

Docket: 2016-5034(IT)I

BETWEEN:

SALWA ABDALLA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on September 12, 2017 at Toronto, Ontario  
Before: The Honourable Eugene P. Rossiter, Chief Justice

Appearances:

Counsel for the Appellant: Jeff D. Pniowsky  
Counsel for the Respondent: Cecil S. Woon

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ORDER

Upon a motion made by the Respondent for an Order quashing the appeals from the reassessments made under the Income Tax Act in respect of the 2007 and 2009 taxation years;

And upon hearing the submissions of the parties;

The appeals from the reassessments made under the Income Tax Act in respect of the 2007 and 2009 taxation years are quashed in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 10<sup>th</sup> day of November, 2017.

“E.P. Rossiter”

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Rossiter C.J.

Citation: 2017 TCC 222

Date: 20171110

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Appellant,

and

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Respondent.

REASONS FOR ORDER

Rossiter C.J.

I. Executive Summary

[1] This matter came before the Tax Court of Canada by way of Notice of Motion by the Respondent wherein the Respondent sought to quash the appeal presented to the Tax Court of Canada by the Appellant, Salwa Abdalla, for the 2007 and 2009 taxation years, pursuant to section 12 of the *Tax Court of Canada Act* and subsection 169(2.2) of the *Income Tax Act* (the “Act”). The Respondent sought to quash the appeal on the basis that the Appellant was bound by a lead appeal known as *Mariano v The Queen*, 2015 TCC 244, pursuant to an Agreement to be Bound and Waiver of Objection and Appeal Rights. The Appellant took a position to the contrary indicating that there were three reasons why the Motion should not be granted. The three reasons were in relation to the Agreement to be Bound and Waiver of Objection and Appeal Rights. The three reasons are:

- a) no valid consideration exchanged for the Appellant’s promise;
- b) Canada Revenue Agency (“CRA”) created conditions whereby the Appellant’s consent was not fully informed; and
- c) the Waiver was obtained by way of undue pressure.

[2] The Motion is granted and the appeal is quashed.

[3] It should be noted that 26 other Appellants with appeals were part of this motion as list in Schedule A annexed hereto appeared. All of these other 26 Appellants appeared by way of an agent, namely one of the Appellants, Brian Gunning. At the hearing, Mr. Gunning advised that he would rely on the Appellant's legal submissions. The Appellant in this particular matter was represented by legal counsel.

## II. Facts

[4] The facts are briefly summarized in the Respondent's written submissions as follows:

- a) The Minister of National Revenue (the "Minister") reassessed the Appellants, which was the Appellant and the 26 other Global Learning Gifting Initiative ("GLGI") participants, in denying donation tax credits claimed in respect of GLGI's donation program.
- b) Each of the Appellants had signed an Agreement to be Bound and Waiver of Objection and Appeal Rights (the "Waivers") agreeing to be bound by the final decision in the appeals among others of *Juanita Mariano* (Court File No.: 2009-3506(IT)G) and waiving any right of objection and appeal in respect of the issue of their entitlement to donation tax credits in respect of the GLGI donation program if the Minister reassesses or confirms the reassessments consistent with the outcome of those appeals.
- c) The Tax Court of Canada decision in *Mariano* was rendered on October 19, 2015 denying the claimed donation tax credits in their entirety in respect of the GLGI donation program and the decision of *Mariano* was not appealed.
- d) The Minister confirmed the reassessments of the Appellants consistent with the decision in *Mariano*. Despite the signed waivers the Appellants filed Notices of Appeal appealing the Minister's reassessments denying donation tax credits in respect of the GLGI donation program. The Appellants' Notices of Appeal all contain the same language and request a Waiver of interest and penalties, yet the Appellants were not assessed any penalties. The Notices of Appeal claimed that the CRA failed to

adequately warn the taxpayers that the donation tax credit claims in respect to the GLGI donation program would be disallowed.

[5] The Appellant had for her 2007 taxation year claimed donation tax credits based upon total charitable donations of \$6,218.00 with respect to the GLGI donation program and \$5,065.00 with respect to the same donation program for 2009. The Appellant did not make a cash contribution to participate in the donation program for either of the taxation years in question.

[6] After the reassessments had been issued, the Appellant objected to the reassessments. In response to the Notice of Objections the CRA, by letter dated December 16, 2014, wrote the Appellant to outline four options available to the Appellant:

- a) to accept an offer by the CRA to waive the interest on the disallowance of the donation tax credits if the Appellant was willing to waive her rights to pursue a further objection and appeal; or
- b) to reject the offer and appeal directly to the Tax Court of Canada as more than 90 days had passed since the Appellant's filing of the Notice of Objection; or
- c) to reject the offer and agree to be bound by the final judgment in similar GLGI donation program appeals and waive any future objection and appeal rights in respect of the donation of tax credits; or
- d) to reject the offer and not agree to be bound by the final judgment in similar GLGI donation program appeals and wait for the CRA to take further action.

See Agreement to be Bound and Waiver of Objection and Appeal Rights attached hereto as Schedule "A". See CRA Notice of Objection Letter attached hereto as Schedule "D".

[7] In the letter of December 16, 2014 from the CRA, there were three documents enclosed: a) a Waiver of Right of Objection and Appeal for the 2007 taxation year (Schedule "A"); b) a Waiver of Right of Objection and Appeal for

the 2009 taxation year (Schedule “B”); c) an Agreement to be Bound and Waiver of Objection and Appeal Rights for 2007 and 2009 taxation years (Schedule “C”).

[8] Subsequent to this correspondence to the Appellant, dated December 16, 2014, the Appellant forwarded correspondence to CRA wherein she stated that she agreed to be bound by the outcome of the cases at the Tax Court of Canada, but did not want to abandon her right of appeal to the Federal Court of Appeal. The CRA responded to the Appellant on January 21, 2015 indicating that it would not agree to the Appellant’s terms outlined in her letter and telling her that she had to submit the form presented to her within five business days or CRA would take further action on her objection without advanced notice. The Appellant then submitted the Agreement to be Bound and Waiver of Objection and Appeal Rights duly signed on January 28, 2015.

[9] It should be noted that during this period of time, the Appellant was given three references to contact. It should also be noted that the Affidavit of Ramona Rudeanu, in support of the Respondent’s motion, was the only evidence presented to the Court by either the Respondent or the Appellant on this particular Motion.

### III. Position of the Respondent

[10] The Respondent takes the position that the Appellant has waived her rights, pursuant to subsection 169(2.2) of the *Act* and thereby is precluded from objecting to the assessment in question. The Respondent further takes the position that its Waiver is a properly enforceable and valid Waiver in all aspects of both statutory and common law.

### IV. Position of the Appellant

[11] The Appellant takes the position that the Waiver in question is not enforceable because a) there was no valid consideration exchanged for the Appellant’s promise; b) the CRA created conditions whereby the Appellant’s consent was not fully informed; and c) the Waiver was obtained by way of undue pressure brought to bear on the Appellant by the CRA.

### V. Legislation

[12] Subsection 169(2.2) reads:

Notwithstanding subsections 169(1) and 169(2), for greater certainty a taxpayer may not appeal to the Tax Court of Canada to have an assessment under this Part vacated or varied in respect of an issue for which the right of objection or appeal has been waived in writing by the taxpayer.

The only requirement imposed by subsection 169(2.2) of the *Act* is that the taxpayer's right of objection or appeal be waived in writing. In the present case, there is no dispute that the Agreement to be Bound and Waiver of Objection and Appeal Rights was in writing.

[13] The leading case on waiver is the Supreme Court of Canada decision in *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co*, [1994] 2 SCR 490 ("*Saskatchewan River Bungalows*"). At paragraphs 19 and 20, the Supreme Court of Canada held that there are basically two fundamental requirements for a waiver:

...The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

[14] Also, the case noted that the waiver does not require consideration and further that the "...[w]aiver can be retracted if reasonable notice is given to the party in whose favour it operates" (*Saskatchewan River Bungalows*, paragraph 27). However a waiver cannot be withdrawn if it is too late or if the withdrawal would result in an injustice to the promisee.

[15] The first issue to be considered is whether or not a Waiver requires consideration. I accept the submissions of the Respondent on this point referring to *W.J. Alan & Company Limited v El Nasr Export & Import Company*, [1972] 2 QB

189, [1972] 2 All ER 127, which basically held that no consideration needed to be moving from the party which benefits from the waiver. This case was decided by Lord Denning, Master of the Rolls, at that time. The Supreme Court of Canada is noted by the Respondent to have adopted similar principles in *Saskatchewan River Bungalows* where the Court stated, at paragraph 20, in part, as follows:

... The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates....

[16] The Supreme Court of Canada has spoken on the issue and as far as I can determine, this is still the law no consideration is required. If I am in error on this particular point that consideration is required, I am of the view that there is good and valid consideration flowing to the Appellant. The Appellant received the benefit of not having to spend any time or effort or cost because her appeal did not proceed to the Tax Court of Canada. In addition, the Respondent held the Appellant's objections in abeyance, and ensured the Appellant's assessments would be confirmed in accordance with the lead case. Each of those in and of themselves is sufficient and adequate consideration in my mind for such a waiver.

[17] Turning to the criteria, as enunciated for a waiver in the *Saskatchewan River Bungalows* case, the Appellant must have full knowledge of her rights. One of the main arguments presented by the Appellant is that the Appellant did not fully know her rights and therefore her consent was not fully informed.

[18] The Agreement to be Bound and Waiver of Objection and Appeal Rights, the document signed by the Appellant, contains the following statements, which if read should give the Appellant sufficient pause if she was concerned that she was not aware of her rights:

1. The document is titled Agreement to be Bound and Waiver of Objection and Appeal Rights;
2. The document states the following in part "...I waive any right of objection and appeal in respect of the issue of my entitlement to donation tax credits...";

3. The document further states “I understand that I will be precluded from filing an objection or an appeal with respect to these issues pursuant to subsections 165(1.2) and 169(2.2) of the *Income Tax Act*”;
4. The document then continues and quotes the limitation of objections in subsection 165(1.2) and waived issues in subsection 169(2.2). The document in and of itself repeats the word waiver on at least three specific occasions including part of the heading. This document was accompanied by the letter from CRA to the Appellant of December 16, 2014.

[19] Before dealing with this letter, it should be noted that the Waiver specifically deals with the right being waived and gives up the right to file an appeal and the entitlement to the GLGI tax credits. Referring to the CRA letter (see Schedule “D”) to the Appellant which was no less than four pages in length, there is no doubt that a) the letter was poorly drafted; b) the letter was poorly worded; and c) the letter was erroneous to some extent in that it referred to two options for the Appellant, but actually contained four. Nonetheless, it is evident from reviewing the letter, if read in its entirety, that there is a sufficient and adequate explanation in the letter that a person would have full knowledge of the rights being waived. In the letter there is background information provided, identifying the issue with respect to the tax shelter number being used for identification purposes only. There is reference to similar donation cases and decisions of the Federal Court of Appeal. There is specificity to the effect that the CRA has audited and disallowed all claims in relation to the GLGI donation program of which the Appellant was a participant.

[20] The CRA letter further goes on to talk specifically about the Appellant’s donation tax credit claims and refers specifically to her 2007 and 2009 charitable donations and how the donations were made. The letter errs by referring to only two options available to the Appellant, when in fact the letter contains four options. However, those options repeatedly, as presented, refer to Waiver of appeal rights. Option #1 is entitled “Notice of Confirmation with a Waiver of Appeal Rights” and that paragraph refers to the Waiver of Right of Objection and Appeal which was due within 30 days of the letter. It refers throughout to the words “reference” and “waive” and it gives a detailed explanation of option #1. What really was option #2, but was not described as option #2, refers to the fact that the Appellant could appeal directly to the Tax Court of Canada if they did not agree with option #1. What really was option #3, but listed as option #2, was rejecting option #1 and



instead signing and returning the Agreement to be Bound and Objection and Appeal Rights. What really was option #4 was rejecting options #1 and #3, with the consequence that the CRA would proceed on their objection without advance notice.

[21] In the summary of actions to be taken, the CRA letter again refers that the Appellant could either accept the offer with interest relief by signing and returning the enclosed Waiver of Right of Objection and Appeal or the Appellant could be bound by the final judgment in the lead case by signing and returning the Agreement to be Bound and Waiver of Objection and Appeal Rights. In either case, the letter gave the Appellant 30 days to sign and return the required document. The letter further goes on in the final paragraph to state as follows: “You may choose to sign and return **either** the attached Waivers of Objection and Appeal Rights **or** the Agreement to be Bound to the address below; however, please do not sign and send both the Waivers and the Agreement to be Bound. Also, please note, there is one Waiver per year to be returned or one Agreement to be Bound which covers all of your outstanding GLGI objections and years.” As noted, the letter could have been drafted somewhat better. There are a few mistakes in the letter, but if the letter is read as a whole, in conjunction with the forms attached, I find it difficult to say that the Appellant would not fully understand her rights have been waived because they are specifically laid out in the letter with great specificity.

[22] In this particular case, the CRA did give quite a bit of information that the rights have been waived and the information was given in the Waiver and in the letter and I would consider 30 days to be ample time. While the CRA could have given more time, 30 days certainly was ample time to get advice. There were three specific references to various contact particulars if the Appellant had any questions about the Waiver. It should be noted that the only evidence before the Court on this particular matter is the evidence of the Affidavit of Ramona Rudeanu referred to aforesaid. There is no evidence of impropriety at any time about the conduct of CRA, nor is there any evidence of any enquiries that have been made by the Appellant for further particulars, or any indication of any nature whatsoever if there was a lack of understanding with respect to the rights being waived. The Appellant did not introduce an affidavit in support of any such argument, nor did the Appellant take the witness stand to rebut such suggestion.

[23] Basically, the Respondent suggested that the Appellant knew or ought to have known what she was signing. I agree with this argument given the documentation which was presented to her had a length and breadth of the explanation.

[24] The second criterion is that there was an unequivocal and conscious intention to abandon these rights. This criterion is satisfied by signing and returning the Agreement to be Bound and Waiver of Objection and Appeal. As the Appellant knew the rights she was waiving, this conduct unequivocally indicates it was her intention to waive her rights. Furthermore, the waiver itself specifically states "I waive any right of objection and appeal...[and] understand that I will be precluded from filing an objection or an appeal with respect to these issues...." In addition, subsections 165(1.2) and 169(2.2) were reprinted in the waiver. There is some suggestion that the CRA failed to adequately warn the Appellant that her claim for GLGI would be disallowed, but there is no duty of care arising from issuing the tax shelter identification number and no duty to warn the Appellant of the issues of the GLGI tax shelter (*The Queen v Scheuer*, 2016 FCA 7).

[25] The Appellant went on at length that there was undue influence and coercion thereby making the waiver unenforceable. The law is clear that the onus was on the Appellant to show she was unduly influenced for the waiver to be unenforceable: *Nguyen c R*, 2005 TCC 697, 2008 DTC 2880 at para 33; *Radelet v the Queen*, 2017 TCC 159, 282 ACWS (3d) 443 at para 14.

[26] I simply do not find such undue influence based upon the evidence before the Court. As I noted, there was no evidence presented by the Appellant on this particular point, it was simply an argument. The case law submitted by the Respondent appears to point quite strongly that where CRA says to the Appellant either sign the waiver or we will close the file that is not undue pressure (*McGonagle v The Queen*, 2009 TCC 168, 2009 DTC 1120). Also in *Hill v The Queen*, 2012 TCC 202, 2012 DTC 1168, the waiver was not invalid simply because the CRA has said it would close the taxpayer's file. At paragraph 29 and 30, the Court stated in part as follows:

**29** According to the evidence, Mr. Hill was told about the settlement offer in an email from Mr. De Micco on Wednesday, March 4, 2009. In that email, Mr. De Micco wrote that the CRA appeals officer "asked that [the settlement offer] be signed by Friday of this week for this new offer to be accepted." Mr. Hill said that

he was told that if he didn't accept the offer, the file would be closed with no adjustment and that he would owe tax on \$1 million of income that had been reassessed.

**30** In my view, the actions of the CRA appeals officer as described by Mr. Hill do not amount to improper or illegitimate pressure. It appears to me that the terms of the settlement offer would not have been a complete surprise to Mr. Hill....

[27] I see no evidence whatsoever which would indicate that there was any undue pressure brought upon the Appellant to sign the form in question. It appears to me that the Appellant had opportunities to sign the waiver over a period of time and did so. Then when the decision on the test case came in and she was not satisfied with the reassessment based upon the Agreement to be Bound and Waiver of Objection and Appeal Rights she decided to proceed with an appeal. Quite simply, I think that the Appellant is bound by the Agreement to be Bound and Waiver of Objection and Appeal Rights and the Motion of the Respondent is granted.

[28] Given that this Motion is granted to quash the Appellant's appeal, the Motion is also granted with respect to the other 26 Appellants' appeals which were heard concurrently, as listed in Schedule "A" annexed hereto.

Signed at Ottawa, Canada, this 10th day of November, 2017.

"E.P. Rossiter"

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Rossiter C.J.

SCHEDULE "A"

File Number: 2017-1764(IT)I, Fraser, Donald v. HMQ

File Number: 2017-1541(IT)I, Loubier, Normand v. HMQ

File Number: 2017-1489(IT)I, Flegg, Murray v. HMQ

File Number: 2016-5364(IT)I, Allen, Marie v. HMQ,

File Number: 2016-5361(IT)I, George, Chris v. HMQ

File Number: 2016-5244(IT)I, Thalen, Harvey v. HMQ

File Number: 2016-5243(IT)I, Wiens, John v. HMQ

File Number: 2016-5242(IT)I, Samadian, Anita v. HMQ

File Number: 2016-5194(IT)I, Fast, Gary v. HMQ

File Number: 2016-5193(IT)I, Prinzen, Bert v. HMQ

File Number: 2016-5192(IT)I, George, Lisa v. HMQ

File Number: 2016-5187(IT)I, Thompson, Donna v. HMQ

File Number: 2016-5184(IT)I, Carpenter, David v. HMQ

File Number: 2016-5181(IT)I, Martens, Edwin v. HMQ

File Number: 2016-5169(IT)I, Martens, Allen v. HMQ

File Number: 2016-5035(IT)I, Pauco, Steve v. HMQ

File Number: 2016-5033(IT)I, Pike, Tracy v. HMQ

File Number: 2016-5032(IT)I, Koshe, Carl v. HMQ

File Number: 2016-5031(IT)I, Gunning, Brian v. HMQ

File Number: 2016-5030(IT)I, Pauco, Terri v. HMQ

File Number: 2016-5029(IT)I, Sonik, Mark v. HMQ

File Number: 2016-5028(IT)I, Cushnie, Ed v. HMQ

File Number: 2016-5027(IT)I, Cairns, Samuel v. HMQ

File Number: 2016-5026(IT)I, Hayhoe, Tim v. HMQ

File Number: 2016-5025(IT)I, Wiens, Patricia v. HMQ

File Number: 2016-5024(IT)I, Armstrong, Roger v. HMQ,

CITATION: 2017 TCC 222  
COURT FILE NOs.: 2016-5034(IT)I  
STYLES OF CAUSE: SALWA ABDALLA AND THE QUEEN  
PLACE OF HEARING: Toronto, Ontario  
DATE OF HEARING: September 12, 2017  
REASONS FOR ORDER BY: The Honourable Eugene P. Rossiter,  
Chief Justice  
DATE OF ORDER: November 10, 2017

APPEARANCES:

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Agent for the 26 Appellants:	Brian Gunning
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