

Docket: 2010-155(IT)I

BETWEEN:

DONALD JOSEPH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 11, 2010, at Ottawa, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Natasha Wallace

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2008 year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of June 2010.

“V.A. Miller”

V.A. Miller, J.

Citation: 2010TCC350
Date: 20100623
Docket: 2010-155(IT)I

BETWEEN:

DONALD JOSEPH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller, J.

[1] The Appellant has appealed the reassessment of his 2008 taxation year. The issue in this appeal is whether the Appellant is required to include in his income the amount of \$43,307.22 which he received from Fording Canadian Coal Trust.

[2] The Appellant testified that he had held 407 units in Fording Canadian Coal Trust (“Fording”). In 2008, Teck Cominco (“Teck”) started an aggressive takeover bid for Fording. In September 2008, Fording asked its unitholders to vote on the takeover. The Appellant stated that he voted against the takeover, but his vote was unsuccessful. In October 2008, Fording agreed to a cash and stock takeover bid from Teck Cominco.

[3] Fording sent out information which included all cash distributions paid by it to its unitholders in 2008. That information included the following:

The following information is based on the Trust's understanding of the Income Tax Act (Canada) and regulations thereunder, and is provided for general information only. T3 Statement of Trust Income Allocations and Designations forms are expected to be available by the end of March 2009.

The following table provides the cash distributions declared in Canadian dollars. The stated amounts are on a per-unit basis and reflect the units outstanding when the payments were declared.

		\$CDN Per Unit			
Record Date	Payment Date	Other Taxable Income	Return of Capital	Redemption Proceeds	Total Distribution Paid
Mar. 31, 2008	Apr. 15, 2008	\$ 0.50000	\$ -	\$ -	\$ 0.50000
Jun. 30, 2008	Jul. 15, 2008	\$ 2.50000	\$ -	\$ -	\$ 2.50000
Consideration pursuant to the Arrangement		\$ 103.50343	\$ 0.94215	\$ 0.01442	\$ 104.46000

The "Other Taxable Income" amount is the portion of the distributions that is to be included in the taxable income of unitholders. Generally, the "Return of Capital" portion (other than that representing redemption proceeds) of the distributions is not taxable but is required to be deducted from the adjusted cost base of a unitholder's units of the Trust. Both amounts will be reported on the T3 Statement of Trust Income Allocations and Designations.

On the redemption of Trust units under the Arrangement, a Canadian resident unitholder will generally realize a capital gain (or a capital loss) equal to the amount by which the aggregate redemption proceeds receivable by the unitholder exceeds (or is less than) the adjusted cost base of the unitholder's Trust units and any reasonable costs of disposition. (Please refer to the section entitled "Taxation of Holders Resident in Canada - Certain Canadian Federal Income Tax Considerations" under the Circular for a more detailed discussion.) The redemption proceeds will be reported on the T5008 Statement of Securities Transactions.

[4] In October 2008, the Appellant was asked to send his unit certificates to Computershare Investor Services Inc. (Computershare), the agent who acted on Fording's behalf. On November 6, 2008, the Appellant received a cheque from Fording. I was not told the amount of this cheque but the Appellant stated that he immediately reinvested the amount of \$38,730.53CDN. In April 2009, the Appellant obtained his T3 and T5008 with respect to these transactions from the agent's website. The T3 showed that in 2008 he had received "Other Income" of \$43,307.22 and a "Return of Capital" of \$383.46. The T5008 showed that the Appellant received "Proceeds of Disposition" of \$44.99.

[5] The Appellant stated that he had received the 300 page document which contained the offer from Teck to Fording. He did not read all of it. He did not understand that Teck and Fording had arranged their transactions so that the sale proceeds would be taxed as ordinary income for the unitholders. He stated that he called the agent and was told that all decisions had been made by Fording. He attempted to telephone and email Fording but was unsuccessful as the company no longer had an independent existence.

[6] It was the Appellant's position that it was ridiculous that the amount of \$43,307.22 was designated as "Other Income". He argued that the amount of \$38,730 ought to have been received by him as a capital gain because it represented the sale of shares which he had accumulated over a 40 year period. He argued that only the amount of \$4,577 ought to have been designated as "Other Income".

[7] The relevant provisions from the *Income Tax Act* (the Act) are:

12. (1) Income inclusions -- There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable:

(m) **benefits from trusts** -- any amount required by subdivision k or subsection 132.1(1) to be included in computing the taxpayer's income for the year, ...

104. (13) Income of beneficiary -- There shall be included in computing the income for a particular taxation year of a beneficiary under a trust such of the following amounts as are applicable:

(a) in the case of a trust (other than a trust referred to in paragraph (a) of the definition "trust" in subsection 108(1)), such part of the amount that, but for subsections (6) and (12), would be the trust's income for the trust's taxation year that ended in the particular year as became payable in the trust's year to the beneficiary; ...

104. (21) Taxable capital gains -- Such portion of the net taxable capital gains of a trust for a taxation year throughout which it was resident in Canada as

(a) may reasonably be considered (having regard to all the circumstances including the terms and conditions of the trust arrangement) to be part of the amount that, by virtue of subsection (13) or (14) or section 105, as the case may be, was included in computing the income for the taxation year of

(i) a particular beneficiary under the trust, if the trust is a mutual fund trust, or

(ii) a particular beneficiary under the trust who is resident in Canada, if the trust is not a mutual fund trust, and

(b) was not designated by the trust in respect of any other beneficiary under the trust,

shall, if so designated by the trust in respect of the particular beneficiary in the return of its income for the year under this Part, be deemed, for the purposes of sections 3 and 111, except as they apply for the purpose of section 110.6, and subject to paragraph 132(5.1)(b), to be a taxable capital gain for the year of the particular beneficiary from the disposition by that beneficiary of capital property.

[8] Paragraph 12(1)(m) required the Appellant to include in his income any amount that was required to be included in income pursuant to subdivision k of the Act. Subsection 104(13) of subdivision k of the Act required the Appellant to include the amount he received from Fording in his income. The amount could be deemed a taxable capital gain only if it was so designated by Fording in respect of the Appellant in Fording's income tax return for 2008. There was no evidence to show that Fording designated any amount in respect of the Appellant as a net taxable capital gain. On the contrary, the T3 issued by Computershare on behalf of Fording showed that the amount paid to the Appellant was "Other Income" and the T5008 issued to the Appellant showed that he received proceeds of disposition in the amount of \$44.99.

[9] Counsel for the Respondent stated that the Appellant realized a capital loss on the redemption of his Trust units. There was no evidence with respect to the amount of this capital loss. The Appellant stated that a capital loss was of no use to him as he did not have any capital gains.

[10] The Appellant has not brought any evidence to show that the Minister's reassessment was incorrect.

[11] The appeal is dismissed.

Signed at Ottawa, Canada, this 23rd day of June 2010.

"V.A. Miller"

V.A. Miller, J.

CITATION: 2010TCC350

COURT FILE NO.: 2010-155(IT)I

STYLE OF CAUSE: DONALD JOSEPH AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 11, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: June 23, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Natasha Wallace

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan,
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