Court File No. 2004-4083(IT)G;

2004-4085(IT)G

TAX COURT OF CANADA

IN RE: the Income Tax Act

BETWEEN:

JEANNETTE WALSH, THE ESTATE OF DAVID G. WALSH

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

HEARD BEFORE THE HONOURABLE MR. JUSTICE PARIS
heard at Courts Administration Service premises, Courtroom No. 1
200 King Street West, 9th Floor,
Toronto, Ontario,
on Tuesday, March 14, 2006 at 1:29 p.m.

APPEARANCES:

Mr. Michael Hunziker for the Appellants

Mr. Louis L'Heureux for the Respondent

Also Present:

Ms Roberta Colombo Court Registrar
Ms Penny Stewart Court Reporter

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Toronto, Ontario
Upon commencing on Tuesday, March 14, 2006 at 1:29 p.m.

JUSTICE PARIS:

This is the matter of 2004-4083(IT)G and 2004-4085(IT)G, Jeannette Walsh and Her Majesty the Queen, and the Estate of David Walsh and Her Majesty the Queen.

The Respondent is seeking an order granting leave to amend the Reply to the Notice of Appeal in each of these proceedings to include what is described as an alternative legal argument in support of the reassessments in issue.

The Appellants oppose the motion on the ground that the proposed amendments represent a change in the very basis of the reassessments at a time when the statutory period for reassessment has expired.

The particulars of the amendment sought by the Respondent are set out in paragraphs 13, 18 and 19 of the proposed Amended Reply to the Notice of Appeal for each appellant which reads as follows:

> 13. In the alternative, if this Honourable Court determines that the Appellant was not a resident of Canada in the 1996 taxation years, whether the stock option benefits, the value of which are described in paragraphs 11(q), (r) and (s) were includible in the computation of her income pursuant to section 3 and 114, subsections 2(3), paragraph 7(1)(a) and subparagraph 11591)(a)(i) of the *Act*.
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> 18. In the alternative, if this Honourable Court determines that the Appellant became a non-resident of Canada as of September 18, 1995, then it is submitted that the amounts of the stock option benefits described in paragraph 16 of this Amended Reply are includible in the computation of the Appellant's income for the 1996 taxation years pursuant to sections 3 and 114, subsection 2(3), paragraph 7(1)(a) and subparagraph 115(1)(a)(i) of the *Act*.
>
> 19. The value of the stock option benefits constitutes income from the duties of offices and employments performed by the Appellant in Canada as contemplated by subparagraph 115(1)(a)(i) of the *Act*.

> Indeed, the stock options were granted at a time when the Appellant was an employee of Bre-x and Bresea.

The Respondent's counsel contends that:

i. these amendments do not involve the pleading of any additional facts but simply raise a new legal argument;

ii. the amendments do not cause any prejudice to the Appellants that cannot be compensated for by costs;

iii. the Appellants will have sufficient time to prepare for trial, the date of which has not been set; and finally,

iv. the amendment is permitted by subsection 152(9) of the *Income Tax Act*.

Counsel for the Appellants argues that the matter of the Crown raising alternative bases in support of a reassessment after the expiry of the statutory period of reassessment is governed by the decision of the Supreme Court of Canada in *Continental Bank of Canada v. Canada*, [1998] 2 S.C.R. 358, where the court held, at paragraph 10 that:

> The Crown is not permitted to advance a new basis for reassessment after the limitation period has expired. The proper approach was expressed in *The Queen v. McLeod,* 90 DTC 6281 (F.C.T.D.), at page 6286. In that case, the court rejected the Crown's motion for leave to amend its pleadings to include a new statutory basis for Revenue Canada's assessment. The court refused leave on the basis that the Crown's attempt to plead a new section of the Act was, in effect, an attempt to change the basis of the assessment appealed from, and "tantamount to allowing the Minister to appeal his own assessment; a notion which has specifically been rejected by the courts".

The Appellants' counsel stated that subsection 152(9) of the *Act* does not overrule the principles in *Continental Bank* and *McLeod*. Counsel also submits that subsection 152(9) does not permit the Minister to defend assessments or reassessments on the basis of

transactions that did not form the basis of the reassessments under appeal.

Counsel contends that the basis of the reassessments under appeal was that Mr. and Mrs. Walsh were resident in Canada through the 1995 and 1996 years. He says the stock option transactions merely determined the quantum of the tax liability but did not form part of the basis of the reassessments.

For the reasons that follow I am of the view that the Respondent's motion should succeed. The current state of the law concerning the Crown's right to raise additional or alternative arguments in support of a tax reassessment is set out by the Federal Court of Appeal in *Canada v. Loewen*, [2004] 4 F.C.R. 3. After a thorough review of the relevant case law, the court said, at paragraphs 19, 21 and 22:

> [19] The right of the Crown to present an alternative argument in support of an assessment is now governed by subsection 152(9) of the *Income Tax Act*, which applies to appeals disposed of after June 17, 1999.
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> ...
>
> [21] As I read subsection 152(9), the expiration of the normal reassessment period does not preclude the Crown from defending an assessment on any ground, subject only to paragraphs 152(9)(*a*) and (*b*). Paragraphs 152(9)(*a*) and (*b*) speak to the prejudice to the taxpayer that may arise if the Crown is permitted to make new factual allegations many years after the event.
>
> [22] As new argument asserted by the Crown pursuant to subsection 152(9) could include an argument that would justify an assessment that exceeds the amount assessed. However, subsection 152(9) does not relieve the Minister from subsection 152(4) which imposes time limitations on reassessments. Therefore, the Minister cannot use the subsection 152(9) argument to reassess outside the time limitations in subsection 152(4), or to collect tax exceeding the amount in the assessment under appeal.

The import of the Federal Court of Appeal's interpretation of subsection 152(9) in the *Loewen* case was aptly described by Chief Justice Bowman of this court in *Gould v. The Queen*, [2005] T.C.J. No. 403. At paragraph 16 he said:

> As I understand the decision of the Federal Court of Appeal in *Her Majesty the Queen v. Charles B. Loewen*, there is virtually no restriction on what the Crown can plead in a reply and there is no distinction between a new basis of assessment (*Continental Bank Leasing Corporation v. The Queen*, 98 DTC 6505) and a new argument in support of the assessment (ss. 152(9) of the *Income Tax Act)*.

On the basis of the decision of the Federal Court of Appeal in *Loewen*, I find that subsection 152(9) of the *Act* permits the Respondent to raise the new argument detailed in the proposed amendments. For the record I note that it was not argued that either of paragraphs 152(9)(a) or (b) of the *Income Tax Act* was applicable in the circumstances of these cases.

Although it is not necessary for me to decide the point, in my view the proposed amendments do not, in any event, amount to a new basis for the reassessments.

In *Loewen,* the Federal Court of Appeal described what constituted the basis of an assessment or reassessment of tax. The court said at paragraph 7:

> The basis of a reassessment normally includes the facts relating to the increased taxable income, as the Minister perceived those facts when the reassessment was made. It also includes the manner in which the Minister applied the facts to the relevant law when making the reassessment, and any conclusions of law that guided the application of the facts to the law. In many cases, the factual basis of an assessment is a particular transaction or series of transactions, but it could also include, for example, facts relating to the residence of the taxpayer or other parties, the personal or legal status of the taxpayer or other parties, or the nature of an activity or business carried on by a person.

In this case, according to paragraph 9 of the Reply to the Notice of Appeal in respect of Jeannette Walsh, and paragraph 11 of the Reply for the Estate, in reassessing the Appellants the Minister relied upon facts relating to certain stock option benefits that were received by the Appellants as well as upon facts relating to their residence.

It can be seen, therefore, that the basis of the reassessments was not restricted to the alleged residence of the Appellants in Canada, but included the stock option transactions which gave rise to the income on which the Minister seeks to tax the Appellants.

I turn now to the criteria to be considered by the court in deciding whether to allow a party to amend its pleadings. The following guidance was provided by the Federal Court of Appeal in *Canderel Ltd. v. R.*, [1993] 3 C.T.C. 213 at paragraph 10:

> ... the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties. Provided notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

Counsel for the Appellants submitted that the Appellants would suffer irreparable prejudice should the Respondent's motion be granted because they would lose the protection of the statutory time limitation on reassessments found in subsection 152(4) of the *Income Tax Act*.

However, this court rejected the same argument in *Smith Kline Beecham Animal Health Incorporated v. The Queen*, [1999] T.C.J. No. 762 since subsection 152(9) of the *Act* gives the Respondent the right to rely on any new argument after the expiry of the statutory time limitation for reassessment. No prejudice to the Appellants can be said to arise by allowing the Respondent to do what is permitted by that provision.

There being no other allegation of potential prejudice to the Appellants arising from the proposed amendments, and given that I am satisfied that the proposed amendments would allow for the determination of the real questions in controversy between the parties, I would allow the Respondent's motion with costs.

Whereupon concluding at 1:40 p.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Shorthand and transcribed therefrom, the foregoing proceeding.

Penny Stewart, Chartered Shorthand Reporter