

BETWEEN:

WILLIAM RADELET,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 12, 2017, at Nanaimo, British Columbia

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Paul Klippenstein

DECISION AND ORDER

IN ACCORDANCE with the Reasons for Order attached, THIS COURT ORDERS THAT:

1. the T2029 waiver dated January 31, 2012, extending the normal assessment period, is valid and enforceable by the Minister of National Revenue (the “Minister”) against the Appellant;
2. the Minister had the authority under the waiver to reassess the Appellant for this 2008 taxation year beyond the normal reassessment period expiring June 1, 2012;
3. Part II of the appeal concerning the correctness of the reassessment shall proceed to hearing before the Court at the first available date at Nanaimo, British Columbia;

4. the judge is seized of hearing Part II of the appeal.

Signed at Toronto, Canada, this 16th day of August 2017.

“R.S. Boccock”

Boccock J.

Citation: 2017 TCC 159
Date: 20170816
Docket: 2015-2089(IT)G

BETWEEN:

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and

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Respondent.

REASONS FOR ORDER

Bocock J.

I. Introduction

[1] This appeal concerns the reassessment for a taxable capital gain of \$222,776.00 against William Radelet (“Mr. Radelet”). The gross capital gain of \$445,551.00 (the “capital gain”) allegedly arose from Mr. Radelet’s disposal of a 4 unit commercial property in Parksville, British Columbia (the “property”). The property was disposed of in 2008.

a) Correctness of reassessment as Part II of appeal

[2] The Minister of the National Revenue (the “Minister”) asserts that Mr. Radelet failed to report the disposition of the property and the capital gain, but did report a business loss of \$400,000.00 (the “recorded loss”) which the Minister disallowed. This undisclosed capital gain and disallowed business loss comprise the portion of the appeal dealing with correctness of the assessment. As described below, that portion shall be Part II of the appeal.

b) Assessment beyond normal period as Part I of appeal

[3] Part I of the appeal concerns the fact that the reassessment was raised beyond the normal reassessment period. The parties agree the normal reassessment period for the 2008 taxation year expired on June 1, 2012. The Minister first

reassessed on July 12, 2012. The Minister did so pursuant to a T2029 “Waiver in respect of the normal reassessment period”. It is undisputed this document was executed by Mr. Radelet on January 31, 2012 (the “waiver”). The Minister, through counsel, concedes she reassessed beyond the normal reassessment period based solely upon the waiver. Mr. Radelet asserts the waiver was executed under duress and/or coercion during a period as a result of mental incapacity or that he failed to understand that the normal reassessment period was extended by the waiver.

c) Basis for separating hearing into Part I and II

[4] The entire appeal was originally scheduled for one and one-half days. After the hearing began, it was clear to the Court that Mr. Radelet required frequent breaks, accommodation for health needs, expressed and showed fatigue with the process and specifically requested partial completion of the hearing and a decision concerning Part I before proceeding to Part II. Importantly, a finding that the waiver is invalid or unenforceable would render the need for conducting Part II of the hearing unnecessary. Simply, based upon the reply, the Minister would lose her sole basis for a reassessment beyond the normal period should the waiver be unenforceable. Further, Part I took the entire first day of hearing. Part II, if needed, will take at least another full day. This could not have been accomplished during the time allocated. For these reasons, the Court completed all testimony and submissions on Part I. Part II shall proceed to hearing when, and if, needed.

II. The (Re) Assessment Process and Execution of Waiver

a) Execution of Waiver

[5] The reassessment process for 2008 taxation year was somewhat disjunctive. It began in earnest in early November, 2011. The Canada Revenue Agency (the “CRA”) attempted to contact Mr. Radelet by telephone. During 2011 and 2012, Mr. Radelet spent the winter in Mexico. He was not available in Canada in person or generally by telephone. A CRA letter dated November 15, 2011 containing working papers was sent by registered mail to Mr. Radelet. In late November, Mr. Radelet’s lawyer, a Mr. Fenton, received the letter. Mr. Fenton held a power of attorney to receive and open such forms and correspondence. Mr. Fenton relayed the contents and information to Mr. Radelet in Mexico.

[6] In early December, Mr. Fenton messaged the CRA auditor, Ms. Anderson. Later they briefly spoke. Mr. Radelet advised that his accountant had died.

Mr. Radelet, stated he, himself, was on narcotic painkiller withdrawal. He needed an extension to respond to the CRA until mid-January. He received an extension until January 24, 2012 to provide responsive information.

[7] In January of 2012, the CRA followed up with Mr. Radelet. The retrieval process had not gone well. He had no access to the documents requested. He reiterated that his accountant had the documents, but had died. The accountant's widow could not assist. His lawyer, Mr. Fenton was not to be involved. Mr. Radelet indicated he had experienced a recent fall and cerebral incident. This was in addition to his withdrawal from narcotic painkillers. He indicated a further extension to April 15, 2012 was needed. At this point, the CRA officer requested a T2029 waiver.

[8] On January 27, 2012, the CRA's Ms. Anderson and Mr. Radelet spoke again. The CRA representative, as confirmed by her notes, requested a waiver to extend the normal 3 year reassessment period in exchange for any extension. She explained the normal reassessment period would expire soon after Mr. Radelet's return. If an extension for the reassessment period were not signed, the reassessment as outlined in the proposal letter of November 15, 2011 (which included gross negligence penalties) would be levied. As a result of this discussion, the logistics of signing and faxing the waiver were established between Ms. Anderson and Mr. Radelet. Mr. Radelet executed the T2029 waiver on January 31, 2012. The CRA auditor received it by fax on February 1, 2012.

b) *Provision of Information by Mr. Radelet and Reassessment*

[9] After several meetings and discussions, Mr. Radelet provided documentation related to the cost base, capital cost allowance and other losses to Ms. Anderson. Ultimately, a reassessment did issue on July 12, 2012, but it did not contain the gross negligence penalty originally proposed in November 2011 and January 2012 under subsection 163(2) of the *Income Tax Act*, RSC 1985, c.1, as amended (the "Act").

c) *Contents of Waiver*

[10] Mr. Radelet admits to signing the waiver. The critical paragraphs are as follows:

**Waiver in respect of the normal reassessment period or
extended reassessment period**

For use by a taxpayer to waive the normal reassessment period in respect of a taxation year, as defined in subsection 152(3.1), or the additional three year period referred to in paragraph 152(4)(c), within which the Minister may assess, reassess or make additional assessments under subsection 154(4) of the *Income Tax Act*.

[describes name, address of taxpayer]

[taxpayer's SIN number] Waiver for the taxation year ended 2008-12-31

Check the applicable box and complete as directed

The normal reassessment period referred to in subparagraph 152(4)(a)(ii) of the *Income Tax Act*, within which the Minister may reassess or make additional assessments or assess tax, interest or penalties under the *Act* is hereby waived for the taxation year indicated above, in respect of:

THE PROPOSAL LETTER OF NOV 15, 2011. BY ACCEPTING THIS DOCUMENT THE CRA AGREES TO EXTEND THE DATES MENTIONED IN THE PROPOSAL LETTER TO APRIL 15, 2012.
[INITIALS]

[signature of Mr. Radelet]

[11] Concurrently or the next day, Mr. Radelet sent a letter which thanked Ms. Anderson for her efforts and patience. He also indicated in handwriting the following:

Dear Ms. Anderson

Thank you very much for your patience in helping me deal with this 2008 income tax matter. I really do appreciate being given a little leeway time wise.

In my case aging has been abetted by a couple of concussions from falls, another bad one, in a car accident, a broken hip, a broken foot and now what looks like a stroke. Luckily, I still have most of my buttons. Again, thank you, and your associates, very much. This matter has my fullest attention and will be dealt with by April 15, 2012.

Regards

William Radelet

III. Validity and Enforceability of the Waiver

(a) *Issues*

[12] There exist three possible issues concerning the validity and enforceability of the waiver. These were raised by Mr. Radelet, either directly or indirectly at the hearing. They are:

- (i) was Mr. Radelet coerced into signing the waiver under threat of subsection 163(2) penalties?;
- (ii) did Mr. Radelet lack sufficient mental capacity to understand the nature and quality of the waiver?; and
- (iii) independent of (i) and (ii) above, did Mr. Radelet understand that the waiver as drafted and signed, by its terms extended the period for reassessment beyond the normal reassessment date?

(b) *Coercion*

(i) Mr. Radelet's submissions

[13] Mr. Radelet was adamant that coercion existed in the interaction between the threat by CRA to levy penalties on tax owing, the request for information from him while he was out of the country and the imposition of deadlines before he could return from abroad. He therefore executed the waiver under duress during a period when Mr. Radelet's personal health situation required him to recuperate in Mexico. His accountant had died and he had no access to the documents. In short, he had no choice and was forced to execute the document because of the dire consequences of threatened penalties if he failed to do so. He needed time to return, find the documents and submit them so the penalties and reassessment would in his words "disappear". The sole basis for signing the waiver was to obtain additional time to make the representations and obviate the consequences of a reassessment. He considered the linkage of the threat of penalties, repeated request for numerous documents and the setting of unilateral time lines for response to be "shocking" when he discovered them contained in the initial letter from the CRA, a government agency.

(ii) The law

[14] It is established law that a waiver such as the one Mr. Radelet asks be set aside cannot be set aside on the basis of coercion or undue influence unless it is established that the CRA tried to mislead, threaten or unduly pressure the taxpayer in connection with the waiver: *Nguyen v. HMQ*, 2005 TCC 697 at paragraph 32. Further, such waiver is unenforceable on the basis of coercion where, more likely than not, the evidence shows the taxpayer did not freely consent or was unduly pressured: *Nguyen* at paragraph 33. Therefore, the issue is whether Mr. Radelet has established on the balance of probabilities that he did not freely consent.

(iii) Was Mr. Radelet coerced?

[15] On the basis of the evidence presented by Mr. Radelet at the hearing, the Court finds he was not unduly pressured, misled or unduly influenced to the extent of nullifying his executed consent to the waiver.

[16] The following conclusions, ascertained upon the evidence, are the basis for the Court's decision.

[17] Mr. Radelet's dealings with CRA in the run up to the execution of the waiver were exclusively by telephone and written correspondence and email. There were no face to face meetings during this period which would otherwise manifest physical or situational intimidation.

[18] The inclusion of the prospect of gross negligence penalties in the initial written correspondence of November 9, 2011 to Mr. Radelet was not unreasonable given the CRA's position that the 2008 disposition of a valuable real property had not been reported in the 2008 tax return.

[19] Beyond that, the sole "threat" was limited to the advice by the CRA that it would issue its reassessment after the expiration of the January 2012 deadline (which passed without any responsive documentation) and its additional request for the waiver to grant the further extension to April 15, 2012.

[20] The request for the extensions of time to provide responsive information was initiated, pursued and specified by Mr. Radelet throughout. The CRA considered these requests, reviewed same among various officers and acceded to the extensions in each case, but in the final stage subject to the reciprocity of receiving the mutual waiver.

[21] Mr. Radelet's subsequently expressed feelings of threats and manipulation were not conveyed during the relevant period to the CRA. He thanked the CRA for "being so patient" in February written correspondence and again in April on the telephone. All records of correspondence and conversations, confirmed as accurate by Mr. Radelet, reflect cordial, normal and considered exchanges which attempted to resolve, at Mr. Radelet's earliest convenience, the submission of responsive documents. This civility remains throughout the December 2011 to June 2012 period. These dealings are factually inconsistent with Mr. Radelet feeling threatened, coerced or manipulated before or at the time he executed the waiver.

[22] Mr. Radelet's first assertion of the threats arises initially after the reassessment issued in July 2012. Before that, the extension of time resulted in the opportunity for Mr. Radelet to submit sufficient documents with some positive consequences. Although he was reassessed, gross negligence penalties were never levied. This was directly related to the benefit of the waiver. With the waiver, Mr. Radelet was able to successfully convince CRA to resile from imposing the penalties. He obtained a benefit from the extension of time he requested and which the waiver afforded. The CRA's audit specifically references these submitted representations during the relevant period when it states "after a careful review of the facts related to omissions in your 2008 personal income tax return, including your representations, we have decided not to assess penalties...under subsection 163(2) of...the Act".

[23] Mr. Radelet's outrage at the "threat" seems to be rooted in his fundamental disagreement with the correctness of the reassessment and the initial possibility of penalties. He also fundamentally believes the prospect of penalties should not have been raised in the November 15, 2011 letter. Objectively, the letters and positions of CRA were not inconsistent, unreasonable or particularly ominous given the presence of an unreported capital disposition of some magnitude from Mr. Radelet's tax return. The perceived threat is possibly related to Mr. Radelet's specific plight and circumstances: his accountant had died, he, himself, was ill and had no ready access to the documents at the time of the request for information. He reasonably requested one extension. It was granted unconditionally. When he missed that deadline, he reasonably requested another one, three times as long. This time, with that background and mindful of the then missed deadline and upcoming expiration of normal reassessment rights, the CRA itself reasonably granted the extension, but in exchange for a waiver relevant to the upcoming reassessment period. These seems a normal *quid pro quo* involving mutual benefits to both parties.

[24] Mr. Radelet signed the waiver at the time it was requested without then contesting or characterizing it as draconian, unilateral or coercive. There was no evidence that Mr. Radelet, a reasonably intelligent and above-average literate person felt manipulated, coerced or unduly influenced in signing the document, flawlessly completed under his own hand, on January 31, 2012.

(c) Mental Capacity

(i) Mr. Radelet's submissions

[25] Mr. Radelet suffers from a variety of physical ailments. He indicated these in detail in Court. As to mental capacity, Mr. Radelet indicated he was withdrawing from narcotic pain medications used to battle some of these ailments and that he had currently experienced a brain event, possibly a stroke. These ailments are also referred to in Ms. Anderson's, the CRA auditor, notes taken at the time of execution of the waiver.

[26] Several months after executing the waiver, in May 2012, Mr. Radelet consulted a physician and psychologist who provided post-facto letters describing Mr. Radelet as having sought treatment for a diagnosis of post-traumatic stress disorder (PTSD). Generally, the view in June 2012 was that the perceived external threats of potential harm had passed.

[27] Mr. Radelet generally asserts that the combined effect of narcotic withdrawal, other physical ailments and PTSD would have robbed him of the necessary cognitive function to understand the nature and quality of the actions and consequences of executing the waiver on January 31, 2012.

(ii) The Law

a. Admissibility of Medical Reports

[28] Respondent's counsel objected to the admissibility of the letters signed by Mr. Radelet's physician and observing psychologist on two grounds. The first is that they represented opinion evidence of an expert and the expert was not present to be cross-examined in Court. The second ground was that neither notice had been given to introduce such an expert report nor were such letters in compliant form under section 145 the *Tax Court of Canada Rules (General Procedure)* (the "Rules").

[29] Apart from these procedural objections, the admissibility of the reports is challengeable on another primary ground: relevance of their contents to the issue before the Court. It is the reason the letters are to be excluded. None of the letters suggests that Mr. Radelet lacked mental capacity. They merely state that Mr. Radelet suffered from a medical condition for which he should undertake treatment. Further, while the prognosis for recovery was good, stressful and traumatic situations should be avoided on and after May and June 2012.

[30] Presumably, this was the reason he was in Mexico. There were no relevant assertions or conclusions in the letters which suggest that as a consequence of PTSD, Mr. Radelet lacked mental capacity preventing him from taking action, executing documents or, otherwise, living his life.

b. Mental Capacity Generally

[31] The law presumes that all persons have the capacity to contract. Where one, such as Mr. Radelet, wishes to avoid a contract through mental incapacity, he, as the one so asserting, must prove it. He bears the onus or burden of proof.

[32] Mr. Radelet must introduce evidence that convinces the Court that on balance, he more likely than not lacked the requisite capacity to enter into the waiver on the very date it was executed: *Wiens v The Queen*, 2011 TCC 152 at paragraph 23.

(iii) Mental Capacity on January 31, 2012

[33] As described above, quite apart from the admissibility issues, the letters from Mr. Radelet's physician and psychologist do not reference any of: mental capacity; the effects of PTSD on mental capacity; or, the consequences of executing the waiver during symptomatic manifestations of PTSD. These letters are not relevant to that question. Testimony of such medical professionals before the Court may have been helpful, but it did not occur.

[34] Further, on the issue of his other ailments and treatment withdrawal, Mr. Radelet quite competently provided wording, by his own hand, concerning the extension in which he was most interested: extending the time for his representations. This also included his completion of the date relating to the assessment year limitation to be extended as referenced in the cited proposal letter of November 15, 2011. Moreover, the waiver also produced partial success for him: the CRA's deletion of gross negligence penalties from the July 12, 2012

reassessment. His letters written at the time strike the Court as clear, lucid, and effective. He managed to print, complete and execute the form and take the form and have it sent. He also acted, through his correspondence at least, in a manner that was efficient, professional and courteous as witnessed by his letters and phone discussions. He suggested, in response to questions on this approach during cross-examination, that he was merely “buttering up” Ms. Anderson. While not exactly cunning, this extra effort was strategic and politic. Cumulatively, this evidence before the Court, concerning mental capacity on January 31, 2012, suggests the spectral opposite of Mr. Radelet lacking mental capacity.

(d) Did Mr. Radelet Intend to Waive the Normal Reassessment Period?

[35] The normal reassessment period under paragraph 152(4)(a)(ii) of the *Act* expired June 1, 2012. There is no dispute on this point. Normally and usually, to extend this a waiver is submitted pursuant to Form T2029. It was in this case. Mr. Radelet admits executing it. In fact, he added critical and relevant information to it before signing it and returning it to the CRA. This is also not in dispute.

[36] Apart from the issues of coercion and mental capacity analyzed above, Mr. Radelet has asserted he did not know he was waiving his rights thereafter to assert the expiration of the normal reassessment period in respect of the November 15, 2011 initial proposal letter. He claims it was never discussed, intended or specifically requested.

[37] As referenced in submissions, the approach in interpreting a waiver is to ascertain the intention of the parties as expressed in the documents and relevant circumstances revealed by the evidence: *Ruzmin Remtilla v. HMQ*, 2015 TCC 200 at paragraph 35, itself referencing *Golberg v. Canada*, [1992] 2 CTC 208 FCTD confirmed in *Mitchell v. Canada*, 2002 FCA 407 at paragraph 37. In turn, the intention must be filtered through the perspective of an objective reasonable bystander: *Noran West Developments Ltd. v. R.*, 2012 TCC 434 at paragraph 74.

[38] In the presence case, Mr. Radelet suggests that the wording of the T2029, which *prima facie* provides for a waiver of the normal reassessment limitation, should be offset by his not understanding that the document included this provision or that he failed to appreciate that it did. The following evidence would lead a reasonable third party to the opposite conclusion, namely, that Mr. Radelet would have or ought to have known the T2029 contained both the waiver in favour of the Minister and the extension of his own right to make representations before the Minister would reassess.

[39] Mr. Radelet requested the extensions to provide such responsive information. The Minister did not offer it. It was in response to that request that the Minister required the T2029 waiver. To effect this, Mr. Radelet inserted all the critical information: his particulars, the taxation year, the subject of the proposed reassessment and the corresponding concession of the Minister regarding the dates for receiving submissions prior to reassessing. The very words added by Mr. Radelet's own hand reflected the scope of the proposed reassessment being waived. These handwritten additions were inserted specifically pursuant to discussions between the CRA and Mr. Radelet. No objective bystander could expect these words to be inserted without the writer's related knowledge of their effect.

[40] Previously, Mr. Radelet was granted an extension in the absence of a T2029 waiver. Mr. Radelet insists he was simply receiving an extension. Reasonably, an objective bystander would then ask, why would Mr. Radelet, who previously received an extension without executing a T2029 not query why one was subsequently needed? Instead, Mr. Radelet meticulously completed it to include the waiver and reassessment delay and signed it. The logical conclusion for the difference: this time, the Minister wanted something in exchange, after having been promised documentation by a previous deadline and received none. An objective bystander, given these circumstances, would conclude Mr. Radelet understood all of this and the reciprocal bargain achieved both by him and the Minister.

[41] Lastly, Mr. Radelet had choices and alternatives. He had a lawyer, his donee under a subsisting power of attorney, Mr. Fenton. Mr. Radelet asserts he had no legal advice at the time of executing the waiver. Yet, at the time, he advised CRA not to deal further with his lawyer. It is more likely than not that Mr. Radelet did not consult Mr. Fenton because he did not need to, did not feel he ought to and/or knew precisely what the waiver achieved. While the print in the waiver is small, it is for a tax matter relatively simple. One can reasonably and objectively conclude, given the relative ease, precision and detail exercised by Mr. Radelet in completing the form without consulting his retained solicitor that he knew its contents, particularly its inclusion of the waiver of the reassessment limitation period for the 2008 taxation year so that he had time to provide written representations.

[42] Quite apart from the separately analyzed issues of coercion and mental capacity, Mr. Radelet otherwise intended the T2029 to waive the reassessment period limitation as described in the waiver.

IV. Conclusion

[43] For the reasons stated above, the waiver is enforceable to defeat Mr. Radelet's position that the assessment dated July 12, 2012 issued in respect of his 2008 is statute barred. Therefore, Part I of the appeal has been determined. The trial shall be reconvened. Part II of the appeal shall be set down at Nanaimo, British Columbia at the first available opportunity.

[44] Costs shall be reserved until conclusion of Part II of the appeal.

Signed at Toronto, Canada, this 16th day of August 2017.

"R.S. Boccock"

Boccock J.

CITATION: 2017 TCC 159

COURT FILE NO.: 2015-2089(IT)G

STYLE OF CAUSE: WILLIAM RADELET AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Nanaimo, British Columbia

DATE OF HEARING: June 12, 2017

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall
S. Boccock

DATE OF JUDGMENT: August 16, 2017

APPEARANCES:

For the Appellant: The Appellant himself
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