Dockets: 2015-3387(IT)G
2015-5474(IT)G

BETWEEN:

ERIC SAVICS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 31, 2018 and February 1, 2018, at Vancouver, British Columbia

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	David Davies, Shawn Tryon
Counsel for the Respondent:	Justine Malone

JUDGMENT

As requested by the Respondent and as acknowledged by the Appellant, Appeal No. 2015-3387(IT)G, pertaining to 1997, is quashed, without costs.

Appeal No. 2015-5474(IT)G, pertaining to 1998, is dismissed, with costs.

The Parties shall have 30 days from the date of this Judgment to reach an agreement on costs in respect of Appeal No. 2015-5474(IT)G and to so advise the Court, failing which the Respondent shall have a further 30 days to file written submissions on costs, and the Appellant shall have yet a further 30 days to file a written response. Any such submissions are to be limited to five pages in length. If, within the applicable time limits, the Parties do not advise the Court that they have

reached an agreement and no submissions are received from the Parties, costs shall be awarded to the Respondent in accordance with the Tariff.

Signed at Ottawa, Canada, this 2nd day of April 2019.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2019 TCC 71
Date: 20190402
Dockets: 2015-3387(IT)G
2015-5474(IT)G

BETWEEN:

ERIC SAVICS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons relate to the Appeals instituted by Eric Savics in respect of the 1997 and 1998 taxation years, for the purpose of appealing from reassessments (the "2014 Reassessments") under the *Income Tax Act* (the "*ITA*")[1] issued on or about October 31, 2014 by the Canada Revenue Agency (the "CRA") on behalf of the Minister of National Revenue (the "Minister").[2] Appeal No. 2015-3387(IT)G (the "1997 Appeal") relates to the 1997 taxation year and Appeal No. 2015-5474(IT)G (the "1998 Appeal") relates to the 1998 taxation year.

[2] In the 1990s, Mr. Savics was a limited partner of three limited partnerships involved in film distribution. On July 5, 2002, the Minister reassessed Mr. Savics in respect of the 1995, 1996, 1997 and 1998 taxation years.[3] Eventually, a settlement (the "Settlement") was reached and the Minister reassessed Mr. Savics

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1 *Income Tax Act*, RSC 1985, c. 1 (5th supplement), as amended.

2 In these Reasons, I will use the abbreviation "CRA" to refer to both the Canada Revenue Agency and its predecessor, the Canada Customs and Revenue Agency. The transition from the Canada Customs and Revenue Agency to the Canada Revenue Agency occurred on December 12, 2003.

3 In these Reasons, the reassessments represented by the notices of reassessment dated July 5, 2002 are referred to as the "2002 Reassessments."

in 2014, supposedly in accordance with the Settlement. Being of the view that the 2014 Reassessments did not correspond with the Settlement, Mr. Savics instituted these Appeals (i.e., the 1997 Appeal and the 1998 Appeal).

[3] At the commencement of the hearing of these Appeals, counsel for Mr. Savics advised the Court that he and his client were conceding the preliminary objection made by the Crown to the effect that there was not a valid notice of objection for 1997 (apparently because the notice of objection did not take issue with the amount of tax that had been reassessed). Accordingly, Mr. Savics and his counsel acknowledged that the 1997 Appeal should be quashed. Counsel for the Crown confirmed that the Crown was not seeking costs in respect of the 1997 Appeal. The balance of these Reasons will focus primarily on the 1998 Appeal; however, for the sake of completeness and clarity, occasional references to the 1997 Appeal will be made below.

II. FACTS

[4] During the 1995, 1996, 1997 and 1998 taxation years, Mr. Savics was a limited partner of AFS Limited Partnership No. 7 ("AFS 7"), AFS Limited Partnership No. 9 ("AFS 9") and AFS Limited Partnership No. 11 ("AFS 11").[4] For those four taxation years, Mr. Savics reported the gains and losses allocated to him by AFS 7, AFS 9 and AFS 11 (collectively, the "Partnerships") and deducted certain interest expenses and carrying charges that he had incurred in respect of his acquisition of his units of the Partnerships.[5]

[5] In the course of an audit undertaken by the CRA from 1999 to 2002, the CRA concluded that the Partnerships did not carry on a business with a view to a profit, with the result that they were not actually partnerships (within the legal sense of the word). Accordingly, the CRA proposed to disallow the losses that had

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[4] The written submissions filed by the Crown at the hearing of these Appeals indicated that the names of the limited partnerships were Alliance Film Services Limited Partnership #7, Alliance Film Services Limited Partnership #9 and Alliance Film Services Limited Partnership #11. However, after reviewing the documents that were entered into evidence, it is my understanding that the names of the limited partnerships were as set out in paragraph 4 above.

[5] The pleadings, the written submissions of Mr. Savics and the Crown and some of the documents prepared by the CRA used the term "gains" when describing the amounts (other than losses) that were allocated by the Partnerships to Mr. Savics. To be consistent with those documents, I will use the term "gains" in these Reasons, recognizing, however, that paragraph 96(1)(*f*) of the *ITA* speaks in terms of an allocation of income.

been allocated by the Partnerships to Mr. Savics and to remove from his income the gains that had been allocated to him for 1997 and 1998 and that he had reported on his income tax returns for those years. As well, the CRA proposed to disallow the interest expenses and carrying charges that had been incurred by Mr. Savics.[6] On July 5, 2002, the CRA, on behalf of the Minister, reassessed the tax payable by Mr. Savics for 1998 in the manner that had been proposed.[7]

[6] Apparently, some 1,200 taxpayers who had invested, as limited partners (the "Limited Partners"), in the Partnerships or related partnerships were reassessed. One of the reassessed Limited Partners (the "Subject Partner") and many (if not all) of the general partners (the "General Partners") of the various limited partnerships were represented by a particular law firm (the "Firm"), which embarked on negotiations with the CRA and the Department of Justice (the "DoJ"), with a view to seeking a settlement. Ultimately, the Firm negotiated a settlement of the appeal of the Subject Partner, which was embodied in Minutes of Settlement (the "Minutes") among the Subject Partner, the General Partners and Her Majesty The Queen (the "Crown"). The Minutes were signed on February 21, 2012 by a representative of the Firm and on February 22, 2012 by counsel for the Crown.

[7] Recital Q of the Minutes defined the term "Qualifying Partners" as including the Subject Partner, all Limited Partners with valid objections and the Limited Partners who had already appealed to this Court. Thus, having filed notices of objection, Mr. Savics was a Qualifying Partner. Recital T of the Minutes indicated that the Crown and the CRA proposed that the appeal of the Subject Partner and the objections or the appeals (as the case may be) of the other Qualifying Partners would be settled on a similar basis, provided that the Settlement was accepted by Qualifying Partners representing at least 75% of the outstanding units (the "Units") of all of the AFS partnerships (subject to certain exclusions). Recital U of the Minutes indicated that the mechanism of reassessment set forth in the Minutes was to apply to each Qualifying Partner who accepted such mechanism (each, an "Accepting Limited Partner").

[8] The relevant portion of section 3 of the Minutes stated the following in respect of AFS 7 (the paragraph letters below correspond to those used in the Minutes):

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6 See Exhibit AR-1, Tabs 1, 2 and 3.

7 Exhibit AR-1, Tab 4. It appears that the notice of reassessment for 1998 was attached to Mr. Savics' Objection for that year.

> (c) all deductions claimed by the Qualifying Partners in respect of AFS 7 (including all interest, carrying charges and partnership losses) for their respective taxation years that include December 31, 1997 and December 31, 1998 will be allowed;…
>
> (g) … no further reassessments (other than reassessments to reflect the above adjustments and any consequential adjustments) will be made in respect of AFS 7. In this regard, consequential adjustments shall *include* the recognition of any capital gains or capital losses arising from the actual or deemed disposition of limited partnership units of AFS 7 … as described in paragraphs (e) and (f) above.[8] [*Emphasis added.*]

[9] Paragraphs (c) and (h) of section 5 (in the case of AFS 9) and paragraphs (c) and (h) of section 1 (in the case of AFS 11) of the Minutes contained similar provisions for 1998 and 1999.

[10] Section 8 of the Minutes provided that the Settlement was subject to the following conditions (which are paraphrased below):

> (a) the Units owned by the Accepting Limited Partners were required to represent at least 75% of the total number of Units owned by the Qualifying Partners who were not deceased, bankrupt or non-residents of Canada; and
>
> (b) each Accepting Limited Partner was required to provide to the CRA a waiver of the right to object or appeal under subsection 165(1.2) or 169(2.2) of the *ITA*, as the case may be, in respect of the adjustments contemplated by the Minutes.[9]

[11] Section 12 of the Minutes stated:

> For greater certainty and subject to any applicable limitation periods contained in the ITA, the terms of these Minutes of Settlement do not preclude the Minister of National Revenue from redetermining any expense or amount not expressly addressed by these Minutes in respect of Qualifying Partners, provided that such

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[8] Exhibit AR-1, Tab 5, p. 7. It is noteworthy that, in defining the term *consequential adjustments*, paragraph 3(g) of the Minutes used the word *include*, and not the word *mean*. This suggests that paragraph 3(g) provided a non-exhaustive definition of the term *consequential adjustments*. In other words, while paragraph 3(g) clarified or extended the ordinary meaning of the term *consequential adjustments*, paragraph 3(g) also confirmed and preserved the usual or ordinary meaning of that term. See *Séguin v The Queen*, [1998] 1 CTC 2453 (TCC), at 2459; and *Klotz v The Queen*, [2004] 2 CTC 2892 (TCC), at 2919.

[9] *Ibid.*, p. 12.

> redetermination does not create a result that is inconsistent with the express terms of these Minutes.[10]

[12] On or about February 16, 2012, the Firm sent to the president of the General Partner of each of the Partnerships several memoranda, which were dated February 16, 2012 and which summarized the settlement offer (the "Settlement Offer") that had been received from the CRA.[11] The Firm indicated that it was still working with the DoJ and the CRA "to fine tune some of the specific language of the Settlement Offer."[12] The Firm also stated that similar offers were being provided by the CRA to the other Limited Partners who had been reassessed.

[13] The Firm's memorandum of February 16, 2012 in respect of AFS 7 stated:

> Under the Settlement Offer, CRA will:
>
> (i) allow slightly more than 78% of all operating expenses claimed by Alliance 6 in 1995 and 1996 which were allocated to the limited partners;[13]
>
> (ii) allow 100% of all other expenses incurred by AFS 7 and Alliance 7 [*sic*] that were allocated to the limited partners;[14] and
>
> (iii) allow 100% of all of the interest and financing charges incurred directly by the limited partners in connection with the investment in AFS 7.[15]

The Firm's memoranda of February 16, 2012 in respect AFS 9 and AFS 11 contained similar statements, except that the percentage stated in item (i) was 75.8% in the AFS 9 memorandum and 79% in the AFS 11 memorandum.

[14] On June 19, 2012, Mr. Savics executed three documents (the "Waivers"), each entitled "Waiver of Right of Objection or Appeal," in respect of AFS 7, AFS 9 and AFS 11 respectively.[16] Pursuant to each Waiver, Mr. Savics accepted the Settlement Offer and waived any right of objection or appeal pertaining to the 1995

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10 *Ibid.*, p. 13-14.

11 Exhibit AR-1, Tab 6 (for AFS 7), Tab 7 (for AFS 9) and Tab 8 (for AFS 11).

12 *Ibid.*, first paragraph of each memorandum.

13 After the various limited partners had acquired their units of AFS 7 in 1995, AFS 7 invested in Alliance Services (No. 6) Limited Partnership, which was a California limited partnership and which was referred to in the Firm's memorandum as "Alliance 6."

14 Based on my reading of paragraph 3 of the Minutes, I think that the above reference to "Alliance 7" should have been a reference to "Alliance 6."

15 Exhibit AR-1, Tab 6, p. 2.

16 Exhibit AR-1, Tabs 9, 10 and 11 respectively.

(1996 in the case of AFS 9 and AFS 11) and following taxation years in respect of the particular Partnership. As well, pursuant to subparagraphs 2(i) and (ii) of each Waiver, Mr. Savics agreed that the CRA could reassess him so as to allow him to claim as deductions in 1995 and 1996 in the case of AFS 7 (or 1996 and 1997 in the case of AFS 9 and AFS 11) the full amount of all deductions claimed by him in respect of the particular Partnership (including all interest, carrying charges and partnership losses) for the particular year, less a specified amount for each Unit held by him at the end of that year. In addition, subparagraphs 2(iii) to (v) of each Waiver stipulated that the CRA was to reassess him as follows:

> (iii) allows all interest expense and carrying charges previously claimed by me in respect of the Partnership in any taxation year in which I have filed an objection or an appeal or which is otherwise open for reassessment;
>
> (iv) allows any consequential claims by me for the carryforward or carryback of any losses resulting from the reassessments as set forth above; and
>
> (v) unless otherwise agreed to by me, does not make any other adjustment to my tax liability in connection with my investment in, or ownership of, limited partnership units of the Partnership other than consequential adjustments or other adjustments that are not expressly addressed by, and do not create a result that is inconsistent with, any of the preceding terms of the Waiver.[17]

[15] While the Minutes and the Waivers specifically discussed the deductibility of the deductions claimed by Mr. Savics and the other Limited Partners (including interest, carrying charges and partnership losses) for the indicated years, the Minutes and the Waivers did not expressly address the partnership gains (i.e., the income earned by the Partnerships and allocated to their respective partners).

[16] On October 31, 2014 the CRA sent to Mr. Savics a letter referencing the Settlement, enclosing a copy of a worksheet (the "Settlement Worksheet") that set out the key monetary features of the Settlement, and advising that notices of reassessment were to follow under separate cover.[18] For the purposes of this part of these Reasons, the relevant portions of the Settlement Worksheet are as follows (the portions of the worksheet relating to taxable capital gains will be discussed below):[19]

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17 Exhibit AR-1, Tabs 9, 10 and 11, p. 2.

18 Exhibit AR-1, Tab 12.

19 *Ibid.*, third page.

Table 1

	1995	1996	1997	1998
AFS L.P., losses (gain) previously claimed				
ASF 7	$1,312,571.90	$109,449.00	($211,810.10)	($88,233.73)
AFS 9		$499,006.99	$4,081.48	($34,873.07)
AFS 11		$226,610.60	$2,025.81	($12,640.64)
…	…	…	…	
AFS L.P. losses allowed	[n/a]	[n/a]	[n/a]	($135,747.44)
Carrying charges previously claimed				
AFS 7	$28,458.00	$123,710.80	$117,666.70	$119,010.55
AFS 9		$24,437.00	$43,358.90	$41,856.62
AFS 11		$3,527.75	$16,614.76	$16,113.92
	$28,458.00	$151,675.55	$177,640.36	$176,981.09
			…	
				$41,233.65**
Total amount allowed by Appeals	[n/a]	[n/a]	[n/a]	$41,233.65

** For 1998, we will allow the net audit adjustment as a carrying charge on line 221.

In essence, the CRA recognized the gains, totalling $135,747.44,[20] that the Partnerships had allocated to Mr. Savics in 1998 and applied a portion of the carrying charges as a deduction against those gains, leaving additional carrying charges in the amount of $41,233.65, which the CRA proposed to deduct against other income reported by Mr. Savics.

[17] Also, on October 31, 2014, the CRA issued a notice of reassessment to Mr. Savics for the 1998 taxation year.[21] In addition, the CRA sent to Mr. Savics an undated Form T7W-C for 1998, that contained the following statement:

> Your income tax return for the taxation year indicated above has been re-assessed. The following is an explanation of the change(s) made….[22]

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20 In the Settlement Worksheet, the CRA, in essence, showed the gains as negative losses.

21 Exhibit AR-1, Tab 14.

22 Exhibit AR-1, Tab 13.

[18] The first entry in Form T7W-C is described as "Total Income Previously Assessed" to the right of which appears a monetary amount. The two-line statement quoted above suggests that the amount of the "Total Income Previously Assessed" was to be taken from Mr. Savics' income tax return. No evidence was placed before me to enable me to ascertain whether such was the case. However, it was the position of counsel for both Parties that the first entry in Form T7W-C did not include any portion of the aggregate gains in the amount of $135,747.44 that had been allocated to Mr. Savics by the Partnerships for 1998.

[19] The Form T7W-C then went on to set out three items as deductions. The first was described as "AFS #7, 9 and 11 Limited partnership losses allowed," to the right of which no amount has been entered (which makes sense, as each of the Partnerships allocated a gain, rather than a loss, to Mr. Savics for 1998). The second deduction is described as "Carrying Charges Allowed," to the right of which appears the amount of $41,233.65, which was the net amount calculated on the Settlement Worksheet.[23] The third to-be-deducted entry is described as "Previous Deductions Allowed," to the right of which appears an amount representing all of the other deductions that Mr. Savics had claimed on his 1998 income tax return.

[20] It is the position of Mr. Savics that the Minutes and other documents describing the Settlement provided only for the interest, carrying charges and partnership losses, but not for any of the gains, to be recognized in the implementation of the Settlement. In other words, he is of the view that he should not be required to recognize any portion of the $135,747.44 of gains that the Partnerships allocated to him for 1998 and that he reported on his 1998 income tax return, but that he is entitled to deduct the full amount of interest, carrying charges and losses (i.e., $176,981.09) against his other income for 1998. He took a similar

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[23] It is my view that, strictly speaking, the Form T7W-C is not in conformity with the Mechanism of Reassessment contemplated by the Minutes and the Waivers. In keeping with the position of the CRA that the gains allocated by the Partnerships to Mr. Savics for 1998 were to be included in his income, those gains should have been included in the first entry shown on Form T7W-C, i.e., the entry described as "Total Income Previously Assessed," particularly since the two-line statement quoted above states that the purpose of Form T7W-C was to show the changes made to Mr. Savics' 1998 income tax return. In turn, the amount shown as a deduction for carrying charges allowed should have been $135,747.44. The end result of the mechanism described in this footnote is the same as the mechanism adopted by the CRA, but, in my view, the mechanism described in this footnote would have been more in keeping with the mechanism contemplated by the Minutes and the Waivers.

position for 1997, i.e., the interest, carrying charges and losses, but not the gains, should be recognized. Accordingly, he instituted these Appeals.[24]

III. ISSUES

[21] The issues that are in dispute in the 1998 Appeal are the following:

a) Does the waiver of the right of appeal set out in each of the Waivers preclude Mr. Savics from instituting and prosecuting the 1998 Appeal?

b) May the terms of the Minutes and the Waivers be interpreted so as to preclude the Minister from including in Mr. Savics' income for 1998 the gains that were allocated to him by the Partnerships for that year?

c) If the above interpretation is correct, do the Waivers and the Minutes set out a settlement that is sufficiently principled to bind the Minister?

d) If the Minister's proposed interpretation of the Settlement embodied in the Waivers and the Minutes is correct, does the principle enunciated in the *Harris* case[25] preclude the Minister from including in Mr. Savics' income for 1998 the gains allocated to him by the Partnerships for that year?

e) Does subsection 152(9) of the *ITA* permit the Minister to assess the gains that were allocated by the Partnerships to Mr. Savics for 1998?

IV. ANALYSIS

A. Waiver of the Right of Appeal

[22] Subsection 169(2.2) of the *ITA*, which took effect as of June 23, 1995, reads as follows:

> Notwithstanding subsections [169](1) and (2), for greater certainty a taxpayer may not appeal to the Tax Court of Canada to have an assessment under this Part vacated or varied in respect of an issue for which the right of objection or appeal has been waived in writing by the taxpayer.

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[24] As indicated in paragraph 3 above, Mr. Savics has acknowledged that the 1997 Appeal should be quashed.

[25] *Louis J. Harris v The Queen*, [1964] CTC 562 (Ex), *aff'd*, [1966] SCR 489.

Even before the enactment of subsection 169(2.2) (which was enacted for greater certainty), the Supreme Court of Canada had acknowledged that a waiver of a right of appeal against a tax assessment is valid and is not contrary to public policy.[26]

[23] However, if a settlement-implementing reassessment is not in keeping with the agreement that the taxpayer and the fiscal authority have reached, a waiver of the right to appeal will not preclude the taxpayer from appealing in respect of the aspect of the reassessment that does not coincide with the settlement agreement.[27] Thus, where a waiver of the right to object or appeal is granted by a taxpayer in the context of a negotiated settlement of a tax dispute, the waiver is, in a sense, conditional on the subsequent reassessment (intended to implement the settlement) actually coinciding with the terms of the settlement.[28]

[24] The 1998 Appeal is based on the premise, advanced by Mr. Savics, that the notice of reassessment issued by the CRA to him on October 31, 2014 did not correspond with the terms of the Settlement. If I ultimately conclude that the notice of reassessment coincided with the Settlement, the Waiver will be operative. In the meantime, the Waiver does not preclude Mr. Savics from instituting the 1998 Appeal, in the hope of showing that the notice of reassessment did not coincide with the Settlement.

B. Interpretation of the Minutes and the Waivers

(1) Jurisprudence

(a) Contractual Interpretation

[25] A settlement agreement to resolve a tax dispute is to be interpreted according to contract-law principles.[29] Both Parties concur that the principles to be applied in interpreting a contract were enunciated by the Supreme Court of Canada in *Sattva Capital*.[30] Some of those principles are set out as follows:

> 46. The shift away from the historical approach [to contractual interpretation] in Canada appears to be based on two developments. The first is the adoption of

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26 *Smerchanski v MNR*, [1977] 2 SCR 23, at 31 & 35.

27 *Rainville v The Queen*, [2002] 2 CTC 2786, 2001 DTC 155, ¶20 (TCC).

28 *Cummings v The Queen*, 2009 TCC 310, ¶15 & 22.

29 *University Hill Holdings Inc. et al. v The Queen*, 2017 FCA 232, ¶20-22.

30 Appellant's Written Submissions, January 31, 2018, p. 10, ¶35-36; and Respondent's Written Submissions, January 29, 2018, p. 8, ¶29.

an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract….

47. Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding"…. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed…. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating….

48. The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement….:

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean….

50. … Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.[31]

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[31] *Sattva Capital Corporation v Creston Moly Corporation*, [2014] 2 SCR 633, 2014 SCC 53, ¶46-48 & 50. The quotation at the end of paragraph 47 of *Sattva Capital* is taken from *Reardon Smith Line Ltd. v Hansen-Tangen*, [1976] 3 All ER 570 (HL) at 574. The quotation at the end of paragraph 48 of *Sattva Capital* is taken from *Investors Compensation Scheme Ltd. v West Bromwich Building Society*, [1998] 1 All ER 98 (HL). See also *Bolton Steel Tube Co. Ltd. v The Queen*, 2014 TCC 94, ¶38-41; *Costco Wholesale Canada Ltd. v The Queen*, 2009 TCC 134, ¶28; and *Plains Midstream Canada ULC v The Queen*, 2019 FCA 57, ¶62.

The above comments indicate that, in interpreting a tax-dispute settlement agreement, a court should apply the principles of contractual interpretation to the words of the written contract, considered in light of the factual matrix (i.e., the surrounding circumstances and the setting in which the agreement was made, including the purpose of the agreement, the genesis of the settlement, and the background and context in which the parties were operating). As well, the court should be guided by reasonableness and common sense.

[26] A waiver of a right of objection or appeal is not a contract, as the waiver does not require consideration.[32] Nevertheless, similar interpretational principles apply. When interpreting a waiver, a court should "seek to ascertain the intention of the parties as expressed in that document together with any relevant circumstances for which evidence is available."[33] A technical defect does not usually impair the substance of a waiver.[34]

(b) Meaning of "Consequence"

[27] One of the questions to be considered in the 1998 Appeal is whether the 2014 Reassessment's inclusion, in Mr. Savics' income for 1998, of the gains allocated by the Partnerships to him was a "consequential adjustment," as contemplated by the Minutes and the Waivers. In *Hallbauer*, Justice Rip set out the following dictionary meanings of the word "consequence":

> *The Shorter Oxford Dictionary On Historical Principles* ... defines the word "consequence" as:
>
> > 1. A thing or circumstance which follows as an effect or result from something proceeding. 2. The action, or condition, of so following; the relation of a result to its cause or antecedent …. A logical result or inference … logical sequence….
>
> *Black's Law Dictionary* (1990 Edition) … defines the word "consequence" as

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[32] *Abdalla v The Queen*, 2017 TCC 222, ¶13-16. See also *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.*, [1994] 2 SCR 490, at 500.

[33] *Solberg v The Queen*, [1992] 2 CTC 208, 92 DTC 6448 (FCTD), ¶13. See also *Mitchell et al. v The Queen*, 2002 FCA 407, ¶37.

[34] *Solberg*, *ibid.*, ¶13; and *Mitchell*, *ibid.*, ¶37.

> [T]he result following in natural sequence from an event which is adapted to produce, or to aid in producing, such a result; the correlative of "cause"….[35]

(2) Documents

[28] In considering the factual matrix of the Settlement, the Minutes and the Waivers, I will review the relevant documents that were put into evidence, and will then turn to the oral evidence presented at the hearing.

(a) CRA Correspondence

[29] In the course of auditing the Partnerships and their partners, the CRA came to the conclusion that the partners were not operating a business with a view to profit, such that the Partnerships were not actually partnerships (within the legal meaning of the word).[36] Therefore, the CRA proposed to disallow the deduction by Mr. Savics of the limited partnership losses that had been incurred by the Partnerships and to disallow the loan arrangement fees and carrying charges that he had incurred.[37]

[30] The impact of the CRA's proposal on Mr. Savics was quantified by the CRA in a letter that it sent to him on February 28, 2000 and that contained the following table (which has been slightly adjusted for purposes of form and brevity):[38]

Table 2

	1995	1996	1997	1998
1. Disallow AFS 7 claimed	$1,312,571.90	$109,449.00	($211,810.10)	($88,233.73)
2. Disallow AFS 9 claimed	-	499,006.99	4,081.48	(34,873.07)
3. Disallow	-	226,610.60	2,025.81	(12,640.64)

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35 *Hallbauer v The Queen*, [1997] 1CTC 2428 (TCC), at 2445. For additional context, see footnote 8 above.

36 Exhibit AR-1, Tab 1, p. 3, section (1); this document is the proposal letter, dated April 15, 1999, sent to Mr. Savics in respect of AFS 7. I assume that similar proposal letters were sent to Mr. Savics in respect of AFS 9 and AFS 11.

37 Exhibit AR-1, Tab 3, which is a letter dated February 15, 2002 from the CRA to Mr. Savics. This letter advised Mr. Savics that the CRA continued to be of the view that "no partnerships had been established" and that the CRA would proceed to issue notices of reassessment as indicated in previous correspondence.

38 Exhibit AR-1, Tab 2.

4.	AFS 11 claimed Interest exp. and Loan Arranging Fee claimed in AFS 7	28,458.00	123,710.80	117,666.70	119,010.55
5.	Interest exp. and Loan Arranging Fee claimed in AFS 9	-	24,437.00	43,358.90	41,856.62
6.	Interest exp. and Loan Arranging Fee claimed in AFS 11	-	3,527.75	16,614.76	16,113.92
	Adjustment to Taxable Income	$1,341,029.90	$986,742.14	($28,062.45)	$41,233.65

The amounts set out in parentheses in items 1, 2 and 3 in the columns for 1997 and 1998 in the above table show the gains allocated by the Partnerships to Mr. Savics,[39] whereas the other amounts shown in items 1, 2 and 3 for 1995, 1996 and 1997 show the losses allocated by the Partnerships to him. Thus, the CRA was proposing not only to disallow the losses allocated by the Partnerships in 1995, 1996 and 1997, but also to disregard the gains allocated by the Partnerships in 1997 and 1998.

(b) Notice of Objection

[31] On August 9, 2002, Mr. Savics (or an authorized representative acting on his behalf) filed a notice of objection (Form T400A) with the CRA in respect of the 1998 taxation year.[40] Attached to the notice of objection were three statements of facts and reasons, pertaining to AFS 7, AFS 9 and AFS 11 respectively.[41] In the reasons portion of each of the three statements is the following sentence:

> The Partnership [i.e., AFS 7, AFS 9 or AFS 11, as the case may be] is registered as a limited partnership under the *Limited Partnerships Act (Ontario)* and otherwise meets the common law requirements of a partnership.[42]

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39 As was done in the Settlement Worksheet, in the letter of February 28, 2000 the CRA, in essence, showed the gains as negative losses.

40 Exhibit AR-1, Tab 4.

41 *Ibid.* The statement of facts and reasons in respect of AFS 7 was actually entitled "Reasons of Objection."

42 *Ibid.*, ¶16 in the statements for AFS 7 and AFS 9, and ¶17 in the statement for AFS 11.

Thus, Mr. Savics disagreed with the CRA's position that legally there were no partnerships, and instead asserted that the Partnerships met the common-law requirements of a partnership and, in essence, should be recognized as such.

(c) Minutes of Settlement

[32] As noted above, settlement discussions ultimately ensued, resulting in the Minutes, which were signed in February 2012. Portions of the Minutes have been summarized or quoted above. A few additional portions of the Minutes merit consideration here:

a) Recital F indicated that AFS 7, AFS 9 and AFS 11 were limited partnerships.

b) Recital H impliedly acknowledged that AFS 7, AFS 9 and AFS 11 were in existence until they were dissolved on September 29, 2006, December 9, 2006 and December 29, 2006 respectively.

c) Recital T indicated that the Crown and the CRA had proposed that the appeal of the Subject Partner and the appeals or objections of the other Qualifying Partners were to be settled on a similar basis, provided that the Settlement was approved by Qualifying Partners collectively owning at least 75% of the outstanding Units of all AFS partnerships (subject to certain exclusions).[43]

d) Paragraphs (a), (b) and (c) of each of section 1 (which deals with AFS 11), section 3 (which deals with AFS 7) and section 5 (which deals with AFS 9) contained the phrase:

> … all deductions claimed by the Qualifying Partners … will be allowed….

Paragraphs (a) and (b) of the above-mentioned sections each went on to specify an exception limiting the extent to which the claimed deductions were to be allowed. It is apparent, in reading the above-referenced provisions in the Minutes, that relevant factors in calculating the impact of the Settlement were the losses allocated by the particular Partnership to its partners and the deductions claimed by the Qualifying Partners. In other words, the amounts shown on the income tax returns of the Qualifying

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[43] See paragraph 7 above.

Partners were relevant considerations in determining the impact of the Settlement.

e) Paragraphs 1(h), 3(g) and 5(h) of the Minutes provided that (subject to an exception that is not relevant here) no further reassessments (other than reassessments to reflect the adjustments contemplated by the Minutes and any consequential adjustments) were to be made in respect of AFS 11, AFS 7 and AFS 9 respectively. Each of those provisions went on to define the term "consequential adjustments" as including the recognition of any capital gains or capital losses arising from the disposition of the Units.[44] This implies that the Settlement was premised on the continuing existence of the Partnerships after 1998, such that the various partners thereof could dispose of their Units. The reference to capital gains or capital losses arising in respect of those dispositions implied that the quantification of the applicable proceeds of disposition and adjusted cost base ("ACB") would be required.

f) Paragraphs 1(e), 3(d) and 5(e) of the Minutes provided that the adjustments contemplated by paragraphs 1(a) and (b), 3(a) and (b) and 5(a) and (b) respectively (i.e., the partial allowance of previously denied losses, interest and carrying charges) were to be reflected in the computation of the final ACB of the applicable Units immediately before the dissolution of the particular Partnership or the disposition of the applicable Units, as the case may be. The recognition of those losses would have decreased the various ACBs.[45] The Minutes were silent as to whether the gains allocated by the Partnerships in 1997 and 1998 were to be ignored or included in computing the ACBs.[46] However, it would be inconsistent to deduct the losses in computing the ACBs, but disregard the gains in computing those same ACBs.

(d) *Memoranda from the Firm*

[33] The memoranda sent on or about February 16, 2012 by the Firm to the president of the General Partner of each of the Partnerships have been briefly

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44 To be precise, with respect to AFS 7, paragraph 3(g) of the Minutes referred to the recognition of any capital gains or capital losses arising from the actual or deemed disposition of limited partnership units of AFS 7 or Alliance 6 described in paragraphs 3(e) and 3(f) of the Minutes.

45 See subparagraph 53(2)(*c*)(i) of the *ITA*.

46 See subparagraph 53(1)(*e*)(i) of the *ITA*.

discussed above. A few additional comments in respect of those memoranda are helpful:

a) After the brief description of the Settlement Offer (as set out in paragraph 13 above), the memorandum in respect of AFS 7 went on to state that the net effect of the Settlement Offer was to reduce by 21.8% the deductible operating expenses incurred by Alliance 6 in 1996 and 1997 and subsequently allocated to AFS 7. The memorandum then stated, "All other expenses will be allowed as claimed."[47] The use of the phrase "as claimed" suggests that the deductions claimed by the various partners on their respective income tax returns were to be the starting point in determining the impact of the Settlement. In any event, it is unlikely that the phrase "as claimed" referred to the notices of reassessment issued to Mr. Savics on July 5, 2002, embodying the 2002 Reassessments, which disregarded the existence of the Partnerships, disallowed the deduction of the partnership losses allocated to Mr. Savics, disallowed the deduction of the interest expenses and carrying charges incurred by him, and removed from his income the gains that had been allocated to him for 1997 and 1998.

b) In discussing the impact of the Settlement Offer on the various Limited Partners of AFS 7, the Firm noted that, although the allocated losses would be reduced, by reason of the Settlement, from the amounts originally allocated, there would be a corresponding reduction in the amount of the capital gain allocated to the Limited Partners (presumably because the ACB of the Units of AFS 7 would have been correspondingly increased) when AFS 7 was wound up in 2005.[48] The table on page 3 of the memorandum in respect of AFS 7, illustrating the impact of the Settlement Offer, indicated that, for a typical Ontario investor who acquired a standard block of 155 Units of AFS 7, the tax payable on the capital gain realized on the dissolution of AFS 7 in 2005, would, if the Settlement Offer were to be accepted, be $11,597, whereas, based on the amounts allocated on Form T5013 issued by AFS 7 for each of its 1995 to 1999 fiscal years, the tax on that capital gain would be $24,797.[49] If the Settlement had been premised on the assumption or understanding that the gains removed from the income of the Limited

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47 Exhibit AR-1, Tab 6, p. 2.

48 Exhibit AR-1, Tab 6, p. 2. See subparagraph 32.f) and footnote 45 above.

49 Exhibit AR-1, Tab 6, p. 3.

Partners by the 2002 Reassessments were not to be restored, one would have expected the Firm to have mentioned this, as the impact would have been to increase the capital gain on the winding-up of AFS 7 in 2005.[50]

c) In comparing the net tax savings to be realized under the Settlement Offer to the net tax savings originally anticipated when the Limited Partners invested in AFS 7, the Firm referred to the amount of tax savings contemplated in the original term sheets pertaining to the offering of Units of AFS 7 and to the amounts allocated in the T5013s issued by AFS 7 for its 1995 to 1999 fiscal years. Those term sheets and T5013s would have contemplated or included (as the case may be) the gains realized by AFS 7 and allocated by AFS 7 to the Limited Partners for 1997 and 1998. If the Settlement Offer was premised on those gains being disregarded, one would have expected the Firm to have made mention thereof.

(e) Waivers

[34] Paragraph 2 of each of the Waivers signed by Mr. Savics stated that he agreed to the CRA reassessing the particular taxation year in which he disposed of his Units of AFS 7, AFS 9 and AFS 11, either on the transfer of the particular Units (in the case of AFS 7) or on the dissolution of the particular Partnership (in the case of AFS 9 and AFS 11), so as to include in his taxable income for that year a taxable capital gain in the amount of $196.51 per Unit of AFS 7, $183.05 per Unit of AFS 9 and $187.14 per Unit of AFS 11.

[35] One of the factors that would have gone into the computation of the taxable capital gains agreed to by Mr. Savics in the Waivers was the ACB to him of the respective Units. If the Settlement was premised on the assumption or understanding that the gains allocated by the Partnerships were to be included in his income, the ACB would have been greater than if the assumption or understanding was that those gains were not to be so included.[51] Neither Party produced any evidence or made any submission as to whether the amount of the taxable capital gain specified in each Waiver was calculated by reference to an ACB that included, or did not include, the gains allocated by the Partnerships to Mr. Savics. If the computation of those taxable capital gains was premised on the inclusion of the allocated gains in computing the ACBs to him of his Units, it

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50 See subparagraph 32.f) and footnote 46 above.

51 See subparagraph 53(1)(*e*)(i) of the *ITA*.

would be inconsistent for him to take the position that the Settlement did not contemplate the inclusion of those gains in his income.

[36] While I do not know for certain whether the respective amounts of the taxable capital gains agreed to by Mr. Savics in the Waivers were computed by reference to an ACB that included the allocated gains or not, it should be noted that the amounts of the taxable capital gains to which Mr. Savics agreed correspond with those set out by the CRA in the Settlement Worksheet. The applicable portion of the Settlement Worksheet is as follows:[52]

Table 3

			2005	2006
Taxable capital gain to be reported:				
AFS 7	196.51	* 1,500 Units	$304,590.50	
AFS 9	183.05	* 566 Units		$103,606.30
AFS 11	187.14	* 250 Units		$46,785.00

Thus, the per-Unit taxable-capital-gain amounts shown in Table 3 correspond with the amounts agreed to in the Waivers, as set out in paragraph 34 above.

(3) Other Evidence

[37] In an affidavit sworn by Mr. Savics on February 27, 2017, for the purpose of providing answers to written examination-for-discovery questions, the following was stated:

> *… Do you admit or deny that the gains in the amounts set out in question 26 [submitted on October 28, 2016] that you reported in your T1 1998 tax return was [sic] incurred or realized by you in respect of AFS #7, AFS #9 and AFS #11? If denied, please indicate on what you would assert that the reporting of those amounts on your part was incorrect.*

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[52] Exhibit AR-1, Tab 12, third page. To be consistent with the terminology used in these Reasons, slight modifications (which do not affect the substance) have been made to the portion of the Settlement Worksheet reproduced in Table 3.

> I admit that I realized gains in the amount of $88,234, $34,873 and $12,641 in respect of AFS #7, AFS #9 and AFS #11 in my 1998 taxation year.[53]

The question and answer quoted above were, at the hearing of these Appeals, read into evidence by the Crown as part of its case.

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[53] Paragraph 2 of the affidavit entitled "Answers on Written Examination For Discovery Questions," sworn on February 27, 2017, and attached to a letter dated February 27, 2017 from counsel for Mr. Savics to counsel for the Crown.

[38] At the hearing of these Appeals, Mr. Savics' testimony was relatively brief. During his direct examination, his testimony included the following:

> Q … And in your 1995 through 1998 transaction [*sic*] years you reported various amounts of interest [*sic*] loss,[54] interest expense, and carrying charges in respect of the units you held in AFS 7, AFS 9 and AFS 11, correct?
>
> A Yes, that's correct.[55]

[39] On cross-examination, Mr. Savics' testimony included the following:

> Q … So you testified earlier this morning that in 1995, 1998, you reported the expense and carrying charges and losses in respect of the AFS partnerships, correct?
>
> A Yes.
>
> Q But you also reported the gains in those years related to the AFS partnerships?
>
> A Yes. I assume that was all part of the filing.
>
> Q Yes, you recall admitting that you had reported those gains?
>
> A Yes….[56]
>
> Q … so just to clarify the factual situation. '95 to '98 you reported various gains and losses from the partnerships, correct?
>
> A Yes.
>
> Q In 2002 the Canada Revenue Agency reassessed you, to deny the carrying charges, losses from the partnerships, but also to delete the income from the partnership, that's correct?
>
> A Yes, I assume they did.
>
> Q Ok, so that's — the document at tab 4 [of Exhibit AR-1] is the Notice of Objection that was filed in response to this 2002 reassessment? You recognize that?

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54 I think that the word "transaction" should have been "taxation" and the phrase "interest loss" should have been "partnership loss."

55 *Transcript*, January 31, 2018, p. 3, lines 8-13.

56 *Ibid.*, p. 10, lines 4-15.

> A Yes.
>
> Q Do you agree with me that the basis for the objection was basically, if you look at the end, paragraph 16, 19 — I'll let you look at them. But basically the reasons for the objection was that these were valid partnerships that were operating a business for profit.
>
> A Yes, that was the intent when the partnerships were offered.
>
> Q That was the basis for the objection for your 2002 reassessment, that is your understanding of it?
>
> A Well, the objection was whether these were reasonable businesses, is that correct?
>
> Q Yes, there was that aspect as well.
>
> A Yes, these were the listed objections.
>
> Q So, your position, or the position of your accountants was that these were valid partnerships operating a valid business?
>
> A Yes, I think the whole premise for the original creation of this was that they were — the Government of Canada was encouraging investment in film and in technology under this basis.[57]

Thus, Mr. Savics has admitted that in 1998 the Partnerships allocated income to him, specifically $88,234 by AFS 7, $34,873 by AFS 9 and $12,641 by AFS 11, and that he reported these amounts on his 1998 income tax return. He has also acknowledged that, in objecting to the 2002 Reassessments, it was his position that AFS 7, AFS 9 and AFS 11 were valid partnerships operating valid businesses for profit.

(4) Application

[40] Having considered the factual matrix (i.e., the surrounding circumstances, setting, purpose, background and context) of which I am aware,[58] the following points stand out:

a) Before 1998, Mr. Savics acquired Units of the Partnerships.

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57 *Ibid.*, p. 11, line 28 to p. 13, line 8.

58 See paragraph 25 above.

b) The Partnerships carried on business and, at the end of each fiscal period, allocated loses or gains (i.e., income), as the case may be, to their respective partners.

c) In 1998, AFS 7 allocated $88,233.73 of gains to Mr. Savics, AFS 9 allocated $34,873.07 of gains to him, and AFS 11 allocated $12,640.64 of gains to him, for a total of $135,747.44.

d) In preparing and filing his 1998 income tax return, Mr. Savics reported the gains set out in the preceding subparagraph.

e) The 2002 Reassessments were premised on the CRA's view that the Partnerships had not been established and were not partnerships for legal purposes, such that neither losses nor gains could be allocated by the Partnerships to Mr. Savics.

f) Although the CRA initially took the position that the Partnerships were not partnerships, as defined by the law of partnerships, the Settlement was based on the premise that, for the purposes of the law of partnerships, the Partnerships had been validly created and continued to exist until the time of their respective dissolutions. In other words, the CRA resiled from its position in the 2002 Reassessments, and accepted the position (concerning the legal nature of the Partnerships) taken by Mr. Savics in his notices of objection.

g) Mr. Savics has not shown that, for the purpose of computing the taxable capital gains, in the amounts to which he agreed, realized on the disposition of his Units of the Partnerships, the gains allocated in 1998 by the Partnerships to him were not taken into consideration in computing the ACBs to him of his respective Units.

h) It would be inconsistent for Mr. Savics to rely on the existence of the Partnerships for the purposes of his notices of objection and the deduction of the allocated losses and the various expenses incurred by him in respect of the Partnerships and possibly for the purpose of computing the ACBs to him of the Units (although there was no definitive evidence in this regard), but not to accept the existence of the Partnerships for the purpose of including the allocated gains in computing his income for 1998.

i) If it is accepted that the allocated gains should be recognized for the purpose of computing the ACBs to Mr. Savics of his Units, it follows that those gains should also be recognized for the purpose of computing his income for 1998.

[41] Given the factual matrix of the Settlement, as set out above (particularly the circumstances summarized in the preceding paragraph), I do not accept the interpretation that Mr. Savics is endeavouring to put on the Minutes and the Waivers. It is my view that the Minutes and the Waivers do not preclude the Minister from including in Mr. Savics' income for 1998 the gains that were allocated to him by the Partnerships for that year.

[42] To summarize, the Settlement is premised on the recognition of the existence of the Partnerships, which represents a retreat from the CRA's original reassessing position, as set out in the 2002 Reassessments. A logical result or inference (i.e., a consequence)[59] of this premise is that the losses and gains allocated by the Partnerships are also to be recognized. In other words, recognizing the gains was a result or consequence of the recognition of the existence of the Partnerships, such that the inclusion of the gains in computing Mr. Savics' income for 1998 was, for the purposes of paragraphs 1(h), 3(g) and 5(h) of the Minutes and subparagraph (v) on page 2 of each Waiver, a consequential adjustment. It would be inconsistent to recognize the existence of the Partnerships and to deduct the losses allocated by the Partnerships, but not to include the gains allocated by the Partnerships. In other words, including the gains in income was consistent with the recognition of the existence of the Partnerships and the deduction of the losses. Therefore, for the purposes of section 12 of the Minutes and subparagraph (v) on page 2 of each Waiver, the 2014 Reassessment's inclusion, in computing Mr. Savics' income for 1998, of the gains allocated to him by the Partnerships for that year does not create a result that is inconsistent with the express terms of the Minutes or with any of the other terms of the Waivers. Furthermore, the inclusion of the gains accords with common sense and is reasonable.[60]

C. Principled Settlement

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[59] See footnote 8 and paragraph 27 above.

[60] See paragraph 25 above.

[43] Mr. Savics acknowledges that the Minister's capacity to enter into a binding settlement agreement to resolve a tax dispute is limited by the principle that the agreement, properly interpreted, cannot be contrary to the *ITA*.[61] The requirement that tax settlements be principled was considered in *Galway*, where the Federal Court – Appeal Division (the "FCAD") stated:

> 4. … It is no part of the Court's function, on an application for consent judgment, to examine the issues, either of fact or of law, involved in the appeal except in so far as may be necessary for the Court to satisfy itself that the judgment sought is within the jurisdiction of the Court and is one that can legally be granted….
>
> 7. … 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 reassessment, it must be for reassessment on the facts in accordance with the law and not to implement a compromise settlement.[62]

Thus, *Galway* precludes a taxpayer and the Crown from arriving at a settlement that has no basis in the *ITA*.[63]

[44] In *CIBC World Markets*, the Federal Court of Appeal (the "FCA") stated:

> 20. … certain legal questions fall for consideration. 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.
>
> 22. This Court is bound by its decision in *Galway*…. In that decision, Jackett C.J., writing for the unanimous Court, stated … that "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." In his view, "it follows that he cannot assess for some amount designed to implement a compromise settlement."

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61 Appellant's Written Submissions, *supra* note 30, ¶65. See also *University Hill*, *supra* note 29, ¶67.

62 *Galway v MNR*, [1974] CTC 454, 74 DTC 6355 (FCAD), ¶ 4 & 7.

63 *University Hill*, *supra* note 29, ¶67.

> The Minister is obligated to assess "on the facts in accordance with the law and not to implement a compromise settlement."...
>
> 24. … But the Minister's power to agree to facts is limited by the *Galway* principle — the Minister cannot agree to an assessment that is indefensible on the facts and the law.[64]

[45] Given that the Partnerships, which validly existed, allocated in 1998 to Mr. Savics the above-mentioned gains, which he reported on his 1998 income tax return, a settlement that did not recognize the inclusion of those gains in his income for 1998 would be indefensible on the facts,[65] would be divorced from the facts,[66] and would have no bearing to reality.[67] Accordingly, I conclude that the interpretation of the Minutes and the Waivers suggested by Mr. Savics would not result in a principled settlement.

D. *Harris* Principle

[46] Mr. Savics submits that the principle enunciated in the *Harris* case[68] precludes the Minister from including in Mr. Savics' income for 1998 the gains that were allocated to him by the Partnerships for that year. This calls for a careful analysis of *Harris*.

[47] To summarize the facts in *Harris*, in mid-1960 Douglas Leaseholds Limited ("DLL") leased certain land and a service station to B.P. Canada Limited ("BP") for rent of $3,900 per year. Pursuant to a lease-option agreement dated October 1, 1960, DLL leased the same property to Dr. Harris for a term of 200 years, with rent at the rate of $3,100 per year, and with an option to purchase the property at the expiration of the term for a price of $19,500. Consequently, Dr. Harris became BP's landlord. During the period October 1, 1960 to December 31, 1960, BP paid rent of $975 to Dr. Harris, and Dr. Harris paid rent of $775.02 to DLL. Subsection 18(1) of the *ITA*, as it read in 1960, provided that a lease-option agreement was deemed to be an agreement for the sale of property and that any rent payable under the agreement was deemed to be on account of the price of the property, and not for the use of the property. Accordingly, the lessee-optionee under such an agreement was entitled to deduct capital cost allowance ("CCA") computed by

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64 *CIBC World Markets Inc. v The Queen*, 2012 FCA 3, ¶20-22 & 24. See also *The Queen v George William Harris*, [2000] 3 CTC 220, 2000 DTC 6373 (FCAD), ¶37.

65 *CIBC World Markets*, *supra* note 64, ¶24.

66 *Bolton Steel Tube*, *supra* note 31, ¶19; and *University Hill*, *supra* note 29, ¶72.

67 *Ibid.*, ¶70.

68 *Harris*, *supra* note 25.

reference to "a capital cost equal to the price fixed by the contract…." Taking the position that all of the rent payable over the 200-year term of the lease formed part of the cost to him of the property, Dr. Harris calculated "the price fixed by the contract" as being $639,516 and deducted CCA in the amount of $30,425.80 for 1960. When the Minister reassessed Dr. Harris, the Minister took the position that the "price fixed by the contract" was only $19,500. The Minister disallowed the deduction of the CCA that had been claimed, but did allow a deduction of rent in the amount of $775.02.

[48] Justice Thurlow held that, on his interpretation of former subsection 18(1) of the ITA, the capital cost of the property was $19,500 (and not $639,516). As the evidence indicated that the value of the land was $9,000, $10,500 (i.e., $19,500 − $9,000) was to be allocated to the depreciable property. Given that the rate of CCA was 5%, the allowable CCA was only $525, which was less than the rent (i.e., $775.02) that the Minister had allowed in the reassessment.

[49] Counsel for the Minister requested leave to amend the reply to seek disallowance of the rent of $775.02, if the Court were to allow Dr. Harris to deduct CCA in the amount of $525. The Minister also submitted that the reassessment should be referred back to the Minister to allow the proper deduction of CCA in the amount of $525 and to disallow the deduction of the rent in the amount of $775.02. In declining to accede to the request of counsel for the Minister, Justice Thurlow stated:

> I do not think, however, that this is the correct way to deal with the matter. On a taxpayer's appeal to the Court the matter for determination is basically whether the assessment is too high. This may depend on what deductions are allowable in computing income and what are not but as I see it the determination of these questions is involved only for the purpose of reaching a conclusion on the basic question. No appeal to this Court from the assessment is given by the statute to the Minister and since in the circumstances of this case the disallowance of the $775.02 while allowing $525 would result in an increase in the assessment[,] the effect of referring the matter back to the Minister for that purpose would be to increase the assessment and thus in substance allow an appeal by him to this Court. The application for leave to amend is therefore refused.[69]

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[69] *Ibid.* (Ex), p. 571. See *Chan v The Queen*, [2000] 1 CTC 2022, 99 DTC 1215 (TCC), ¶18; *aff'd*, 2001 FCA 302, ¶17, which confirmed that a purported appeal by the Minister from his or her own assessment occurs "only where the Minister is seeking to increase the amount of tax assessed." See also *Vineland Quarries and Crushed Stone Ltd. v MNR*, 70 DTC 6043 (Ex), p. 6045-6046.

[50] In *Harris*, counsel for the Minister suggested that the amount of the reassessment that was before Court (and not some prior reassessment) was too low, and submitted that the Minister should be given an opportunity by the Court to reconsider the reassessment and to issue an increased reassessment. That is not the situation facing Mr. Savics. Here, the Minister is not suggesting that the 2014 Reassessment (which is the reassessment before the Court) was too low.

[51] The Supreme Court of Canada (the "SCC") upheld the decision of the Exchequer Court in *Harris* and agreed with Justice Thurlow, but on slightly different grounds, that the reassessment should not be referred back to the Minister. Justice Cartwright determined that the 200-year term of the lease-option agreement offended the rule against perpetuities, with the result that the option was void, such that former subsection 18(1) of the *ITA* had no application, with the further result that there was no deemed acquisition of the property, meaning that rent, rather than CCA, was the appropriate deduction. Therefore, the question of whether the reassessment could be referred back to the Minister, for reassessment of a greater amount of tax, did not need to be considered by Justice Cartwright.[70]

[52] Counsel for Mr. Savics referred me to the *Petro-Canada* case,[71] which dealt with the renunciation of Canadian exploration expense ("CEE") by two joint exploration corporations to Petro-Canada. Petro-Canada and other parties to the transactions, whereby certain seismic data were acquired (either by shooting seismic or by purchasing seismic data), had taken the position that the fair market value of the seismic data was $46,751,752. In reassessing Petro-Canada, the Minister assumed that the fair market value of the seismic data was $8,884,497. At the trial of Petro-Canada's tax appeal, the trial judge rejected the expert evidence called by both parties and came to his own conclusion that the fair market value of the seismic data was $4,759,464, such that the deduction allowed by the Minister (i.e., $8,884,497) was more than $4,000,000 greater than it should have been (based on the value determined by the trial judge). However, the Crown did not argue in the Tax Court of Canada (the "TCC") that Petro-Canada should be reassessed to disallow the $8,884,497 deduction originally allowed by the Minister, as the Crown acknowledged that, by reason of *Harris*, it was not permitted to appeal the reassessment.

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70 *Ibid.* (SCC), p. 497-498 & 504-505, ¶22-23, 44 & 47.

71 *Petro-Canada v The Queen*, 2004 FCA 158.

[53] A secondary issue in the appeal before the TCC related to certain scientific research and experimental development ("SRED") expenses totalling approximately $700,000 that had been incurred by Petro-Canada but disallowed by the Minister. Before the trial began, the Crown acknowledged that the SRED deduction should have been allowed. Accordingly, the parties signed a consent to judgment allowing the $700,000 deduction and presented it to the trial judge at the commencement of the trial. The trial judge, having concluded that the Minister had allowed Petro-Canada to deduct CEE in the amount of $8,884,497, when the appropriate amount was only $4,759,464, declined to give effect to the consent to judgment, reasoning that Petro-Canada had already been allowed a deduction greater than that to which it was entitled.

[54] The FCA upheld the decision of the trial judge insofar as the fair market value of the seismic data and the renunciation of CEE were concerned, but reversed the decision of the trial judge in respect of the $700,000 SRED deduction. Concerning this point, the Court stated:

> 68. The Judge was correct when he concluded that Petro-Canada had been allowed a deduction that exceeded its entitlement…. The Judge was precluded by *Harris* from requiring the Minister to reduce the deduction because, in effect, that would allow the Crown to appeal the assessment.
>
> 69. However, the Judge refused to require the Minister to give effect to the consent judgment. Refusing Petro-Canada's rightful claim to the deduction for scientific research and experimental development had the same effect as an order allowing that claim but reducing Petro-Canada's seismic expense deduction by the same amount. It is as though the Judge had allowed, in part, the Crown's appeal of the seismic data deduction. The Judge was doing indirectly what he could not have done directly. In my view, the Judge erred in failing to give effect to the consent judgment.[72]

[55] Like the *Harris* case, the *Petro-Canada* case dealt with a situation where, in the course of a trial, it was determined that the amount assessed in the reassessment that was the subject of that trial was too low. In each case, the Court held that the Minister was precluded from reconsidering the matter and issuing a further reassessment so as to increase the amount of the tax. As noted above, that is not the situation concerning Mr. Savics, who has appealed in respect of the 2014 Reassessment for 1998. However, the Crown is not arguing that the amount of tax

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[72] *Ibid.*, ¶68-69. For additional comments by the FCA in *Petro-Canada* in respect of the *Harris* principle, see ¶24, 32 and 65.

assessed in the 2014 Reassessment was too low, nor is the Minister seeking to increase the amount of tax assessed in the 2014 Reassessment.

[56] Counsel for Mr. Savics also referred me to the *Last* decision,[73] in which the FCA discussed the *Harris* and *Petro-Canada* decisions. In *Last*, the CRA assessed Mr. Last on the assumption that in 2002 he had realized capital gains in the amount of $601,135.38, arising on the disposition of shares of a US corporation. At the trial, Mr. Last, who did not file his 2002 income tax return until after he had been assessed, took the position that the gains realized on the share dispositions were on income account, and that various purported expenses in the amount of $483,721 were deductible, resulting in a net profit of $117,414. The trial judge concurred with Mr. Last's submission that the trading gains were business income, but held that the purported expenses were loans and were not deductible. The Crown submitted that the Court should order the Minister to reassess income in the amount of $601,135 on the basis that the gains were ordinary income (and not capital gains), provided that the resultant reassessment would not increase the overall tax above that which had already been assessed for 2002. The trial judge declined to do so, on the basis that it would not be appropriate to require a reassessment that changes the character of the gains from capital to income after the limitation period in subsections 152(4) and (4.01) of the *ITA*.[74]

[57] The Crown appealed and Mr. Last cross-appealed. The FCA dismissed both the appeal and the cross-appeal. The FCA's comments in respect of *Harris* included the following:

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[73] *Last v The Queen*, 2012 TCC 352; *aff'd*, 2014 FCA 129.

[74] *Last* (TCC), *ibid.*, ¶3-4, 12, 37, 46 and 48-51.

> 23. *Harris* is authority for the proposition that on appeal from an assessment, the question to be answered is whether the Minister's assessment is higher than it should be. However, *Harris* is also authority for the proposition that a taxpayer's appeal cannot result in an increased assessment. This is because the Act does not give any right of appeal to the Minister and any increase to an assessment would in effect allow the Minister to appeal from her own assessment. This principle is to be applied to each source of income.
>
> 24. This principle was applied by this Court in *Petro-Canada*….[75]

[58] The *Last* case does not assist Mr. Savics, as there has been no suggestion, in the context of Mr. Savics' Appeal from the 2014 Reassessment, that the 2014 Reassessment should be referred back to the Minister for reassessment of an increased amount of tax.

[59] Accordingly, it is my conclusion that the principle enunciated in the *Harris* case is not applicable to the 2014 Reassessment, and, therefore, does not preclude the Minister from including in Mr. Savics' income for 1998 the gains allocated to him by the Partnerships for that year (which, as noted above, Mr. Savics realized and reported on his 1998 income tax return).

E. Subsection 152(9)

[60] Subsection 152(9) of the *ITA* provides that the Minister may, after the normal reassessment period, advance an alternative basis or argument in support of the amount determined on assessment to be payable under the *ITA* (subject to an evidentiary-related exception, which is not applicable here).[76]

[61] Mr. Savics submits that the Minister may not use subsection 152(9) of the *ITA* to reassess outside the time limitations in subsection 152(4) of the *ITA* or to collect tax exceeding the amount in the assessment under appeal,[77] nor may the

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75 *Last* (FCA), *ibid.*, ¶23-24.

76 Subsection 152(9) was added to the *ITA* by the 1998 Budget bill, SC 1999, c. 22, applicable to appeals disposed of after June 17, 1999. For a discussion of subsection 152(9) of the *ITA*, in the context of the rule that precludes the Minister from appealing from his or her own assessment, see *Chan* (TCC), *supra* note 69, ¶18. The TCC noted that the *ITA*, including subsection 152(9), does not permit the Minister to appeal from his or her own assessment.

77 Appellant's Written Submissions, *supra* note 30, ¶84.

Minister attempt to rely on subsection 152(9) to issue a fresh reassessment outside the normal reassessment period.[78]

[62] While the Crown's Amended Reply, under the heading "Statutory Provisions Relied On," does indicate that the Deputy Attorney General of Canada is relying on, *inter alia*, section 152 of the *ITA*, there is nothing in the Amended Reply to suggest that she is relying on subsection 152(9) specifically. Similarly, there is nothing in the Respondent's Written Submissions indicating that the Crown's case depends on subsection 152(9).

[63] I accept the comments made by counsel for Mr. Savics, as summarized and cited above. However, I do not think that those comments assist Mr. Savics, as it is my understanding that the Minister, in issuing the 2014 Reassessments, did not use or rely on subsection 152(9).

V. CONCLUSION

[64] As requested by the Crown and as acknowledged by Mr. Savics, the 1997 Appeal is quashed, without costs.

[65] Given that I have found that the Minutes and the Waivers do not preclude the Minister from including in Mr. Savics' income for 1998 the gains that were allocated to him by the Partnerships for that year, and given that I have found that the inclusion, in computing Mr. Savics' income, of those gains was a consequential adjustment that was not inconsistent with the Minutes and the Waivers, it follows that the waiver of the right of appeal set out in each of the Waivers is operative, so as to preclude Mr. Savics from pursuing the 1998 Appeal to a successful conclusion. Thus, in accordance with this finding and the above Reasons, the 1998 Appeal is dismissed, with costs.

[66] As indicated in the preceding paragraph, costs in respect of the 1998 Appeal (but not the 1997 Appeal) are awarded to the Crown. The Parties shall have 30 days from the date of the Judgment in respect of these Appeals to reach an agreement on costs and to so advise the Court, failing which the Crown shall have a further 30 days to file written submissions on costs, and Mr. Savics shall have yet a further 30 days to file a written response. Any such submissions are to be limited to five pages in length. If, within the applicable time limits, the Parties do not advise the Court that they have reached an agreement and no submissions are

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[78] *Ibid.*, ¶86.

received from the Parties, costs shall be awarded to the Crown in accordance with the Tariff.

Signed at Ottawa, Canada, this 2nd day of April 2019.

"Don R. Sommerfeldt"

Sommerfeldt J.

CITATION:	2019 TCC 71
COURT FILE NOS.:	2015-3387(IT)G, 2015-5474(IT)G
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