Federal Court of Appeal | Cour d'appel fédérale

Date: 20161128

Docket: A-432-15

Citation: 2016 FCA 301

CORAM: **NADON J.A.**
RENNIE J.A.
DE MONTIGNY J.A.

BETWEEN:

EASY WAY CATTLE OILERS LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Saskatoon, Saskatchewan, on November 14, 2016.

Judgment delivered at Ottawa, Ontario, on November 28, 2016.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: RENNIE J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of D'Arcy J. of the Tax Court of Canada (the Judge) dated August 21, 2015 (2015 TCC 211) which dismissed the appellant's appeal of a reassessment made under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the Act) for the appellant's 2008 taxation year.

[2] The Judge held that because the appellant had failed to comply with the requirements of paragraph 127(9)(*m*) of the Act, it could not claim an investment tax credit for its 2008 taxation year in respect of certain scientific research and experimental development expenditures (SR and ED expenditures). More particularly, in the Judge's view, the appellant had failed to file by June 30, 2010, the form prescribed by the Minister for the purposes of paragraph 127(9) (*m*), namely Form T2SCH31 (the prescribed Form).

[3] Subsection 127(9) of the Act, and paragraph (*m*) in particular, provide as follows:

except that no amount shall be included in the total determined under any of paragraphs (a) to (e.2) in respect of an outlay, expense or expenditure that would, if this Act were read without reference to subsections 127(26) and 78(4), be made or incurred by the taxpayer in the course of earning income in a particular taxation year, and no amount shall be added under paragraph (b) in computing the taxpayer's investment tax credit at the end of a particular taxation year in respect of an outlay, expense or expenditure made or incurred by a trust or a partnership in the course of earning income, if…	Toutefois aucun montant n'est inclus dans le total calculé selon l'un des alinéas a) à e.2) au titre d'une dépense qui, s'il n'était pas tenu compte des paragraphes (26) et 78(4), serait engagée ou effectuée par le contribuable en vue de gagner un revenu au cours d'une année d'imposition, et aucun montant n'est ajouté, aux termes de l'alinéa b), dans le calcul du crédit d'impôt à l'investissement du contribuable à la fin d'une année d'imposition au titre d'une dépense engagée ou effectuée par une fiducie ou une société de personnes en vue de gagner un revenu, si, selon le cas :
…	[…]
m) the taxpayer does not file with the Minister a prescribed form containing prescribed information in respect of the amount on or before the day that is one year after the taxpayer's filing-due date for the particular year; (*crédit d'impôt à l'investissement*)	*m*) le contribuable ne présente pas au ministre un formulaire prescrit contenant les renseignements prescrits relativement au montant au plus tard le jour qui suit d'une année la date d'échéance de production qui lui est applicable pour l'année en question. (*investment tax credit*)

(emphasis added)

[4] Thus, in order to meet the requirements of paragraph 127(9)(*m*), a taxpayer who seeks to claim an investment tax credit in regard to its SR and ED expenditures must file with the Minister the prescribed Form containing prescribed information within one year of its filing due date for the relevant taxation year.

[5] There is no dispute that June 30, 2010 was the deadline within which the appellant had to file the prescribed Form containing the prescribed information and that the appellant did not file the prescribed Form within that deadline. However, the appellant filed on June 30, 2010 a completed Form T661 as required to support its claim for SR and ED expenditures. Although the Minister accepted the appellant's claim for expenditures in relation to SR and ED, he denied the appellant's claim for an investment tax credit because the prescribed Form was not filed by June 30, 2010. It was only filed on August 16, 2010.

[6] The only issue on this appeal is whether the Judge erred in holding that filing the prescribed Form was the only way to claim an investment tax credit in relation to SR and ED expenditures pursuant to paragraph 127(9)(*m*) of the Act. For the reasons that follow, I conclude that the Judge made no reviewable error.

[7] The only argument put forward by the appellant in this appeal is that its failure to file the prescribed Form with the Minister by June 30, 2010 is not fatal because, by that time, all of the prescribed information was available to the Minister. More particularly, the appellant says that all of the prescribed information required by the Minister to calculate the investment tax credit

sought by it could be found in Form T661 and its T2 corporate income tax return for the 2008 taxation year filed on September 30, 2009.

[8] The appellant says that the information contained in Form T661 and in its T2 income tax return was "sufficiently clear and complete" so as to allow the Minister to calculate its investment tax credit. Consequently, according to the appellant, this information put the Minister in a position to make the necessary calculations to determine the appellant's investment tax credit in relation to its SR and ED expenditures.

[9] In support of its position, the appellant referred us to section 32 of the *Interpretation Act*, R.S.C., 1985, c. I-21 which provides as follows:

32 Where a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead, do not invalidate the form used.	**32** L'emploi de formulaires, modèles ou imprimés se présentant différemment de la présentation prescrite n'a pas pour effet de les invalider, à condition que les différences ne portent pas sur le fond ni ne visent à induire en erreur.

[10] At paragraph 16 of its memorandum of fact and law, the appellant says that:

> Canadian courts have consistently held that section 32 of the *Interpretation Act* operates to ensure that a deviation from a prescribed form does not invalidate the document. There is a substantial body of authority to this effect and a review of some of the more relevant cases will illustrate that the decision of the trial judge was wrong in law.

[11] In my view, the appellant's reliance on section 32 of the *Interpretation Act*, on the facts of this case, is misguided.

[12] First, the prescribed Form and Form T661 serve different purposes notwithstanding that some of the information contained therein may overlap. The purpose of Form T661, as stated on the form itself, is to provide technical information regarding SR and ED projects, to calculate the SR and ED expenditures, and to calculate those expenditures which would qualify as SR and ED expenditures for investment tax credits should such credits be claimed. The stated purpose of the prescribed Form is, *inter alia*, for a corporation to claim investment tax credits in regard to SR and ED expenditures.

[13] Second, the clear intent of section 32 of the *Interpretation Act* is, in my respectful view, to avoid penalizing a taxpayer who has complied substantively with a statutory provision which requires the filing of a prescribed form containing prescribed information. In other words, section 32 applies where the taxpayer has filed the prescribed information, but has not used the prescribed Form to do so. Nonetheless, the taxpayer has substantially complied with the requirements of the form by providing the Minister the information which the Minister needs in regard to the taxpayer's claim. In this case, there can be no doubt that the appellant did not file the prescribed information by June 30, 2010. In other words, the appellant had not filed any form setting out the prescribed information for the purpose of claiming an investment tax credit in relation to its SR and ED expenditures by the deadline.

[14] What the appellant seeks, in my respectful view, is to transform its Form T661 and its T2 corporate income tax return into a prescribed Form filed by June 30, 2010. The respondent, at paragraph 40 of its memorandum of fact and law, correctly explains the appellant's approach as follows:

> The appellant is attempting to convert the information in the T2 and the Form T661 that the Minister could have used to calculate the appellant's investment tax credits into a stand-alone application for ITCs [investment tax credits], equivalent to Schedule 31 [the prescribed Form] but defective only in form. This is over-reaching.

[15] In the respondent's view, should the appellant's approach herein be approved by this Court, the Minister would have to second guess a taxpayer's intention with regard to investment tax credits when processing that taxpayer's Form T661 which, as I have already indicated, serves an entirely different purpose. In other words, the Minister, upon being apprised of the taxpayer's intention after the deadline, would then have to look back at the taxpayer's files and make the calculations which the taxpayer ought to have made when filing the prescribed form. Clearly, such an approach cannot be right.

[16] In my respectful opinion, it is the taxpayer's responsibility to inform the Minister whether it is claiming an investment tax credit in relation to SR and ED expenditures. The way to communicate that intention to the Minister is for the taxpayer to file the prescribed Form containing the prescribed information by the prescribed deadline. In this case, the appellant did not communicate its intention of claiming an investment tax credit in regard to its SR and ED expenditures before it filed the prescribed Form on August 16, 2010.

[17] Consequently, section 32 of the *Interpretation Act* cannot help the appellant. On the facts of this case, the appellant's failure to file the prescribed Form by June 30, 2010, or any other form in compliance with the requirements of paragraph 127(9)(*m*), is fatal to its appeal of the Minister's reassessment of its 2008 taxation year.

[18] Lastly, in support of its position on this appeal, the appellant also referred us to a number of cases decided by the Tax Court, the Federal Court, and this Court dealing with waivers. In my view, all of these cases are distinguishable and they provide no support to the appellant's position.

[19] As I see no basis for interfering with the Judge's decision, I would dismiss the appeal with costs.

"M Nadon"

J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-432-15
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE D'ARCY OF THE TAX COURT OF CANADA DATED AUGUST 21, 2015 (DOCKET NO.: 2012-1217(IT)G)	
STYLE OF CAUSE:	EASY WAY CATTLE OILERS LTD. v. THE QUEEN
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 14, 2016
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	RENNIE J.A. DE MONTIGNY J.A.
DATED:	NOVEMBER 28, 2016

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