Docket: 2014-3997(IT)G

BETWEEN:

R & S INDUSTRIES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard March 30, 2017 in Edmonton, Alberta

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:	Darryl R. Antel
Counsel for the Respondent:	Donna Tomljanovic

ORDER

The motion is denied. Costs of the motion shall be in the cause.

The Respondent shall file a reply on or before June 30, 2017.

Signed at Ottawa, Canada, this 5th day of May 2017.

"David E. Graham"

Graham J.

Citation: 2017 TCC 75
Date: 20170505
Docket: 2014-3997(IT)G

BETWEEN:

R & S INDUSTRIES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Graham J.

[1] The Respondent has brought a motion to quash the appeal of R & S Industries Inc. on the basis that the Court does not have the jurisdiction to hear the appeal.

[2] In 2005, R & S transferred its business to a limited partnership called Big Eagle Limited Partnership. The parties elected to have the rollover provisions in subsection 97(2) of the *Income Tax Act* apply to the transfer. R & S filed a T2059 election with its return. The Minister assessed R & S as filed.

[3] The Minister subsequently became aware that the tax consequences of the elected amounts on the T2059 election were different than those reported by R & S in its tax return. Accordingly, the Minister reassessed R & S to include substantial amounts in its income.

[4] The primary issue in this motion is whether the Court has jurisdiction to hear the appeal.

[5] There are several components to a T2059 election form. One component is the basic factual information about the parties, the transaction and the property transferred. There is no dispute about this component of the T2059 election.

[6] A second component of the T2059 election is the parties' election of an "agreed amount" in respect of each property transferred. There is no dispute about this component of the form. Both R & S and the Respondent agree that R & S and Big Eagle are bound by the agreed amounts set out in the T2059 election, subject to the filing of an amended election. Since the request by R & S and Big Eagle to file an amended election under subsection 96(5.1) was denied by the Minister and since the Federal Court denied their application for judicial review of the Minister's decision, R & S is not in a position to file an amended election. This Court does not have jurisdiction to order the Minister to accept an amended election. Accordingly, R & S cannot, through its appeal, change the agreed amounts that it and Big Eagle put on the election form.

[7] A third component of a T2059 election is the parties' description of various key facts relating to the transfers. These key facts include the fair market value of the property transferred, the number and value of the partnership interests received for the transfer, and the type and value of the non-partnership interest consideration received for the transfer. Subsections 97(2) and 85(1) provide that the agreed amount selected by the parties to a rollover will be altered in certain factual situations. The key facts set out in the third component of a T2059 election allow the Minister to determine whether these provisions will apply to alter the agreed amount or not. It is in respect of this third component of the T2059 election that R & S and the Respondent disagree.

[8] R & S takes the position that the allocation of consideration between partnership interests and non-partnership interests that was set out on the T2059 election form does not reflect the actual allocation agreed to by R & S and Big Eagle. R & S anticipates that, if this matter proceeds to trial, it will be able to introduce sufficient evidence to convince the Court that the actual allocation was different and that R & S should accordingly be reassessed based on that actual allocation.

[9] The Respondent takes the position that a taxpayer cannot use an appeal to the Tax Court to dispute the allocation of consideration between partnership interests and non-partnership interests in a T2059 election. The Respondent submits that, because such amounts can have the effect of indirectly altering the agreed amount through the operation of subsection 85(1), allowing a taxpayer to amend such amounts effectively allows the taxpayer to amend the taxpayer's election. The Respondent also submits that the allocation of the consideration set

out on the T2059 form is part of the election and thus cannot be amended other than in accordance with subsection 96(5.1).

[10] I disagree with the Respondent's position. I find that the only thing that subsection 85(1) requires the parties to a transaction to elect is the agreed amount. There is no doubt that the key facts set out in the T2059 election are essential in order for the Minister to properly determine whether the various provisions in subsection 85(1) apply to alter the agreed amount. However, there is an important difference between the agreed amount and the key facts. The agreed amount is an amount selected by the parties to the transaction. Other than in accordance with the provisions of subsection 85(1), the agreed amount cannot be altered by the Minister. By contrast, the key facts are factual determinations. For example, the parties to a transaction may record the fair market value of the non-partnership interest consideration as being $X. However, simply recording $X on the T2059 election form does not mean that the fair market value is $X. It simply means that the parties believe it to be $X. If the Minister disagrees with that valuation, the Minister is free to reassess based on a different valuation. Doing so may, through the operation of subsection 85(1), have the effect of altering the agreed amount, but that is not the same as the Minister simply changing the agreed amount. The Respondent does not dispute the fact that, if, in this example, the taxpayer disagreed with the fair market value upon which the Minister had reassessed, the taxpayer could object to, and ultimately appeal from, the resulting reassessment. In bringing such an appeal, the taxpayer could not simply point to the fair market value set out in its T2059 election. The taxpayer would have to introduce evidence of the fair market value. As in any valuation case, the Court would not be bound by either the figure argued for by the Minister or the figure argued for by the taxpayer. Ultimately, the fair market value would be found to be what the Court, based on all of the evidence, concluded it was.

[11] Other key facts, such as the allocation of consideration among transferred properties, are no different than fair market value. The Minister is not bound by the key facts stated on the T2059 and may, if she disagrees, reassess accordingly. Similarly, taxpayers are free to object to, and appeal from, such reassessments.

[12] The Minister is bound by the agreed amount because it is something that the parties have elected. The Minister is not bound by the key facts because the facts are the facts. They exist independently from the election. So, if the Minister is not

bound by the key facts stated in the election, why would the parties to the transaction be bound by them?

[13] There is no question that a taxpayer would face an uphill battle in court trying to prove that a key fact that both parties to the transaction certified in the T2059 election to be true is, in fact, not true. However, that does not mean that the taxpayer is not free to try to do so. More importantly, it does not mean that the Court lacks jurisdiction to hear such an appeal.

[14] Based on all of the foregoing, the Respondent's motion to quash the appeal for want of jurisdiction is denied.

[15] The Respondent asserts in the alternative that the Amended Notice of Appeal lacks key particulars. Specifically, the Respondent asserts that the Amended Notice of Appeal fails to identify the total consideration that R & S says was paid and the allocation of that consideration among the different items of property. The Respondent submits that, if I deny her motion to quash the appeal on the basis of jurisdiction, I should nonetheless strike the appeal on the basis that the Appellant has, after what amounts to three attempts, failed to disclose a reasonable ground for appeal. While I agree that the Amended Notice of Appeal lacks certain key information and that additional particulars are required, I am not prepared to strike the appeal on that basis. During the hearing of the motion, R & S conceded that the total consideration was $39,931,772. Rather than force the Respondent to bring a demand for particulars, I advised the parties that if I found for R & S on the motion I would order that R & S provide particulars to the Respondent in the form set out on page 3 of the T2059 election, showing R & S' position as to what R & S and Big Eagle intended the allocation of consideration to be. R & S has since provided those particulars to the Respondent so there is no need for me to order it to do so.

[16] The Respondent shall have until June 30, 2017 to file a Reply to the Amended Notice of Appeal.

[17] Costs of this motion shall be in the cause.

Signed at Ottawa, Canada, this 5th day of May 2017.

"David E. Graham"

Graham J.

CITATION:	2017 TCC 75
COURT FILE NO.:	2014-3997(IT)G
STYLE OF CAUSE:	R & S INDUSTRIES INC. v. THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 30, 2017
REASONS FOR ORDER BY:	The Honourable Justice David E. Graham
DATE OF ORDER:	May 5, 2017

APPEARANCES:

Counsel for the Appellant:	Darryl R. Antel
Counsel for the Respondent:	Donna Tomljanovic

COUNSEL OF RECORD:

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