred year if the relevant Notices of Objection are held in abeyance. This is the very request made by Kerry Canada. IC 71-17R5 recognizes the inherent time delays in the CCA process and the effect those delays may have on the implementation of CCA decisions in the face of the limitation periods for reassessment contained in the *ITA*.

[62] The Respondent argues that the issuance of the Second Reassessments superseded Kerry Canada's request that the Part I Objections be held in abeyance. While the Part I Objections may no longer have been effective as notices of objection vis-à-vis the Second Reassessments, I see no reason why the requests for abeyance, repeated in the First and Second CA Requests, were

automatically rendered ineffective. The knowledge and conduct of Kerry Canada and the CRA in this case are critical.

[63] In distinguishing *Mitchell*, the Respondent argues that there was no mutual understanding that Kerry Canada's request for abeyance was an express or implied waiver of the applicable reassessment periods pending resolution by the CCA of both the Daritone C5994 and royalty issues. I do not find this argument persuasive. First, the CRA and the Minister were aware of the abeyance request and the parallel CCA processes from 2007 onwards. Second, the Minister acted in specific response to the First CA Decision by issuing the Second Reassessments in June 2012, five years after the filing of the Part I Objections.

[64] Both Kerry Canada and the CRA knew that the Second CA Request remained outstanding. More importantly, the Appeals Division of CRA knew Kerry Canada continued to pursue resolution of the royalty deduction dispute through the Competent Authority process. It follows that the CRA was aware that Kerry Canada would seek reassessment of the 2002 and 2003 taxation years in the event of a favourable CCA decision.

[65] The Respondent states that, not only was Kerry Canada warned to file Notices of Objection at the time of issuance of the Second Reassessments, but also that Mr. Nicotera specifically informed Kerry Canada in December 2012 of the need to file Notices of Objection. However, it is clear that the discussion to which the Respondent refers was a discussion between Mr. Nicotera and Mr. Nick Coburn of Kerry Canada regarding a separate collections issue, the Stall Issue. Indeed, Mr. Nicotera's responses on cross-examination demonstrate that the CRA

knew Kerry Canada was awaiting the Second CA Decision. Mr. Nicotera had spoken with a contact at the CCA regarding Kerry Canada's collections issue. He stated that Mr. Coburn had expressed surprise that the collections issue had arisen in light of the royalty issue still under consideration by the CCA. The following excerpt from the cross-examination is instructive:

> Q. And at this stage [December 2012], what you were doing was trying to sort out how to resolve this collections issue, why they were taking their money, right?
>
> A. Right, because I think Nick's concern was that we have objections, why is all the tax due all of a sudden, and I didn't know, and now I do know.
>
> Q. But you knew that there were objections, right?
>
> A. Yes.
>
> Q. At the time you knew there were objections.
>
> A. Sure.
>
> Q. And you knew this issue was before Competent Authority.
>
> A. Yes.
>
> Q. And you knew at this time that Kerry intended to pursue these issues, right?
>
> A. Of course.
>
> Q. And, equally, you knew that the Applicant, that Kerry didn't intend to abandon this issue at this time.
>
> A. Yes, of course.

[66] On re-examination by the Respondent's counsel, Mr. Nicotera explained his understanding of the outstanding issue:

> RE-EXAMINATION BY MS. SITTLER:
>
> Q. I'll take you back to Exhibit A. Earlier in the examination on your affidavit, Exhibit A is the e-mails exchanged in December of 2012, and the question to you was, you knew Kerry did not

> intent to abandon this issue, I'm not sure if you recall that, and you had said yes. So the question was …
>
> A. At the time of the first e-mail from Nick.
>
> Q. In December 2012, I understand the line of questioning was you knew Kerry did not intend to abandon this issue. Could you just clarify what your understanding is of "this issue"?
>
> A. Okay, the issue of the second transfer pricing issue that was still – with Ireland that was still open.
>
> Q. Open in what sense?
>
> A. It hadn't been decided with the Competent Authority yet. There was no decision made with regards to those transfer pricing issues with Competent Authorities.
>
> Q. And then later on in the questioning you were asked a question to which you said issues remained outstanding, and still specifically in relation to Exhibit A, issues remained outstanding. In what sense did you mean issues remained outstanding?
>
> A. The same thing, so the Competent Authorities still had not made a decision on the outstanding issues of the transfer pricing audits of 2001 to 2003.

[67] I find that Kerry Canada and the CRA mutually understood Kerry Canada's intention that its requests that the Part I Objections be held in abeyance would function as effective waivers. The CRA was aware that the CCA process regarding the royalty dispute was continuing well after the date of the Second Reassessments. In my view, the CRA's conduct suggests at least tacit acknowledgement of the continued utility of CCA process. The normal conclusion of that process was the reassessment of the 2002 and 2003 taxation years in accordance with the eventual Second CA Decision.

[68] The Respondent submits that Kerry Canada confused its requests that the Part I Objections be held in abeyance with its obligation to file Notices of Objection to the Second Reassessments. She states that Kerry Canada did not understand the distinction between the two processes. The Respondent may be correct in this regard but any confusion on Kerry Canada's part with respect to the Second Reassessments does not change the fact that in 2007 it requested a waiver, whether express or implied, of the applicable reassessment period(s) for 2002-2003 pending resolution of both issues before the CCA.

[69] I agree with the Respondent that the CRA had no obligation to specifically inform Kerry Canada that the Second Reassessments discharged the Part I Objections. However, I find that it was unreasonable for the CRA to ignore the parallel CCA process and rely on the effect of the Second Reassessments on the Part I Objections by operation of the *ITA* to deny Kerry Canada any benefit from the Second CA Decision. As stated above, the CCA is a division of the CRA. As a matter of fairness, the CRA cannot act in silo, particularly where the evidence shows that the Appeals Division knew of the involvement of the CCA from 2007 onwards and knew that Kerry Canada continued to await the Second CA Decision. There is no prejudice to the CRA in implementing the Second CA Decision. Rather, the implementation of the Second CA Decision would reflect the principles enshrined in Canada's international tax treaties and avoid the unwarranted double taxation of a Canadian taxpayer.

4. Analysis – Requirement for reasons

[70] In response to Kerry Canada's arguments that the Decision itself was sparse and unintelligible, the Respondent relies on jurisprudence which requires a consideration of not only

a decision but also the evidentiary record in assessing the reasonableness of the decision (*Newfoundland Nurses*; *Hi-Tech Seals*; *Sherry*). Kerry Canada distinguishes the *Hi-Tech Seals* and *Sherry* cases cited by the Respondent as it received no accompanying report or document explaining the basis for the Minister's Decision. Kerry Canada also states that the materials eventually provided to it contained no elaboration of the underlying reasons for the Decision.

[71] I have reviewed the Decision against the requirement to provide Kerry Canada intelligible reasons. The Decision contains no analysis of Kerry Canada's December 31, 2013 and May 26, 2014 requests that the CRA implement the Second CA Decision. With regards to Kerry Canada's argument that the Second CA Request should be considered an implied waiver, the Decision states:

> Implied Waivers
>
> Our review of the facts and circumstances of the case has resulted in our conclusion that CRA has no legal basis on which to reassess the 2002 and 2003 years beyond their respective statute-barred dates as per section 152(4)(c) of the Income Tax Act.

[72] I find that the reasons provided in the Decision were inadequate. The brief statement regarding the issue of waiver provides no basis for Kerry Canada to understand the CRA's reasoning. In *Hi-Tech Seals* (at para 23), Justice Phelan stated that it is not sufficient for the Respondent to argue that the reasons for a decision could be gleaned from ancillary materials, requiring the taxpayer to stitch together the CRA file. In both *Hi-Tech Seals* and *Sherry*, the Court found that the decision in question was inadequate but that accompanying documents or reports could save the decision by providing the underlying reasoning of the decision-maker (*Hi-Tech Seals* at para 24; *Sherry* at para 15). In this case, Kerry Canada received no accompanying

explanation for the Decision. Therefore, the jurisprudence cited by the Respondent does not assist in supporting the Decision as reasonable.

[73] I have also considered the Rule 317 materials provided to Kerry Canada. The only document relevant to this analysis is an interoffice memorandum prepared by Mr. Nicotera dated May 27, 2014. In the memo, Mr. Nicotera considered whether Kerry Canada had provided an implied waiver for the 2002 and 2003 taxation years. He reviewed the *Mitchell* decision and concluded that the CRA is obliged to treat any document as a waiver, providing it contains the necessary information. Mr. Nicotera compared the information required in the prescribed CRA form (T2029) to the information contained in Kerry Canada's Second CA Request. He concluded that the Second CA Request contained all the necessary information other than any discussion waiving the normal or extended reassessment periods referred to in subparagraph 152(4)(a)(ii) and paragraph 152(4)(c) the *ITA* respectively. Mr. Nicotera referred to the Part I Objections but stated, "as we know, these objections were previously dispatched".

[74] In my view, even if the additional materials were provided to Kerry Canada contemporaneously with the Decision, the CRA's analysis in support of the Decision is incomplete. Mr. Nicotera did not consider all of the circumstances of Kerry Canada's request or the subsequent conduct of Kerry Canada and the CRA. He relied on the fact that Kerry Canada did not expressly waive the statutory reassessment periods without considering its intention in requesting that the Part I Objections be held in abeyance pending resolution of the two issues before the CCA. He also relied on the discharge of the Part I Objections by operation of the Second Reassessments. It appears that Mr. Nicotera felt constrained by the effect of the Second

Reassessments as he acknowledged in cross-examination that it was fair to say that, at the time he prepared the May 27, 2014 memo, he would have liked to have helped Kerry Canada but felt there was nothing he could do.

5. Summary

[75] In summary, I find that the Decision was unreasonable. The Minister did not consider all of the evidence in making the Decision. She relied primarily on the absence of an explicit waiver request and on the discharge of the Part I Objections by the Second Reassessments to counter Kerry Canada's argument that it had provided effective waivers for the 2002 and 2003 taxation years. The Minister did not consider the substance of Kerry Canada's 2007 requests for abeyance contained in the Part I Objections and repeated in the First and Second CA Requests. She failed to acknowledge that the CRA knew Kerry Canada was continuing to pursue its Second CA Request and that the reasonable inference from Kerry Canada's course of conduct was an intention to forego the benefit of the limitation periods set forth in the *ITA*. In my view, the conclusion that Kerry Canada did not provide either an express or implied waiver does not fall within the range of possible outcomes for this case.

[76] As Justice Sexton observed in *Mitchell*, waiver is the privilege of the taxpayer. The CRA's Second Reassessments cannot override Kerry Canada's express request to the CRA to keep the 2002 and 2003 taxation years open for reassessment pending resolution by the CCA of both the transfer payment and royalty deduction issues.

VIII. Conclusion

[77] The application is allowed.

[78] The parties agreed at the hearing that the successful party should be entitled to costs of $2,500 as a lump sum award (inclusive of disbursements and taxes, if any). Therefore, costs are awarded in the lump sum of $2,500 (inclusive of disbursements and taxes, if any) to be paid by the Respondent to Kerry Canada.

JUDGMENT in T-2489-14

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred back to the Minister or her delegate for redetermination.

2. Costs are awarded in the lump sum of $2,500 (inclusive of disbursements and taxes, if any) to be paid by the Respondent to Kerry Canada.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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