Docket: 2011-3577(IT)I

BETWEEN:

ROBERT L. BREWSTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 16, 2012, at Edmonton, Alberta

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Robert Neilson

JUDGMENT

The Appellant's appeal in relation to the reassessment of his liability under the *Income Tax Act* for his 2009 taxation year is allowed and the reassessment is vacated. The Respondent shall pay costs to the Appellant which are fixed in the amount of $250.

Signed at Halifax, Nova Scotia, this 1st day of June 2012.

"Wyman W. Webb"

Webb J.

Citation: 2012TCC187
Date: 20120601
Docket: 2011-3577(IT)I

BETWEEN:

ROBERT L. BREWSTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant was reassessed in relation to his 2009 taxation year on the basis that his registered retirement savings plan ("RRSP") account had acquired non-qualified investments in 2009.

[2] The Appellant stated during the hearing that, in 2009, he had acquired, through his RRSP account at CIBC Investor Services Inc., shares in Bebida Beverage Co., Bioelectronics Corp., and Opti Canada Inc. The Appellant was unable to provide any particular details about these companies, nor was the Respondent. Other individuals that the Appellant knew had recommended these companies to him and he contacted CIBC Investor Services Inc. who arranged for the shares to be acquired in his RRSP account. There was no discussion or any indication that these shares may not be qualified investments for his RRSP account.

[3] Subsection 146(10) of the *Income Tax Act* (the "*Act*") as it read in 2009, provided, in part, that:

> 146(10) Where at any time in a taxation year a trust governed by a registered retirement savings plan
>
> (*a*) acquires a non-qualified investment, …
>
> the fair market value of

> (*c*) the non-qualified investment at the time it was acquired by the trust, …
>
> … shall be included in computing the income for the year of the taxpayer who is the annuitant under the plan at that time.

[4] A "non-qualified investment" is an investment that is not a "qualified investment" (subsections 146(1) and 207.01(1) of the *Act*). To determine what investments are "qualified investments" it is necessary to review the definition of "qualified investment" in subsection 146(1) of the *Act*, parts of the definition of qualified investment in section 204 of the *Act*, and section 4900 of the *Income Tax Regulations* (the "*Regulations*") (which, in subsection 4900(6) thereof incorporates the definition of "eligible corporation" found in subsection 5100(1) of the *Regulations*).

[5] CIBC Investor Services Inc. issued four T4RSPs "Statements of RRSP Income" in the name of the Appellant for 2009 and these were as follows:

Date	**Amount**
2011-12-07	$2,533.49
2011-12-07	$3,729.60
2011-12-07	$5,107.30
2011-12-07	($2,207.92)
Total:	$9,162.47

[6] Although the forms are all dated as indicated above, the forms introduced at the hearing were reproductions. It is not clear when the original forms were sent by CIBC Investor Services Inc. but I accept the Appellant's testimony that he was not aware of any problems with his RRSP account until he was notified by the Canada Revenue Agency that he was being reassessed.

[7] No explanation was provided on the forms or otherwise to explain why these forms were issued. It appears that these relate to the Appellant's investment in the three companies referred to above but it is not possible to determine which form relates to which company or even if these amounts do relate to the companies identified above by the Appellant. The investments that were alleged to be "non-qualified investments" were not identified in the Reply.

[8] The assumptions made by the Minister are set out in paragraph 10 of the Reply and these are as follows:

10. In determining the Appellant's tax liability for the 2009 taxation year, the Minister made the following assumptions of fact:

    (a) the Appellant was the owner of the RRSP account with the contract number …;

    (b) the RRSP account was a self-directed RRSP account; and

    (c) through his RRSP account the *[sic]* Appellant's acquired non-qualified investments amounting to $11,369.

[9] In *The Queen* v. *Anchor Pointe Energy Ltd.*, 2003 FCA 294, [2004] 5 C.T.C. 98, Justice Rothstein (as he then was) in writing on behalf of the Federal Court of Appeal stated that:

> 8 In the Reply to the Notice of Appeal, the Minister's assumptions are set forth, including assumptions arising as a result of the Global decision. Specifically, the Reply states at paragraph 10:
>
> In reassessing, the Minister assumed the following facts:
>
> ...
>
> (q) API, APII, APIII, APIV and APV did not purchase the seismic data for the purpose of determining the existence, location, extent or quality of an accumulation of oil or gas;
>
> (r) the seismic was not used for exploration purposes;
>
> …
>
> (z) the seismic data purchased by API, APII, APIII, APIV and APV does not qualify as a Canadian Exploration Expense ("CEE") within the meaning of s. 66.1(6)(*a*) of the *Income Tax Act* (the "*Act*").
>
> …
>
> 24 Paragraph 10(z) was struck by Rip J. for an additional reason. He considered it to be a conclusion of law "that has no place among the Minister's assumed facts".
>
> 25 I agree that legal statements or conclusions have no place in the recitation of the Minister's factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact.

> The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law.
>
> 26 However, the assumption in paragraph 10(z) can be more correctly described as a conclusion of mixed fact and law. A conclusion that seismic data purchased does not qualify as CEE within the meaning of paragraph 66.1(6)(a) involves the application of the law to the facts. Paragraph 66.1(6)(a) sets out the test to be met for a CEE deduction. Whether the purchase of the seismic data in this case meets that test involves determining whether or not the facts meet the test. The Minister may assume the factual components of a conclusion of mixed fact and law. However, if he wishes to do so, he should extricate the factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.

[10] It seems to me that whether the Appellant acquired "non-qualified investments" through his RRSP account is a conclusion of mixed fact and law that can only be determined based on the facts related to the investments and then applying the law to those facts. It is not proper for the Minister to assume the final conclusion that the investments were not qualified investments. The factual components should have been separated and clearly stated for the Appellant. Someone must have determined that the Appellant had acquired non-qualified investments but based on the Reply and also on the information provided during the hearing it is not even possible to ascertain if the shares in the companies identified by the Appellant are the investments that were determined to be non-qualified investments.

[11] Justice Rothstein (as he then was) writing on behalf of the Federal Court of Appeal in *The Queen* v. *Anchor Pointe Energy Ltd.*, 2003 DTC 5512 stated that:

> [23] The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet.

[12] In this case the assumptions do not even identify which investments were non-qualified investments. The assumptions as set out in the Reply are not precise and do not assist the Appellant in determining what case he has to meet.

[13] Counsel for the Respondent submitted that the Appellant had to prove that the investments were qualified investments. In *McMillan* v. *The Queen*, 2012 FCA 126, the Federal Court of Appeal stated that:

> 7…In our respectful view, it is settled law that the initial onus on an appellant taxpayer is to "demolish" the Minister's assumptions in the assessment. This initial onus of "demolishing" the Minister's assumptions is met where the taxpayer makes out at least a *prima facie* case. Once the taxpayer shows a *prima facie* case, the burden is on the Minister to prove, on a balance of probabilities, that the assumptions were correct (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 at paragraphs 92 to 94; *House v. Canada*, 2011 FCA 234, 422 N.R. 144 at paragraph 30).

[14] It seems to me that the logical extension of this is that if the Minister has not made any valid assumptions that would support the reassessment, there are no assumptions for the Appellant to "demolish" and therefore the Appellant will be successful.

[15] It should be noted that included in the list of "qualified investments" are "securities … that are listed on a designated stock exchange", (paragraph (*d*) of the definition of "qualified investment" in section 204 of the *Act*) and shares of a "public corporation" (paragraph 4900(1)(*b*) of the *Regulations*[1]. The Appellant did not have any connection to any of the companies identified above and he had simply contacted CIBC Investors Services Inc. to acquire the shares of these companies. If these shares were not listed on a designated stock exchange or the companies were not public corporations, how did CIBC Investors Services Inc. acquire the shares for the Appellant's RRSP account?

[16] In this case since there are no valid assumptions of fact in relation to any investments that were non-qualified investments, there were no valid assumptions for the Appellant to "demolish". Since the Respondent did not lead any evidence to support a finding that any of the investments were non-qualified investments[2], the

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[1] "Public corporation" is defined in subsection 89(1) of the *Act* and this definition applies for the purposes of the *Act* as provided in subsection 248(1) of the *Act*. However I was unable to locate any link or reference to this definition applying for the purposes of section 4900 of the *Regulations*, such as subsection 20(1.1) of the *Act* which provides that the definitions in subsection 13(21) of the *Act* apply to any regulations made under paragraph 20(1)(a) of the *Act*. This issue was not raised during the hearing and I will leave this issue for another matter, as it does not affect my decision in this case. If there is no link or reference to this definition of "public corporation" applying for the purposes of section 4900 of the *Regulations*, what is the definition of a "public corporation" for the purposes of section 4900 of the *Regulations* and in particular would the corporation have to be resident in Canada (which is a condition imposed by the definition contained in subsection 89(1) of the *Act*)?

[2] If the Respondent would have attempted to lead evidence, this would have raised the issue of what evidence the Respondent could have led based on the Reply.

Appellant's appeal is allowed and the reassessment is vacated. The Respondent shall pay costs to the Appellant which are fixed in the amount of $250.

Signed at Halifax, Nova Scotia, this 1st day of June 2012.

"Wyman W. Webb"

Webb J.

CITATION:	2012TCC187
COURT FILE NO.:	2011-3577(IT)I
STYLE OF CAUSE:	ROBERT L. BREWSTER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 16, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	June 1, 2012

APPEARANCES:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Robert Neilson

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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