Docket: 2003-2598(IT)G

BETWEEN:

LES ENTREPRISES BERNARD MARCEAU INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on September 29, 2005, at Sherbrooke, Quebec

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Richard Généreux
Counsel for the Respondent: Nathalie Lessard

ORDER

Upon the Respondent's motion to obtain leave of the Court to file an amended Reply to the Notice of Appeal pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)*;

And upon the submissions of the parties;

The motion is allowed.

Signed at Ottawa, Canada, this 16th day of November 2005.

"François Angers"

Angers J.

Translation certified true
on this 17th day of March 2009.

Brian McCordick, Translator

Citation: 2005TCC729
Date: 20051116
Docket: 2003-2598(IT)G

BETWEEN:

LES ENTREPRISES BERNARD MARCEAU INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR ORDER

[1] This is a motion by the Respondent to obtain the Court's leave to file an amended Reply to the Notice of Appeal pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)*. The motion is presented after the close of pleadings.

[2] The Appellant opposes this motion on the grounds that, first, the amendment constitutes a withdrawal of admissions, and second, it allows the Respondent to alter the basis of the appealed assessment after the normal reassessment period. At the hearing of the motion, the parties were in agreement that the normal assessment period has expired.

[3] The Respondent argues that this is not a withdrawal of admissions since its amendment is intended to reflect the factual situation more accurately by submitting the interpretation of the agreements between the Appellant and a third party to the Court. In regard to the allegation that it is an amendment that affects the basis of the assessment, the Respondent submits that it is simply an alternative argument in support of the assessment and that she may advance it after the normal reassessment period under subsection 152(9) of the *Income Tax Act* (the "*Act*"), which reads as follows:

> **Alternative basis for assessment** — The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this *Act*
>
> (a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and
>
> (b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

[4] This issue in this appeal concerns the tax treatment of a sum of money (consideration) obtained by the Appellant in exchange for the sale of intellectual property rights accompanied by undertakings of confidentiality, non-competition and exclusivity concerning the nature of this consideration. The Respondent's position, which is the basis of the assessment being appealed, is that it is income from a business under subsection 9(1) of the *Act* since this sale is part of the Appellant's sphere of activity. In support of her submission, the Respondent cites sections 3, 9, 14, 38 and 39 and paragraph 12(1)(*b*) of the *Act*. The Appellant, for its part, argues that what was sold was eligible capital property and that in this case it involves a disposition of all of its rights of this nature, it is a single contract, and it is therefore a disposition of capital. It cites sections 3, 14, 39, 54, 89 and 248 of the *Act*.

[5] In paragraph 9 of her Reply to the Notice of Appeal, the Respondent admitted the facts alleged in paragraphs 14 and 15 of the Notice of Appeal, which read as follows:

> [TRANSLATION]
>
> (14) In the said agreement, the Appellant also made undertakings of confidentiality, non-competition and exclusivity.
>
> (15) In consideration of the assignment of its intellectual property rights and undertakings of confidentiality, non-competition and exclusivity, the Appellant received the sum of $450,000, of which $100,000 was paid in the course of 2000 and $350,000 was paid in the course of 2001.

[6] The Respondent, in her amended Reply to the Notice of Appeal, asks that her paragraph 9 now be amended as follows:

> [TRANSLATION]
> In regard to paragraphs 14 and 15 of the Notice of Appeal, he relies on the agreements entered into between the Appellant and Technologie Estrie (the third party) and denies anything that is inconsistent therewith.

[7] The Respondent also asks that two new subparagraphs be added to the one that describes the facts on which its assessment is based, as well as an entirely new paragraph, as follows:

> [TRANSLATION]
>
> (n) The Appellant sold to Technologie Estrie (the third party) the services of Bernard Marceau as a research and development advisor and it was provided from the outset that the procedure to be designed and developed would be for and on behalf of Technologie Estrie, which would consequently be the sole owner thereof.
>
> (o) The Appellant's compensation included a portion that was conditional on the functionality of the process, namely the sum of $450,000, but this compensation pertained nonetheless to the services as a research and development advisor that were the subject matter of the contract between Technologie Estrie and the Appellant.
>
> 17. At this stage of the proceedings, he adds that:
>
> (a) The Appellant never intended to use the process designed and developed for Technologie Estrie in its business.
>
> (b) If the Appellant thought that it held any property rights whatsoever in this process, which he denies, its intention was to speculate on the re-sale of the said property rights.

[8] Do the amendments the Respondent wishes to make to its Reply to the Notice of Appeal amend the basis of the assessment or are they simply alternative arguments? Has there been a withdrawal of admissions as the Appellant contends?

[9] The importance of the first question lies in the fact that the Minister cannot be allowed to advance a new basis for a reassessment after the limitation period has expired. This statement comes from *Continental Bank of Canada v. Canada*, [1998] 2 S.C.R. 358, in which McLachlin J. held:

> . . . The Minister cannot argue that the Bank could not transfer its partnership interest at this stage. The Minister must accept that this transfer took place because his assessment of the Bank was based on the assumption that the Bank disposed of its partnership interest. I agree with Bastarache J. that the Minister's argument that the Bank sold depreciable leasing assets or was otherwise liable for recapture of capital cost allowance pursuant to s. 88(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended, raised for the first time in this Court, cannot be entertained. The Minister

> should not be allowed to advance a new basis for a reassessment after the limitation period has expired.

[10] In my opinion, based on the pleadings, the dispute between the parties turns on the issue of whether what is involved is business income from the Appellant's activities and undertakings or income from the sale of all of the Appellant's eligible capital property. If it is the latter, the income, because it involves a single contract, would be income from capital and thereby subject to 50% inclusion under subsection 14(1) of the *Act* for the taxation year at issue.

[11] In her amendments, the Respondent still argues that it is business income. In my opinion, the amendments she adds do not alter the basis of the assessment. Rather, it is an additional argument supporting the thesis of business income derived from the Appellant's activities and undertakings, this thesis being established in conformity with what the *Act* defines as being part of a business. The term "business" is defined in subsection 248(1) as follows:

> "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment;

[12] In a very recent decision of the Tax Court of Canada, *Réal Beaulieu v. The Queen*, 2005TCC605, Dussault J. conducted a detailed analysis of the case law on the question of whether an amendment by the Minister to his pleadings constitutes a new basis for an assessment or whether it is an alternative argument. He concluded that this is a distinction that is very difficult to make and that it is imprecise. He states, at paragraphs 50 and 51 of his decision:

> As may be seen, the distinction between something that is a change in the basis of an assessment and something that may be regarded as new arguments in support of an assessment can be very difficult to make, and the distinction is imprecise. However, it is impossible to avoid the fact that the courts have traditionally acknowledged that an assessment is essentially the result of a process, and that that result expresses the amount of tax, interest and penalties for which a taxpayer is liable, and that it is that result that is fundamentally what is at issue in an appeal from an assessment.
>
> The decision of the Supreme Court of Canada in *Continental Bank*, *supra*, established the principle that after the time limit has expired, the Minister may not advance an argument that amounts to changing the basic assumption on which the assessment is based, or, as it were, “its basis”, so that the subject matter of an appeal would then be a fundamentally different assessment from the assessment that was made. However, if we consider an assessment as essentially representing “an

> amount", as the courts have so often said, I think that subsection 298(6.1) of the *Act* — like subsection 152(9) of the *Income Tax Act* — allows the Minister, subject to the restrictions they state, to advance any argument after the time limit has expired that is based on the facts or the law, to defend all or part of the assessment. Obviously, the restriction is that the Minister may not try in any way to increase the assessment after the time limit has expired, because this would amount to allowing the Minister to appeal his own assessment.

[13] In the case at bar, the basis of the assessment is that it involves income from a business. The Respondent, in my opinion, is simply raising an additional argument, that this business income may consist of a commercial transaction or involve risk, but in any event it is income from a business under subsection 9(1) of the *Act*. The amendments the Respondent makes do not in any way affect the issue, which is whether this is a sale that falls within the framework of the activities of a business or whether it is a sale of eligible capital property.

[14] It seems obvious to me, therefore, that in this case the amendments the Respondent wishes to make are not intended to increase the amount of the assessment. The fundamental assumption on which the assessment is based is not altered, so it is permissible for the Respondent, in this case, to advance alternative arguments as subsection 152(9) of the *Act* allows. It is therefore an alternative argument in support of the assessment.

[15] The Appellant argues that if the amendment of the Reply to the Notice of Appeal is allowed, it would effectively grant the Respondent a withdrawal of the admission she made regarding the content of paragraphs 14 and 15, reproduced above. The Respondent does not see it as a withdrawal of an admission since she relies simply on the agreements entered into between the Appellant and a third party, and these agreements should shed light on what the parties agreed.

[16] I have not heard the evidence or definitively analyzed the agreements entered into between the parties. That falls within the jurisdiction of the judge who will try the case. However, it is conceivable to me that the consideration paid by the third party was for the purpose of purchasing the intellectual property and obtaining undertakings of non-competition and confidentiality. For that reason, it seems to me that the amendment to the Reply to the Notice of Appeal does not alter the nature of what was sold, so it is not a withdrawal of admissions *per se*. The Respondent is attempting instead, it seems to me, to ensure that the issue in dispute bears on the interpretation of the agreements, which may no doubt help in determining the nature of this transaction and its tax treatment. I am not persuaded, therefore, that the

amendments the Respondent wishes to make on this issue constitute a withdrawal of admissions as such.

[17] For these reasons, the Respondent's motion is allowed and I authorize the filing of the amended Reply to the Notice of Appeal, dated September 20, 2005, in accordance with section 54 of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Ottawa, Canada, this 16th day of November 2005.

"François Angers"

Angers J.

Translation certified true
on this 17th day of March 2009.

Brian McCordick, Translator

CITATION:	2005TCC729
COURT FILE NO.:	2003-2598(IT)G
STYLE OF CAUSE:	Les Enterprises Bernard Marceau Inc. and Her Majesty the Queen
PLACE OF HEARING:	Sherbrooke, Quebec
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DATE OF ORDER:	November 16, 2005
APPEARANCES:	
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Counsel for the Respondent:	Nathalie Lessard
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