

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180108

Docket: A-197-17

Citation: 2018 FCA 2

**CORAM: STRATAS J.A.
NEAR J.A.
WOODS J.A.**

BETWEEN:

KELLY-JEAN ARCHIBALD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on January 8, 2018.
Judgment delivered from the Bench at Toronto, Ontario, on January 8, 2018.

REASONS FOR JUDGMENT OF THE COURT BY:

WOODS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 8, 2018).

WOODS J.A.

[1] This is an appeal by Kelly-Jean Archibald from a judgment of the Tax Court of Canada concerning an assessment under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), which disallowed Ms. Archibald's claim for a tuition tax credit (2017 TCC 96). The assessment relates to the 2014 taxation year.

[2] The Tax Court, in a decision by Justice Boyle, upheld the assessment on the ground that tuition fees paid by Ms. Archibald to the University of Liverpool for an on-line MBA program did not qualify for the credit because Ms. Archibald was not enrolled at the University on a full-time basis as required by paragraph 118.5(1)(b) of the Act.

[3] As a preliminary matter, a motion by Ms. Archibald to introduce fresh evidence should be considered. The Crown opposed this motion. In our view, the evidence should not be admitted. The relevant test for the admission of fresh evidence is quite strict. The test has not been satisfied in this case because the evidence could have been introduced at the Tax Court, and in any event, the evidence is not conclusive of the issue in this appeal.

[4] I now turn to the substantive issue in the appeal and begin with the relevant standards of review.

[5] In this case, the Court must apply the standards of review as described in the case of *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. These principles are well established, and require that the Tax Court decision be upheld unless the Court made an error in determining a question of law or made a palpable and overriding error in respect of questions of fact or questions of mixed fact and law. The terms “palpable” and “overriding” in this context mean obvious and affecting the heart of the result in the case.

[6] We are satisfied that the Tax Court made no such reviewable error, and that the appeal should be dismissed.

[7] In particular, there is no reversible error with the approach of the Tax Court which gave significant weight to the policy of the University that gives credits for this on-line course at a rate of 30% to 40% of the rate that credits are accumulated for equivalent on-campus studies. As a result, the on-line course takes three years to complete whereas the equivalent course attended by students on campus takes just one year.

[8] Accordingly, there is no reviewable error in the Tax Court's conclusion that Ms. Archibald did not attend the University on a full-time basis.

[9] Ms. Archibald submits that it is not fair for the legislation to leave the decision as to the meaning of full-time attendance to each post-secondary institution. We disagree with this submission partly because the legislation does not leave the meaning of "full-time attendance" to the institution. It is a determination to be made by a court based on all relevant facts.

[10] Ms. Archibald also submits that the benefit of the doubt in this case should go in her favour because the meaning of the term "full-time attendance" is unclear. If Ms. Archibald suggests that the term "full-time" should be given an interpretation which extends to the on-line program that she was enrolled in, we respectfully disagree. Although there may be cases in which there is some doubt as to whether the full-time attendance requirement has been satisfied, this is not one of them. For the reasons given by the Tax Court, Ms. Archibald clearly did not satisfy the full-time requirement.

[11] Ms. Archibald also suggests that requiring full-time attendance may result in discrimination against students who pursue education outside of Canada through the internet. If the legislation results in unfairness to students such as Ms. Archibald relative to students who attend institutions in Canada, this is a matter for Parliament, and not the courts, to address. The full-time requirement is within the prerogative of Parliament to enact.

[12] Ms. Archibald also submits that she is aware of individuals similarly situated who have been granted the tax credit. This may be so, but it is not a basis for relief. As pointed out in a decision of Justice Bowie of the Tax Court, it is “well settled that a taxpayer does not become entitled to relief simply because another taxpayer similarly situated was assessed differently” (*Roy v. The Queen*, 2011 TCC 299, [2011] 6 C.T.C. 2215, at paragraph 15).

[13] Ms. Archibald further submits that she is of the opinion that on-line learning takes more effort to complete than learning by attending lectures. Even if this opinion is accepted, it does not establish that the on-line course attended by Ms. Archibald was the equivalent of full-time attendance. No reviewable error has been shown in the Tax Court’s decision.

[14] We have concluded that the appeal should be dismissed, with costs to the Crown fixed at \$250, all inclusive.

"Judith Woods"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-197-17

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BOYLE OF THE TAX COURT OF CANADA DATED MAY 30, 2017, DOCKET NO. 2016-3189(IT)I.

STYLE OF CAUSE: KELLY-JEAN ARCHIBALD v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: JANUARY 8, 2018

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.
NEAR J.A.
WOODS J.A.

DELIVERED FROM THE BENCH BY: WOODS J.A.

APPEARANCES:

Kelly-Jean Archibald FOR THE APPELLANT
(ON HER OWN BEHALF)

Leonard Elias FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin FOR THE RESPONDENT
Deputy Attorney General of Canada