Citation: 2008TCC282
Date: 20080513
Dockets: 2004-4087(IT)G
2004-4092(IT)G

BETWEEN:

SEAN WALSH and
BRETT WALSH,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

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Counsel for the Appellants: Alan J. Lenczner, Q.C.
Counsel for the Respondent: Elizabeth Chasson and Louis L'Heureux

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**REASONS FOR JUDGMENT**
**(Delivered orally from the Bench on**
**April 23, 2008, in Toronto, Ontario)**

**Miller J.**

[1] At the outset of these appeals brought by Sean and Brett Walsh, their counsel, Mr. Lenczner, brought an application to have the appeals allowed, and the assessment of the Minister of National Revenue vacated, on the grounds that the pleadings do not raise the issue that the Respondent only now wishes to put before me. The Appellants rely on comments of the Federal Court of Appeal in the cases of *Pedwell*[1] and *Loewen*[2] to bring this application.

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1 *Pedwell v. Canada*,[2000] 4 F.C. 616 (C.A.)

2 *Loewen v. R.*, [2004] 3 C.T.C. 6 (F.C.A.), leave to appeal denied 2004 CarswellNat 5843 (S.C.C.)

[2] After some deliberation, I decided to proceed to hear the trial without ruling on Mr. Lenczner's application, but deferring that decision until I heard all the evidence on the merits. I made it clear to counsel that I would address Mr. Lenczner's application upon conclusion of the trial. I have now heard the evidence of the only witness, Mr. Brett Walsh, one of the Appellants. The Respondent called no witnesses. I am now prepared to address Mr. Lenczner's application in the context of ruling on the appeal generally.

[3] Some background is in order. The Appellants filed their 1996 returns on the basis they each made a charitable donation of several hundred thousand shares in Bresea Resources Ltd., having a fair market value of more than $9 million each or, in total, more than $18 million. The Minister reassessed in January 1999 on the basis that the transfer of shares did not take place in 1996. This is clear from a Canada Revenue Agency letter dated January 14, 1999, to Mr. Brett Walsh. That letter states in part:

> The 1996 personal income tax return includes a donation receipt from The Walsh Foundation for $9,100,000. This amount represents the donation of 650,000 Bresea Resources Ltd. shares @ $14.00 to the Foundation in 1996.
>
> The T3010 Registered Charity Information Return of The Walsh Foundation filed for the fiscal period ended March 31, 1997, however, shows “amounts receivable from founders, directors, trustees…” of $18,690,000, indicating that the Bresea Resources shares were not actually received as at March 31, 1997.
>
> Therefore, we are disallowing the deduction of charitable donations amounting to $9,100,000 for the 1996 year.

[4] The Appellants objected on a timely basis, submitting that they did make a charitable donation during 1996 for the amount claimed. More than five years later, in June 2004, the Minister confirmed the assessment on the basis, “there has not been a voluntary transfer of property”.

[5] In the Respondent's Reply to the Notice of Appeal of Sean Walsh, the Respondent made five assumptions. It is worth repeating them all:

> a) on or about November 18, 1996, the Appellant exercised a stock option in Bresea Resources Ltd. (“Bresea”), acquiring thereby 850,000 common shares of Bresea;
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> b) at all material times, the Appellant did not give or transfer any shares of Bresea to the Foundation;

c) in the alternative, if the Appellant gave or transferred common shares of Bresea to the Foundation, such transfer occurred only after March 31, 1997;

d) the T3010 return of the Foundation filed in respect of its taxation year ended March 31, 1997 reported an amount of $18,690,000 as an "amount receivable from founders, directors, employees, members, etc.";

e) this amount receivable of $18,690,000 was composed of $9,590,000 receivable from the Appellant in respect of an alleged gift of 685,000 shares in the capital of Bresea and $9,100,000 receivable from Brett Walsh in respect of an alleged gift of 650,000 shares in the capital of Bresea.

[6] The Respondent in paragraph 5 of its Replies admitted the Appellants reported a charitable donation but denied the remainder of the facts alleged in paragraph 2 of the Appellants' Notices of Appeal.

[7] At paragraph 2 of the Notice of Appeal of the Appellant, Sean Walsh, it stated:

> The claim was made by Sean Walsh on his 1996 T1 return as a result of Sean Walsh having voluntarily transferred 685,000 common shares of Bresea Resources Ltd., having a fair market value of $9,590,000 to the Walsh Foundation prior to the end of the 1996 taxation year.

[8] Then, in March 2008, three weeks ago, the Respondent wrote the following to Appellants' counsel:

> The Respondent no longer disputes that the Appellants each made a donation of the shares in the capital of Bresea Resources to the Walsh Foundation and that the donation was made in December 1996, which is in accordance with the insider trading report filed with the OSC and is consistent with the letter signed by Gaston English relating to the donation of the shares to the Walsh Foundation.
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> In our view, the only fact that remains outstanding is the time of the donation in 1996 and, as a consequence of that, the fair market value of the shares at that time. As the Bresea shares were publicly traded shares, the date of the donation will likely determine the value of the shares. As you are aware, the Appellants have each pleaded that the fair market value of the Bresea shares at the time of the donation to the Walsh Foundation was $9,100,000 (in the appeal of Brett Walsh) and $9,590,000 (in the appeal of Sean Walsh). The Respondent has pleaded no knowledge to this assertion and as such, the value remains in issue.

[9] The Respondent has brought no motion to amend its pleadings. The Appellants' position is simple: The assumptions the government relied upon no longer exist. There remains no issue established by the pleadings to be determined by

me. The Appellants rely on the Federal Court of Appeal's decision in *Loewen* in support of its position. The Federal Court of Appeal did make some comments on pleadings but it appears the motion was decided more on the application of subsection 152(9) of the *Act*, which I will have more to say about shortly.

[10] The Federal Court of Appeal did indicate that the basis of an assessment is a matter of historical fact. I agree. I have no difficulty concluding that the basis for reassessment in this matter was that the donations did not take place in 1996. The assessment had nothing to do with the valuation of the shares. The assessment for more than $2 million in tax was based on there being no donation in 1996. The Minister argues that they have simply abandoned one issue and are left with the valuation issue, indicating that they specifically denied the fact of the value of $9 million in their denial in paragraph 5 of its Replies, which I have read. With respect, no reading of the pleadings would lead me to find that value was ever an issue.

[11] Indeed, of the five Crown assumptions, the last assumption appears to acknowledge there was a receivable of $18 million in respect of an “alleged gift”. Clearly the issue was whether there was a gift in 1996. The Crown appears to be assuming the value. I am not convinced the blanket denial in paragraph 5 of the pleadings overrides the Crown's assumptions and leaves value as an issue.

[12] However, I am convinced the question of value was not a basis of assessment. It only became an issue three weeks ago. It was simply not an issue before then.

[13] Where does this leave the Crown? The Crown argues that the Appellants must still make out their cases of an entitlement to the charitable donation tax credit by proving the value of the donations, even if all the Crown's assumptions were proven incorrect. As Crown counsel pointed out, what would have happened if it was only at trial that it became clear that the evidence supported the 1996 donations, but at a time when the publicly listed shares traded at less than $18 million? Would it not be open for me as trial judge to allow the appeals but at the reduced value? That might seem to be the fair thing to do but I am not convinced it is the right thing to do. Is it indeed how the rules of the game are to be invoked? I am not so sure. I do believe, however, that this is where subsection 152(9) needs to be considered. As you know, subsection 152(9) was enacted as a response to the Supreme Court of Canada's decision in *Continental Bank*[3]. It reads:

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[3] *Continental Bank of Canada v. Canada*, [1998] 1 S.C.R. 358

> 152(9) 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*,
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> (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.

[14] The Federal Court of Appeal dealt with this subsection in the related case of the *Estate of Walsh*[4], where the Crown was seeking to support exactly the same amount of tax liability assessed with an additional argument.

[15] That is not the case before me today. Although the Crown is not attempting to increase the assessment by raising the valuation issue, the Crown is certainly not making the same assessment. The assessment in issue is over $2 million. The assessment of tax in issue on this new basis of assessment for Mr. Brett Walsh would have been only $135,000. It is simply not the same assessment.

[16] In *Estate of Walsh*, the Federal Court of Appeal identified three conditions for the application of subsection 152(9):

> 1) the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment;
>
> 2) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)*(a)* and *(b)*, which speak to the prejudice to the taxpayer; and,
>
> 3) the Minister cannot use subsection 152(9) to reassess outside the time limitations in subsection 152(4) of the Act, or to collect tax exceeding the amount in the assessment under appeal.

[17] Turning to the first condition, is the Minister now trying to include a transaction which did not form the basis of the reassessment? The Minister may believe the alleged, and that is the Minister's word, donation is the same transaction. Yet the transaction, according to the Minister, either did not take place at all, i.e., there was no transaction, or it took place in 1997. Its pleadings were not centred on a November or December 1996 transaction. I am not satisfied the first condition is met.

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4 *Walsh v. R.*, 2007 FCA 222, [2007] 4 C.T.C. 73

[18] Condition two, I believe, certainly can be met.

[19] But what about condition three? Is the Minister using subsection 152(9) to reassess outside the time limitation? I believe that is exactly what the Minister is doing. The Minister is simply too late. The Minister has had nine years to get this right and has failed to do so.

[20] I would add to my reasoning on subsection 152(9) that, notwithstanding Justice Rothstein's comment in the *Anchor Pointe*[5] case regarding distinguishing a new basis of assessment and a new argument being an unproductive semantical argument, I find that where, as here, the new basis is with respect to an assessment that is so fundamentally different from the reassessment at issue, the confirmation and the pleadings, and results in a far different tax liability, albeit a lower one, that subsection 152(9) cannot and should not be engaged. I add to these circumstances the fact that one of the Crown's own assumptions recognized the amount receivable by the Foundation was composed of $9,590,000 receivable from Sean Walsh and $9,100,000 receivable from Brett Walsh and I am strengthened in my view that this is not a situation to open the subsection 152(9) door for the Crown. The new argument does not support the reassessment at issue, and that is a fundamental requirement for subsection 152(9) to come into play.

[21] The matter has now proceeded to trial. Does it make any difference? I do not believe it does. Once the Appellant convinced me the donation was in 1996, that should end the lawsuit, and it does.

[22] I have no doubt a lengthy treatise could be written on the technicalities of the role of pleadings and the interplay with subsection 152(9). I will leave that for others. When I step back and look at the lawsuit generally, I conclude simply it was not a lawsuit about the valuation of shares in November or December 1996. The *Act* and the *Rules* exist in an adversarial system to ensure a fair fight, one in which neither side is ambushed or surprised but knows the case to meet, knows what to expect, can proceed in an efficient and timely fashion ultimately to a court hearing about the issue in front of them. They are not intended to allow one side to unbalance the playing field, let alone change the field altogether, 12 years after the transactions giving rise to the lawsuit and 9 years after the basis for assessment had been set.

[23] I agree with Mr. Lenczner, the result of which is to vacate the assessment.

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5 *Her Majesty the Queen v. Anchor Pointe Energy Ltd.*, 2003 FCA 294

[24] I wish to make some further comment. Had I had to determine whether the donation took place on December 4, 1996 as alleged by the Crown, when the value of the shares was less than $14 a share, I have the following comments.

[25] First, I disagree with the Respondent that the onus rests on the Appellants to prove the value of the donation. This is, as I have indicated, a completely new basis for assessment to the point that my view is that it is a new assessment, one not raised in the pleadings. As such, I believe the onus is on the Respondent to prove, on balance, that the shares at the time of the donation were valued at less than $14, the amount claimed by the Appellants. To be clear, the value at the time of donation is readily ascertained as these were publicly traded shares. The fact to be proven by the Respondent is the date on which the donation took place. The Respondent claims the date was December 4, 1996. The Respondent called no witnesses, not the broker who handled the transaction, not the Foundation trustee, no one, but relies entirely on documents entered as exhibits through one of the Appellants. That Appellant's evidence was that he donated the Bresea shares to the charitable foundation on November 21, 1996 when he called his broker to transfer Bresea shares from his brother and from him to the Foundation. At the same time, he instructed Mr. English to sell the balance of the shares held by he and his brother, respectively, to cover their transaction costs. There was evidence in the form of trading slips that such sales commenced November 21, 1996. These facts were not disputed.

[26] What did the Respondent rely upon to prove the donation occurred December 4? The Respondent relied primarily upon the documents in the minute book of the Foundation, specifically: first, resolutions of lawyers of a shelf trust dated as of December 4 appointing the Walshes as directors; second, an undated resolution of the Walshes establishing themselves as members of the Foundation, resolutions in fact indicating the blank-day of December; third, again undated, consents of the Walshes to act as directors, dated the blank-day of December, 1996.

[27] These documents finalize a process the Walshes had started in October. Mr. Brett Walsh was clear that, notwithstanding the resolutions, he believed the shelf trust acquired from the Ottawa law firm was effectively under the Walsh family control in November.

[28] Fourth, the Respondent relied upon a resolution of the Foundation dated December 4, authorizing Mr. English's firm, Montreal Bonds, to establish an account for the Foundation. Again, I am satisfied Mr. Walsh was instructing Mr. English verbally, well before this corporate housekeeping resolution. In any event, what is the

significance of the paperwork to transfer the shelf Foundation to the Walsh family? The Foundation certainly existed long before December 1996, and the Walshes were treating it as theirs as early as October or November. I am not swayed by the dating of these resolutions. The issue is the timing of the donation to the Foundation, not the timing of when the directors or members were put in place in the Foundation.

[29] The Respondent also relies on an insider report signed by the Appellants' father, the late David Walsh, which indicates the acquisition of the Bresea shares by the Foundation again on the blank-day of December, 1996. Mr. Brett Walsh testified that was simply in error. The fact that no day was inserted on this document casts some doubt as to its veracity generally. It is not strong proof.

[30] Finally, the Respondent relies on the Appellants' Notices of Appeal, and Mr. Brett Walsh's written answers on examination as confirming a December 1996 donation. I place no weight on these statements as they were made in the context of a lawsuit where the sole issue was whether the donation took place in 1996 at all, not when in 1996. For the Respondent to now point to the Appellants with something -- and I don't mean to be unfair -- with a tone of "Aha, see, you yourself said December 1996 in your own answers," is not acceptable. This highlighted for me why it is not appropriate for the Respondent to be allowed to shift gears and attempt to present a new assessment at trial. It simply skews the procedures that have gone before. All to say I place no reliance on the Notices of Appeal or the Appellants' answers to conclude that the donation took place in December.

[31] I conclude the Respondent has not met the onus of proving the donation occurred on December 4, 1996. The Respondent's speculation based on these documents is not corroborated by any direct evidence of any witnesses -- none were called in that respect -- and it is contrary to the evidence of the only witness who testified and who provided uncontradicted evidence of the timing of events.

[32] I have been satisfied that the Walshes intended to acquire the Bresea shares by exercising their options, selling sufficient shares to cover that cost and the resulting tax liability and donating the balance to a Foundation, all as part of one transaction. They had that intention as early as October and took sufficient steps to implement it in November 1996, to constitute a donation at that time.

[33] An *inter vivos* gift requires intention to give, acceptance and a sufficient act of delivery. The Respondent's position is that there could not have been acceptance or delivery in November, as the Foundation resolutions authorizing the agent were not

dated until December. I weigh this against Mr. Walsh's testimony of instructing the agent November 21, and find the Respondent's position not convincing.

[34] I suspect that had the parties known for the last nine years that this case was about whether the donation took place on November 21 or December 6, or somewhere in between, this matter would have settled years ago. I also suspect if that had been the issue, and the matter had still proceeded to trial, much greater care -- I say this with no disrespect -- would have been taken in producing corroborative evidence. Because of how this has unfolded, that simply did not happen. Again, this strengthens my view that the Respondent ought not to be allowed to rely on subsection 152(9) to effectively raise a new assessment.

[35] For these reasons, the appeals are allowed and the assessments are vacated. Costs to the Appellants.

Signed at Ottawa, Canada, this 13th day of May, 2008.

"Campbell J. Miller"

C. Miller J.

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