

BETWEEN:

ALLISON BURNET

Applicant

- AND -

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR DECISION

TREMBLAY-LAMER J.

The Applicant seeks an Order of *mandamus* compelling the Respondent to issue to her, pursuant to subsection 152(1.1) of the *Income Tax Act (Canada)*,¹ a Notice of Determination of Loss for her 1987 taxation year in an amount not less than \$260,460.

THE FACTS AND BACKGROUND

The Applicant is married to Mr. K. Peter Burnet. In 1987, the Burnet's sold a property in West Vancouver, B.C., which they owned jointly. They incurred a total loss of \$520,920.00 when they sold the property. The Applicant did not claim any portion of the loss when she filed her 1987 tax return. Her income for the 1987 taxation year was assessed as filed on August 15, 1988. She did not object to her income tax assessment nor did she appeal the assessment.

Mr. Burnet claimed the loss in its entirety as a business loss in his

¹ R.S.C. 1952, c. 148, as amended.

1987 tax return. On April 26, 1991, the Respondent reassessed his 1987 taxation year and disallowed the loss because it was a personal-use loss. Mr. Burnet appealed that reassessment to the Tax Court of Canada.

On October 5, 1992, the Applicant applied to the Respondent for a Notice of Determination of her non-capital loss for her 1987 taxation year pursuant to subsection 152(1.1) of the *Income Tax Act (Canada)* in an amount equal to half the loss — i.e. \$260,460.00 —, on the basis that she was a joint owner of the property.

Mr. Burnet's April 26, 1991 reassessment for his 1987 taxation year was replaced by a new reassessment dated October 7, 1992. Mr. Burnet amended his original notice of appeal, pursuant to Rule 25 of the *Tax Court of Canada Rules*,² claiming only half of the loss on the basis that he was a joint owner of the property.

By letter dated January 23, 1993, the Respondent agreed to hold the Applicant's October 5, 1992 application in abeyance pending the decision of Mr. Burnet's appeal by the Tax Court of Canada. By letter dated August 5, 1994, the Respondent agreed with the Applicant that if Mr. Burnet was successful in appealing half of the loss then that would be taken into account in determining the Applicant's non-capital loss for her 1987 taxation year and the Respondent would issue to her a Notice of Determination of Loss accordingly. The relevant paragraphs of the letter read:

If the final outcome of Peter Burnet's appeal from the assessment for the 1987 taxation year results in a loss, on account of income, on the disposition of the property (the "Property") which was jointly owned by that person and the taxpayer, the taxpayer's share, whether it be one-half or otherwise as the case may be, of such loss would be taken into consideration in determining the taxpayer's non-capital loss for the 1987 taxation year and a Notice of Determination of such non-capital loss would be issued accordingly.

However, even though the taxpayer may have a non-capital loss for the 1987 taxation year as referred to in the immediately preceding paragraph, the taxpayer's 1987 taxation year is statute-barred from re-assessment, and the taxpayer's share of any income loss on the disposition of the Property

² SOR/90-688.

cannot be taken into consideration in computing her income, taxable income and tax payable for that year unless the Minister of National Revenue exercises his discretion to do so pursuant to the provisions of subsection 152(4.2) of the *Income Tax Act*. No such discretion has been exercised by the Minister of National Revenue or any of his delegated officials.

By judgment dated May 26, 1995, the Tax Court of Canada determined that Mr. Burnet was entitled to a business loss equal to half the loss incurred from the sale of the property.

On October 27, 1995, in light of the decision of the Tax Court of Canada, the Applicant applied to the Respondent for a Notice of Determination of Loss for her 1987 taxation year equal to half the loss, as agreed in the August 5, 1994 letter. By letter dated September 23, 1996, the Department of National Revenue denied the Plaintiff's application for a Notice of Determination of Loss.

THE RELEVANT STATUTORY PROVISIONS

The basis for this application is subsection 152(1.1) of the *Income*

Tax Act, which states:

152. (1.1) - Determination of losses

Where the Minister ascertains the amount of a taxpayer's non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss for a taxation year and the taxpayer has not reported that amount as such a loss in the taxpayer's return of income for that year, the Minister shall, at the request of the taxpayer, determine, with all due dispatch, the amount of the loss and shall send a notice of determination to the person by whom the return was filed.

ANALYSIS

It is not disputed that the principles governing the issuance of an order in the nature of *mandamus* are those which were enunciated by the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*³ and subsequently endorsed by the Supreme Court of Canada.⁴ It must first be

³ [1994] 1 F.C. 742 (C.A.).

⁴ [1994] 3 S.C.R. 1100.

determined whether the Respondent owed a public legal duty to the Applicant pursuant to subsection 152(1.1) of the *Income Tax Act*. Once it is established that the Minister has ascertained a taxpayer's loss for a taxation year to be different than what the taxpayer reported in his or her income return for that year, he is required to issue a Notice of Determination of Loss. Thus, the only real issue before this Court in the present case is whether the Respondent "ascertained" the Applicant's loss for her 1987 taxation year as different than what she reported in her return of income for that year.

The Applicant agrees that the Respondent did not originally ascertain the Applicant's loss to be different than that which she initially reported — i.e. nil. The Applicant, however, submits that the Respondent subsequently ascertained the Applicant's loss for her 1987 taxation to be \$260,460. The *Income Tax Act* does not define the word "ascertain" in subsection 152(1.1). According to the *Shorter Oxford English Dictionary*(1973) "ascertain" means "to determine" or "to fix". An amount may be "ascertained" or "fixed" even if a precise amount is not given; it is sufficient if the amount can be made certain through the use of a formula [*Hill v. Straight*,⁵ *British Pacific Properties Ltd. v. Minister of Highways and Public Works*⁶ and *Rizzi v. Grazcos Co-operative Ltd.*⁷]. Applying these definitions to the facts of the present case, the Applicant contends that the Respondent, according to the first paragraph of the Respondent's letter dated August 5, 1994 "ascertained" the Applicant's loss for her 1987 taxation year — i.e. for an amount equivalent to that allowed by the Tax Court in Mr. Burnet's appeal for his 1987 taxation year.

The Respondent submits it did not "ascertain" the Applicant's loss in its letter of August 5, 1994. An amount, he argues, can only be said to have been "ascertained" where a definite sum has been determined which is not subject to some contingency or condition which may never happen.⁸ The

⁵ [1913] 5 W.W.R. 225, at 230 (Man.K.B.).

⁶ (1980), 112 D.L.R. (3d) 1 at 6 (S.C.C.).

⁷ (1981), 153 C.L.R. 669, at 675 (High Court of Australia).

⁸ *Wiltsie v. Ward* (1883), 8 O.A.R. 549 (O.C.A.).

position set out in the August 5, 1994 letter to the Applicant's counsel was conditional and could not therefore constitute the "ascertainment" of a loss.

For the following reasons, I would conclude that the precondition in subsection 152(1.1) of the *Income Tax Act* was not satisfied and thus the Respondent owed no public legal duty to the Applicant.

As stated above, for the Respondent to have a duty under subsection 152(1.1), it must be established that the Minister "ascertained" the taxpayer's loss for a particular taxation year to be different than the taxpayer reported in his or her income return for that year.

The Applicant invoked authorities to support the proposition that an amount may be ascertained even if no precise amount is given. These authorities suggest that it is sufficient that the amount can be made certain through the use of a formula. However, such is not the case here. The Respondent's August 5, 1994 letter did not provide a formula sufficient to ascertain the Applicant's loss. Not only did the letter not make the amount certain but the position contained therein was also made conditional. It flows from the jurisprudence that an amount cannot be said to have been ascertained when it is subject of some contingency. In this regard, I would agree with counsel for the Respondent and adopt the views of Spragge

C.J.O. in *Wiltsie v. Ward*.⁹

The amount is to be "*ascertained*" by the signature of the defendant. The fair meaning of these words surely is, that the ascertainment means of some certain and definite sum, and not to be subject to any contingency or condition which may never happen.

The Minister ascertained the Applicant's loss for her 1987 taxation year to be nil as reported by her income return for that year. The Respondent's August 5, 1994 letter did not, in my opinion, change that. It was a reply to the Applicant's October 5, 1992 demand pursuant to subsection 152(1.1). The position set out in the letter was conditional upon

⁹ *Ibid.*, at 552.

the Tax Court allowing Mr. Burnet's appeal. The conjunction "if" in the letter makes it clear that the allowance of the loss was subject to contingency. The Oxford English Dictionary upon which counsel for the Applicant heavily relied in defining the word "ascertain" defines the word "if" as follows: "introducing a clause of condition; on condition that".

In the final analysis, I am satisfied that the Respondent's August 5, 1994 letter did not "ascertain" the Applicant's loss for her 1987 taxation to be different than that which she reported in her income tax return for that year.

I have concluded that the Respondent owed no public legal duty to the Applicant. In these circumstances, a writ of mandamus simply cannot be issued. Therefore, the application for judicial review is dismissed.

OTTAWA, (Ontario)
This 12th day of June 1997

JUDGE