Docket: 2002-2769(IT)G

BETWEEN:

ELIAS G. ACKAOUI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 14, 2005, at Montréal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Christopher Mostovac

Counsel for the Respondent: Natalie Goulard

AMENDED JUDGMENT

The appeal from the assessment made under the *Income Tax Act* (the *Act*) with respect to the 1986 taxation year is dismissed, with costs, in accordance with the attached Reasons for Judgment.

The appeal from the assessment made under the *Act* with respect to the **1983** taxation year is allowed on consent.

Signed at Ottawa, Canada, this 23rd day of September 2005.

"François Angers"

Angers J.

Translation certified true
on this 8th day of March, 2006.

Garth M^{c}Leod, Translator

Citation: 2005TCC416
Date: 20050923
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BETWEEN:

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Appellant,

and

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Respondent.

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AMENDED REASONS FOR JUDGMENT

Angers J.

[1] The Appellant is appealing from assessments made by the Minister of National Revenue ("the Minister") with respect to the 1983, 1985 and 1986 taxation years. At the start of the hearing, the Appellant informed the Court that he was dropping his appeal with respect to his **1985** taxation year, and the Respondent, for her part, consented to judgment with respect to the Appellant's **1983** taxation year. Thus, only the 1986 taxation year is in issue. The initial Notice of Assessment was issued on September 30, 1987. On November 17, 1987, the Minister prepared a new Notice of Assessment for the year in issue, and a final Notice of Assessment was prepared on December 1, 1994. To enable the Minister to make the last assessment, Michel Bayouk, the Appellant's accountant ("the accountant"), signed the Appellant's name, rather than his own, on a waiver of the limitation period under subparagraph 152(4)(*a*)(ii) of the *Income Tax Act* ("the *Act*").

[2] The Appellant objected to the final assessment on February 1, 1995, without raising the question of whether the assessment of December 1, 1994, had been statute-barred. The Minister confirmed the assessment for the 1986 taxation year on April 25, 2002, after sending the Appellant a statement of account on November 14, 2001.

[3] Thus, the issue in this case is whether the assessment dated December 1, 1994, is statute-barred on the basis that the waiver of April 16, 1990, signed by the Appellant's accountant, is invalid because the accountant signed the Appellant's name. It should be noted that the accountant was not trying to replicate or forge the Appellant's signature.

[4] The Appellant and the accountant are friends. The accountant has been preparing the Appellant's income tax returns since 1980. He also prepares the financial statements of a corporation owned by the Appellant and the statements of the medical clinic where the Appellant practices. In 1986, his accountant proposed the purchase of a share in Alexis Partnership Limited ("Alexis"), a limited partnership that is involved in research and development. Consequently, the Appellant claimed a partnership deduction and an investment tax credit on his income tax return for the year in issue.

[5] The Appellant says that it is only when he received his assessment dated December 1, 1994, that he learned that Revenue Canada had disallowed the deductions claimed on his 1986 income tax return. In fact, he says that he was unaware, before that date, of any problem involving his investments in Alexis, and he acknowledges that his accountant looked after all this. He says that any correspondence that he received in connection with his taxes was sent to his accountant. He adds that in his view, the audit of Alexis was a matter for the Vancouver office and had nothing to do with him.

[6] Several other taxpayers apparently found themselves in the same circumstances, and, as a result, a group was formed to fight Revenue Canada with regard to the situation. The Appellant's accountant allegedly asked the Appellant to join the group. The Appellant allegedly paid a fee and attended one meeting. A lawyer was retained, and, in fact, the Appellant's notice of objection is signed by that lawyer. According to the Appellant, judgments have been rendered in a number of test cases, but he was unaware of any details (see *Drouin v. The Queen*, TCC, December 14, 1999, 96-3190(IT)G, 2000 DTC 1740). On or about April 25, 2002, the Respondent sent the Appellant a Notification of Confirmation in respect of his 1983, 1985, 1986, 1988, 1991 and 1993 taxation years. The Appellant therefore went to the same lawyer's office, where he was told that the year 1986 was statute-barred. However, the lawyer had to revise his stance when he was sent the waiver dated April 16, 1990, and now in issue. The Appellant testified that he never saw this document and was unaware of its existence. He says that he was in Montréal on that date and could have signed the waiver himself.

However, he recognizes the signature of his accountant friend who signed his name.

[7] The Appellant claims that he was never apprised of the measures undertaken by his accountant at the time, and was never informed of the need to provide Revenue Canada with a waiver of the limitation period. He added that no representative of Revenue Canada contacted him or had discussions with him about Alexis.

[8] The Appellant acknowledges that, on April 27, 1990, at the accountant's request, he signed an authorization allowing Revenue Canada to give his accountant or representative any information about his income tax return for the year 1989, as well as prior or subsequent years, or to discuss the returns with either of them. The authorization named the accounting firm's representative as the Appellant's agent with regard to any matter involving these returns. It was in force until revoked in writing. The Appellant says that when he signed the authorization, his accountant did not tell him that certain things were not going well. Allegedly, the accountant simply mentioned that he needed the authorization, but did not discuss details involving Alexis. In fact, the Appellant signed another authorization of the same kind on April 28, 1992, and suspects that he might have signed another one before 1990, but does not recall. The Appellant also acknowledges having authorized his accountant to sign a tax return (the 1993 return) while he was outside Canada. Essentially, he wanted his accountant to look after everything, and left the details to him because he trusted him.

[9] In addition to signing the Appellant's name on the waiver, the accountant signed the Appellant's name on an authorization that is similar to the one described above but was made out in favour of Coopers & Lybrand and pertains more specifically to Alexis-related matters. Revenue Canada's Vancouver office received this authorization and the waiver in issue at the same time on May 1, 1990.

[10] For his part, the accountant acknowledges that he proposed the Alexis partnership to the Appellant and to others. He thought it was an attractive tax shelter. However, in 1988 and 1989, he learned that there was a problem with the partnership, and that audits were being conducted by Revenue Canada's Vancouver office. His former partner informed him that they would be represented by Coopers & Lybrand in their dealings with Revenue Canada in Vancouver.

[11] The accountant says that he discussed the situation with the Appellant, and generally informed him of what was going on. For example, he allegedly told him

that a law firm had been retained to represent the Appellant and others. According to the accountant, Revenue Canada was in contact with the Appellant in writing about his file. The accountant does not know whether the Appellant was aware of the fact that he had signed the Appellant's name on the waiver around the time of the signature, but he says that the Appellant was told about this later on.

[12] The accountant says that he signed the waiver because the Appellant was probably absent. He admitted that he should probably have signed his own name and added the letters "p.p.", an abbreviation of the French words "*par procuration*", which mean "under power of attorney". He says that he probably spoke to the Appellant about the waiver before signing it. He says that it would have made sense for him to have notified the Appellant that by signing a waiver, he was preventing Revenue Canada, and especially Revenu Québec, from making an arbitrary assessment, because if Revenue Canada had made an arbitrary assessment, Revenu Québec would have followed suit. The accountant says that it was the law firm that suggested the waiver, and that he discussed it with the Appellant.

[13] Mr. Bayouk had, in the past, signed some of the Appellant's tax returns before the waiver, and, in his opinion, he had the authority to sign the waiver. He believed that he had the power to sign it, and that signing the waiver did not pose a problem. He acknowledges that he would not have done this if he and the Appellant had not been friends.

[14] With regard to the authorizations permitting Revenue Canada to discuss the Appellant's tax returns with the accountant, and appointing the accountant as the Appellant's representative, the accountant testified that the authorization dated April 27, 1990 (Tab 10) had been signed at the same time as the 1989 tax return, and that he believes that he obtained such an authorization for each taxation year. As for whether the Appellant was in Montréal on the date of the waiver, the accountant does not recall. The accountant ended his testimony by saying that he had also discussed with the Appellant the authorization permitting Revenue Canada to discuss the 1986 and prior taxation years with Coopers & Lybrand, and that this firm represented him in matters involving Alexis (Tab 9). Coopers & Lybrand represented all the investors.

[15] Mark Toner was an appeals officer with Revenue Canada at the time. He explained that almost 90 taxpayers were involved, and that 33 of those taxpayers were in the Montréal area. He explained that waivers become necessary when a limitation period is close to expiration, and that Revenue Canada received

33 waivers from Montréal in connection with the Alexis case. The waiver document grants the Minister the power to make an assessment beyond the normal assessment period. Should a taxpayer refuse to provide a waiver, the Minister is entitled to make an arbitrary assessment. As a general rule, the form is prepared by Revenue Canada so that the nature of the waiver is specified and the relevant provisions of the Act are cited. Mr. Toner was unable to say whether the waiver in issue was prepared by a Revenue Canada representative; he simply said that this was the approach used for this purpose. He notes that the issue of the waiver had not been raised at the objection stage. The waiver in issue, Form T2029, refers to the 1986 taxation year, and specifies that the issues are the Appellant's losses on his investment in the Alexis partnership, and the investment tax credit in respect of that partnership.

[16] Counsel for the Appellant submits that his client only learned of the existence of the waiver on or about April 26, 2002. Thus, his accountant had no mandate to sign the waiver, let alone sign the Appellant's name on such a document. Consequently, he submits that the waiver is invalid, and, as a result, the Respondent's assessment of the Appellant, made on December 1, 1994, and confirmed on April 25, 2002, is statute-barred. Counsel for the Appellant submits that the Respondent has the obligation to prove that the waiver form was sent to the taxpayer or his legal representative in order to establish that discussions took place regarding the existence and necessity of the waiver. Further, he submits that the burden is on the Respondent to prove that the waiver was indeed received from the taxpayer or his legal representative.

[17] For her part, counsel for the Respondent submits that the written authorization dated April 27, 1990, merely attests to a pre-existing implied mandate. She adds that the authorization is broad enough to enable the accountant to sign a waiver on the Appellant's behalf and that the Appellant is bound by the acts of his agent. Counsel for the Respondent also submits that the fact that the waiver conferred a benefit favours its validity, since the accountant's signing of the waiver prevented the Appellant from being subject to an arbitrary assessment, which Revenu Québec would have compounded. She submits that the waiver is a routine procedural document and that the accountant's signature was not an extraordinary juridical act that needed to be based on a specific mandate. Lastly, counsel for the Respondent submits that the Act does not impose the obligation that counsel for the Appellant referred to, and that the receipt of a waiver that appears *prima facie* to be valid is sufficient to suspend the limitation period and makes it possible to assess the taxpayer for a year that would otherwise be statute-barred.

[18] It is only in certain cases that the *Act* permits the Minister to reassess a taxpayer after expiry of the normal reassessment period applicable to a taxpayer for the year. Subparagraph 152(4)(*a*)(ii) of the *Act* confers this ability if the taxpayer files a waiver with the Minister. The provision is worded as follows:

> (4) The Minister may at any time assess 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, and may
>
> (*a*) at any time, if the taxpayer or person filing the return
>
> . . .
>
> (ii) has filed with the Minister a waiver in prescribed form within 3 years from the day of mailing of a notice of an original assessment or of a notification that no tax is payable for a taxation year
> . . .

[19] The prescribed form is Form T2029, which contains the following text:

> For use by a taxpayer to waive the normal reassessment period in respect of a taxation year, as defined in subsection 152(3.1), within which the Minister may assess, reassess or make additional assessments under subsection 152(4) of the *Income Tax Act*.
>
> . . .
>
> This Waiver must be signed by the taxpayer or legal representative, or if a corporation, by an authorized officer.

[20] In *CAL Investments Ltd. v. Canada*, [1991] 1 F.C. 199, 90 DTC 6556, Joyal J. of the Federal Court very aptly summarized, at pages 213-214 F.C., the reason for the provisions of the *Act* concerning the waiver of the limitation periods set out in section 152:

> A waiver of the sort at issue in this case, might be interpreted as an accommodation between the Crown and a taxpayer for the better administration of the *Income Tax Act* and to provide a more efficient determination of any liability thereunder. In the light of the limitations on assessments under s. 152 of the Act, the Crown requests a waiver so that it may continue its assessment or audit work in a normal administrative mode without having to worry about limitations. The taxpayer, on the other hand, knows full well that on an assessment being made, he alone has the

> burden of proving it wrong. That burden becomes much heavier if the Crown, facing the end of the limitation period, issues what might be termed a premature assessment which, for purposes of abundant caution, would include many sundry items which the taxpayer would have to traverse one by one. The taxpayer in those circumstances would look upon a waiver as being to his own benefit as well as the Crown's and would ordinarily comply with the Crown's request.
>
> In many cases, also, the waiver might be limited to specified issues, i.e., those where assessing or auditing processes have not been completed and which in fact remain the only outstanding items on which the Crown can ultimately decide to assess or reassess. This narrows the field of the assessment and again provides mutual advantages to both the Crown and the taxpayer.

[21] Rip J. of our Court stated the following in *Bailey v. The Minister of National Revenue*, TCC, July 4, 1989, 88-2034(IT)I, 89 DTC 416, at page 419:

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

[22] This being said, the issue is whether, in the case at bar, the Appellant's accountant had a mandate that made him his legal representative and empowered him to execute a waiver of the limitation period under the *Act*.

[23] Since 1980, the Appellant has entrusted all his responsibilities concerning the preparation of his financial statements and tax returns to his accountant and friend. In fact, he testified that anything involving his taxes, and any correspondence from Revenue Canada, was forwarded to his accountant so that he could look after it. According to his testimony, he was not apprised of Revenue Canada's refusal to allow the deductions and the income tax credit that he was claiming until he received the assessment dated December 1, 1994, and he was not aware of any problem concerning his investments in Alexis. However, the documentation tendered in evidence contains a Notice of Objection (Tab 6) signed by the Appellant and dated August 18, 1992, which is two years earlier. This Notice of Objection pertains to the 1985 taxation year and refers to Revenue Canada's refusal to grant the investment tax credit in respect of the Appellant's investment in Alexis in 1985.

[24] The accountant believes that the Appellant had been informed, and he sincerely believes that he informed the Appellant of the measures undertaken with the Vancouver office of Revenue Canada through Coopers & Lybrand.

[25] I accept the accountant's version of the facts, i.e. that he spoke with the Appellant about the lawyers' opinion that it would be advantageous to provide the waiver because it would avoid an arbitrary assessment by Revenue Canada and a similar assessment by Revenu Québec. Having regularly and continuously mandated his accountant to look after all his accounting and tax matters, the Appellant cannot now pick and choose among the decisions and actions of his agent, rejecting those which might be against his interests.

[26] The fact that the Appellant systematically entrusted his accountant with all issues involving Revenue Canada, and signed authorizations permitting Revenue Canada to discuss his tax matters with his agent (the accountant) means that accountant was the Appellant's legal representative for purposes of his dealings with Revenue Canada in any matter involving his income tax returns.

[27] Under these circumstances of the case at bar, it is difficult to conclude that the accountant did not have a sufficiently broad mandate to enable him to consent to a waiver of the limitation period on behalf of the Appellant.

[28] However, even if I were to find that the Appellant had not been apprised of the existence of the waiver until April 26, 2002, or thereabout, I do not believe that his lack of awareness of the signature nullifies the waiver. In the case at bar, the Appellant chose not to get involved in the management of his financial affairs, and this disengagement is the basis of his mandator-mandatary relationship with his accountant. Thus, he cannot now insulate himself from the consequences of the choice that he made, whether those consequences are positive or negative.

[29] Is the waiver invalid because the accountant signed the Appellant's name, and not his own? It should be pointed out here that nobody tried to forge or replicate the Appellant's signature in the case at bar. Upon reflection, the accountant himself acknowledged that he should have signed his own name and added the letters "p.p.", an abbreviation meaning "power of attorney" in French. In my opinion, given the overall context, including the existence of a mandate, the mere fact that the accountant signed the Appellant's name does not nullify the waiver. The signature is an irregularity or defect of form that does not constitute an

extraordinary act in the management of the Appellant's fiscal affairs because the waiver and the attendant consequences were actually favourable to the Appellant.

[30] In *CAL Investments Ltd.*, *supra*, Joyal J. had to decide whether the absence of the corporate seal on the waiver form and the absence of a specific mandate to sign the waiver rendered it invalid. In that case, the plaintiff's vice-president, finance, had signed a waiver on the plaintiff's behalf but had not been given an express mandate to do so, and no corporate seal was affixed to the waiver, even though the form then in use specified that if the taxpayer was a corporation, a corporate seal had to be affixed. The person who signed the form did not have the power to affix this seal but had a general mandate that entitled him to manage the plaintiff's financial and tax affairs. Here is an excerpt from the conclusion, in which Joyal J. set out (at pages 216-18) his understanding of the special nature of a waiver under the *Act*:

> A review of the particular facts before me as well as of the extensive case law referred to by counsel leads me to the conclusion that the requirement of the corporate seal is directory only. I view the prescription imposed by the Minister in that regard as one to provide the Minister with an assurance that he can safely postpone his reassessment and that he may rely on the corporate taxpayer being bound by it. The taxpayer would not, absent unusual circumstances such as a forged signature, be in a position to repudiate it when the limitations have run out.
>
> On the facts before me, no such unusual circumstances apply. There is no doubt in my mind that Mr. Briggs, as Vice-President, Finance, had an implied authority to agree to a waiver. He knew full well the purpose of the waiver and although he had not previously been called upon to deal with a waiver on behalf of his company, he knew from his previous experience as a chartered accountant what a waiver was all about. He had no hesitation in signing it. He assumed, correctly in my view, that without a waiver, an immediate assessment would issue. He did not feel the need to bring the matter to the attention of his directors. He felt it was part of his basic responsibility as Vice-President, Finance, to deal with it. For some years, as a matter of fact, he had dealt with the company's tax matters and had signed several T-2 tax returns in previous years. Mr. Briggs of course had no specific authority to use the seal but I must find, on the evidence, he had no less an implied authority to sign a waiver than he had to sign corporate tax returns.
>
> The other aspect material to the case is that the prescription imposed by the Minister is, in my view, for the benefit of the Minister. For reasons already stated, it is the Minister's measure of protection and may, in appropriate circumstances, be waived by him. The Minister's position in that regard is analogous to any person's prerogative to waive a condition prescribed in his favour.

> A further element in the matter before me is that this waiver, however prescribed in its form, is not a statutory obligation imposed on a taxpayer over which, in appropriate cases, statutory defences might be raised. A waiver, as prescribed in this case, is no more, no less a consensual arrangement between the taxpayer and the Crown to accept a delayed process for an assessment to be made for reasons which are mutually advantageous. It is clear from the evidence that Mr. Briggs willingly signed the waiver with the intention of making of it a valid waiver binding on the company. From the realities of the situation as I have described it, the waiver, in the eyes of Mr. Briggs, was no big deal.
>
> In such circumstances, can it now be said in the absence of such a ministerial prescription as a corporate seal on the waiver form, the document should be considered null and void and bereft of any legal weight? To do so, in my respectful view, would be to endorse the arguments advanced by plaintiff's counsel that the subject matter be treated within the narrow perimeters of the prescribed form, within the even narrower context of the Minister's printed postulates and that the substance and mutuality of the waiver process itself be disregarded. It would require a strict or literal interpolation of the several doctrines of interpretation suggested by plaintiff's counsel and confer on the prescription of the waiver form a sovereign and inviolate character which, in my respectful view, is not warranted.
>
> If an unsigned tax return can be found to be a valid return as in the *Hart Electronics* case, or if a waiver signed by one company can be found to bind another company, as in the Simard-Beaudry case, I can see no reason why, in the particular circumstances of the case before me, a document intended to bind the company, signed on its behalf by a senior officer with the very least an implied authority to do so, could now be repudiated on grounds of non-compliance with one of its prescribed conditions. It may be said that the Minister was at risk when he accepted the plaintiff's waiver without its corporate seal. It does not, however, leave it open to the plaintiff to repudiate the waiver on that ground.
>
> I should therefore find that, despite the ingenious arguments of the plaintiff's counsel to the contrary, the corporate seal is a discretionary provision for the Minister's benefit, that the deficiency in the waiver does not create a nullity and that the assessment subsequently issued is valid in all respects.

[31] Counsel for the Appellant relied on the comments made by Campbell J. of this Court in *Loyens v. Canada*, [2003] T.C.J. No. 204 (QL), [2003] 3 C.T.C. 2381.

[32] In *Loyens*, Campbell J., writing in *obiter* at the end of her reasons, considered the lawyers' arguments regarding the validity of the waiver executed in that case. She found that a waiver signed by a taxpayer's brother, who was not the taxpayer's legal representative, was invalid because the form specifies that it must be signed by the taxpayer or his legal representative. That case is distinguishable

from the instant case, for here the accountant was the Appellant's agent and representative, whereas the brother in *Loyens* was not.

[33] The last potentially outstanding question is whether the Canada Revenue Agency has a duty of care on which the validity of the waiver depends. Counsel for the Appellant submits that the Respondent needs to be able to prove that the waiver form was sent to the taxpayer or his representative in order to substantiate a transaction involving discussion establishing knowledge of the existence of the document and establishing that the waiver was indeed received by the taxpayer or his representative. Given conclusion that I have reached, i.e. that the Appellant conferred a mandate on the accountant, it matters little whether the waiver form was sent to the Appellant or to his accountant, or whether it was the Appellant or the accountant who returned it to the Respondent.

[34] This leads us to another question. If I had found that no mandate existed, and that the Respondent had received a waiver that appeared *prima facie* to have been signed by the taxpayer, would the Respondent then have had an obligation to look beyond this, regardless of whether the waiver had been sent to the taxpayer or his representative and whether one of them had returned it? The waiver in the case at bar appears to bear the taxpayer's signature, and, in my opinion, there would need to be exceptional circumstances capable of alerting the Respondent's representatives and causing them to doubt the authenticity of the waiver. It would be absurd to impose a duty on the Respondent to verify the authenticity of the signatures on every waiver that it receives.

[35] I therefore find that the waiver is valid and, consequently, that the assessment of December 1, 1994, pertaining to the 1986 taxation year, is not statute-barred. The appeal concerning this taxation year is dismissed and the Respondent will be entitled to her costs. The appeal concerning the **1983** taxation year is allowed on consent and the Appellant drops his appeal concerning the **1985** taxation year.

Signed at Ottawa, Canada, this 23rd day of September 2005.

"François Angers"

Angers J.

Translation certified true

on this 8th day of March, 2006.

Garth M^{c}Leod, Translator

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