Date: 20070416

Docket: A-330-06

Citation: 2007 FCA 151

CORAM: **DÉCARY J.A.**
NOËL J.A.
SEXTON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

INTERIOR SAVINGS CREDIT UNION

Respondent

Heard at Vancouver, British-Columbia, on March 8, 2007.

Judgment delivered at Ottawa, Ontario, on April 16, 2007.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DÉCARY J.A.
SEXTON J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from an interlocutory Order of Little J. of the Tax Court of Canada dismissing the Crown's Motion to strike out Interior Savings Credit Union's ("Interior") Notice of Appeal ([2006] 4 CTC 2440, 2006 DTC 3351) from an assessment issued with respect to its 2004 taxation year.

[2] In its Notice of Appeal, Interior does not take issue with the taxes assessed for the year. Rather, it challenges the adjustment indicated with respect to one of its running accounts (i.e., the "preferred rate amount" ("PRA")).

[3] Before filing its Reply, the Crown brought an application before the Tax Court of Canada to quash the Notice of Appeal on the ground that Interior's right of appeal under subsection 169(1) of the *Income Tax Act* ("the Act") is restricted to a challenge of the taxes assessed for the year. Since Interior did not take issue with the taxes assessed for the year, there was nothing to appeal.

[4] In the alternative, the Crown sought an extension of time to file its Reply to the Notice of Appeal. At the time when the Crown's Motion was filed, the delay for filing the Crown's Reply had been extended by consent and had yet to expire.

DECISION OF THE TAX COURT JUDGE

[5] Dealing with the Crown's Motion to quash, Little J. first noted that the "general rule" is that a nil assessment cannot be appealed (Reasons, at paras. 25 and 26):

> Under subsection 152(4) of the *Act*, the Minister may issue to a taxpayer either an "assessment" or a "notification that no tax is owing". This notification is often called a "nil assessment".
>
> Subsection 169(1) of the *Act* allows a taxpayer to appeal from an "assessment". A nil assessment is not an "assessment". Therefore, the general rule is that a taxpayer cannot appeal from a nil assessment.

[6] However, the assessment before him was not a nil assessment and even though no challenge was made by Interior to the taxes assessed, Little J. held that the PRA determination could be

appealed. In coming to this conclusion, he relied on the decision of the Tax Court in *Imperial Oil Limited and Inco Limited v. The Queen*, 2003 DTC 179 (*Imperial Oil*), as confirmed by the Court of Appeal (*The Queen v. Imperial Oil and Inco Limited*, 2003 DTC 5485) (Reasons, paras. 27-34).

[7] Little J. went on to hold that in any event, the nil assessment rule has been modified by the case law over the years such that nil assessments can now be appealed (Reasons, para. 35). After noting that it was critical for Interior to know as early as possible where its PRA pool stood (Reasons, at para. 36), Little J. dismissed the Crown's Motion with costs in any event of the cause (Reasons, at paras. 35-37).

[8] Finally, Little J. granted the Crown's motion in the alternative for an extension of time to file its Reply. At the same time, he ordered pursuant to subsection 44(2) of the *Tax Court of Canada Rules (General Procedure)* SOR/90-688 ("The Tax Court Rules") that the allegations of fact contained in the Notice of Appeal be presumed to be true (Reasons, paras. 38-42).

ALLEGED ERRORS IN DECISION UNDER APPEAL

[9] In support of its appeal, the Crown alleges that Little J. misconstrued the case law and ignored the binding authorities when he held that Interior could pursue its appeal despite the fact that it was not challenging the amount of tax assessed for the year. A right of appeal is a creation of statute and there are no provisions in the Act which allow Interior to attack the Minister's computation of its PRA pool in a year where this calculation has no impact on the amount of taxes assessed.

[10] In any event, it was not open to Little J. to order that the facts alleged in Interior's Notice of Appeal be presumed to be true while at the same time extending the time within which the Crown could file its Reply. Accordingly, the Crown asks that this aspect of Little J.'s order be rescinded in the event that it is not successful on the first branch of the appeal.

ANALYSIS AND DECISION

[11] The potential dispute surrounding Interior's PRA stems from the merger of two credit unions which took place in 2002 under the laws of British Columbia, Interior being the resulting entity. Subsection 87(1) of the Act provides that when two credit unions amalgamate, they must add their PRA's together to determine the PRA of the amalgamated credit union. It is not necessary to go into the details of the PRA computation except to say that a credit union has an interest in having the lowest possible PRA since it is a capped account which attracts a lower tax rate.

[12] In this case, Interior took the position that the merger which took place in 2002 was not an amalgamation within subsection 87(1). Consequently, rather than adding together the PRAs of the two amalgamated credit unions, Interior took the position in filing its tax return for the year of the merger that it had a PRA of 0 and continued to compute its PRA pool on that basis (with appropriate yearly adjustments) for its 2003 and 2004 taxation years.

[13] With respect to each of those years, the Notices of Assessment issued by the Minister of National Revenue reflected in their bottom part under the heading "Explanation" the Minister's

calculation of Interior's PRA arrived at by adding the PRAs of the two amalgamated credit unions. The PRA so indicated for the year of the merger was at $54,348,490 which continued to be reflected with appropriate yearly adjustments in the Notices of Assessment issued with respect to Interior's 2003 and 2004 taxation years.

[14] In 2004, Interior took issue for the first time with the Minister's computation of its PRA. It did so even though, as for the two prior years, this computation had no impact on the taxes assessed. Interior's sole contention is that its PRA was improperly reflected on this assessment and that it is entitled to have this computation reviewed now rather than later, in a taxation year where the PRA will impact on its taxes payable.

[15] In my respectful view, the Tax Court Judge erred in dismissing the Crown's Motion to strike. The Minister's power and duty under subsection 152(1) of the Act is to "… assess the tax for the year, the interest and penalties, if any, …". The taxpayer's right to object (ss 165(1)) and to appeal to the Tax Court of Canada (ss 169(1)) can only be exercised in order "… to have the assessment vacated or varied …". It follows that unless the taxpayer challenges the taxes interest or penalties assessed for the year, there is nothing to appeal and indeed no relief which the Tax Court can provide (*Chagnon v. Norman*, (1989) 16 SCR 661 at 662).

[16] The Tax Court Judge properly notes in his reasons that the assessment before him was not a nil assessment. However, he goes on to state that even if it was a nil assessment, he would nevertheless allow the appeal to continue. The expression nil assessment does not appear anywhere

in the Act. When dealing with a situation where a person owes no taxes, the Act authorizes the Minister to issue a notice "that no tax is payable" (subsection 152(4)).

[17] Nonetheless, the term nil assessment is often used in the case law to identify an assessment which cannot be appealed. There are two reasons why a so-called nil assessment cannot be appealed. First, an appeal must be directed against an assessment and an assessment which assesses no tax is not an assessment (see *Okalta Oils Limited v. MNR*, 55 DTC 1176 (SCC) at p. 1178: "Under these provisions, there is no assessment if there was not tax claimed"). Second, there is no right of appeal from a nil assessment since: "Any other objection but one related to an amount claimed [as taxes] was lacking the object giving rise to the right of appeal …" (*Okalta Oils, supra*, at p. 1178).

[18] The two aspects of the rule are succinctly put by Lamarre Proulx J. in *Faucher v. Canada*, 94 DTC 1575, at p. 1579:

> In conclusion, there is no right of appeal from an assessment of a nil amount, or from an assessment of which a reduction is not requested, …

[19] It is the second branch of the rule which applies to a situation where as here taxes are assessed, but no objection is taken in the Notice of Appeal to the taxes assessed. The decision of Rip J. (as he then was) in *Les Soudures Chagnon Ltée v. M.N.R.*, 90 DTC 1203 at p. 1205, and the cases to which he refers illustrate the application of this aspect of the rule:

> By appealing from its assessment for 1981, the appellant is asking that its income, and accordingly its taxes, be increased. The appeal procedure provided by the Act is, however, intended to alleviate taxpayers' tax burdens. The Court can only consider an appeal brought from a tax assessment if the taxpayer is asking for a reduction of tax for the year at issue: *No. 526 v. M.N.R.*, 58 DTC 497, *Niel L. Boyko*

> *et al. v. M.N.R.*, 84 DTC 1233, at 1237, *Steven Cooper v. M.N.R.*, 87 DTC 194, at 205 and *Paul Cohen v. M.N.R.*, 88 DTC 1404, at 1406. For this reason, the appeal brought from a tax assessment for 1981 will be dismissed.

[20] Parliament has over the years created exceptions to the rule stated in *Okalta Oil*. For instance, the Act (para. 152(1)(a)) requires the Minister to determine by way of assessment the amount of specified refunds to which a taxpayer may be entitled for a given taxation year and provides that the objection and appeal provisions apply to such determinations with such modification as the circumstances require (subsection 152(1.2)). Similarly, where there are diverging views about the extent of a taxpayer's specified losses, the Minister may be required to determine the loss (subsection 152(1.1)), in which case the objection and appeal procedures apply.

[21] However, no such exception has been created with respect to the computation of a taxpayer's PRA. There is in this case no statutory duty on the part of the Minister to determine where Interior's PRA stood in 2004 (or in the two prior years) and no corresponding right of appeal. The Minister's view was communicated to Interior as a matter of convenience. The fact that it was set out on the Notice of Assessment does not make it part of the assessment.

[22] The situation is much the same as that described in *Ruffolo v. The Queen*, 2000 DTC 6357 (FCA), where the appellant argued that his "balance unpaid" was part of the assessment and binding on the Minister because it was reflected on the Notice of Assessment. Through error, the amount of the balance had been inscribed as 0. Rothstein J.A. (as he then was) writing for the Court disposed of the argument as follows (at para. 5):

> The Minister's duty to assess in subsection 152(1) of the Act is in respect of "...the tax for the year, the interest and penalties, if any, payable ...". The determination of

> the "balance unpaid" is as a result of the assessment, but is not a component of the assessment of the tax, interest and penalties payable. It is included in the notice of assessment as a convenience but it is not part of the assessment. That the box marked "balance unpaid" is stated as "nil" is not binding on the Minister.

The same reasoning applies to the PRA in this case.

[23] Little J. quoted *Imperial Oil* as authority for the proposition that “every assessment can be appealed” (Reasons, at paras. 27-34). His reasons suggest that *Imperial Oil* enunciated a new principle which opens the door to Interior’s attempt to challenge the PRA despite the fact that no challenge is made to the taxes assessed.

[24] *Imperial Oil* is a case where the Crown attempted to strike a Notice of Appeal on the ground that an initial or desk assessment could not be appealed. The Crown’s argument was that these species of assessments, because they usually reflect the taxpayer’s filing position, were not intended by Parliament to be subjected to the appeal process. Bowman C.J. was unable to identify any statutory basis for excluding such assessments from the appeal process. He rejected the Crown’s argument and the Court of Appeal agreed. There is no suggestion in *Imperial Oil* that the right of appeal provided under subsection 169(1) can be used to put in issue anything other than the taxes interests or penalties assessed.

[25] Little J. goes on to hold that in any event Interior could pursue its appeal even if the assessment was a nil assessment. In support of this proposition, he cites *Corriveau v. The Queen*, 2006 DTC 2583, and *Joshi v. Canada*, 2003 DTC 1550 (*Joshi #1*) and the cases which are

referenced in these decisions. According to Little J., these cases broke with the established rule that no appeal lies from a nil assessment.

[26] In *Corriveau*, McArthur J. was confronted with a nil assessment. The reasons state that "there are some exceptions, where the Court can rule on an assessment in respect of which no tax is payable"; the decisions of the Tax Court in *Martens v. MNR*, 88 DTC 1382, *Aallcann Wood Suppliers Inc. v. Canada*, 94 DTC 1475 and *Joshi #1* are footnoted. However, McArthur J. holds that these exceptions (without discussing them) are not applicable in the case before him (*Corriveau*, at para. 11).

[27] In *Joshi #1*, Hershfield J. refused to quash a Notice of Appeal directed against a nil assessment in the context of an interlocutory application. His reasons indicate that he attributes no finality to this ruling and state that the matter is left to be decided at trial. It does not appear as though *Joshi #1* ever proceeded to trial. At least, there is no record of any trial decision in the Book of Authorities submitted by the parties and I have been unable to find any reported trial decision.

[28] However, in *Joshi v. The Queen*, 2005 DTC 22 (*Joshi #2*), a case which apparently involves the husband of the appellant in *Joshi #1*, the Tax Court (O'Connor J.) did hold that a nil assessment can be appealed. The following five decisions were quoted in support of that proposition: *Joshi #1*, *Martens*, supra, *Aallcann Wood Suppliers,* supra, *Liampat Holdings Ltd. v. Canada*, [1995] F.C.J. No. 1621 and *Bruner v. Canada*, 2003 F.C.J. No. 144 (FCA). We have

already seen that *Joshi* #1 is not authority for the proposition that a nil assessment can be appealed. In my respectful view, the same applies to the other cases relied upon by O'Connor J.

[29] In *Martens* the Tax Court refused to strike out a nil assessment on the basis that the subject matter of the appeal came within a statutory exception to the normal rule. Rip J. (as he then was) explained that although the assessment did not assess any taxes, it did set out an amount which the Minister had the duty to determine and with respect to which a special right of appeal had been created. After quoting the relevant provisions, he said (at p. 1384):

> Subsection 127.1(1) provides the means by which the taxpayer is deemed to pay an amount on account of tax equal to his refundable investment tax credit for the year. The Minister, in accordance with paragraph 152(1)(b), determines the amount of tax deemed to be paid for the year.
>
> If the taxpayer does not agree with the Minister's determination of the amount of tax deemed to be paid he has the right to object to and appeal the determination: subsection 152(1.2) grants the taxpayer the right to apply the provisions of Divisions I and J of the Act, which provide, *inter alia*, for the rights to object to an assessment of tax and to appeal such an assessment, or a determination, other than a determination made under subsection 152(1.1). Amounts to be determined by the Minister include the determination of an amount of tax deemed by subsection 127.1(1) to have been paid on account of tax under Part I of the Act for the year.
>
> In the matter at bar the Minister has determined the amount of the refundable investment tax credit in 1984 to be $2,366.24 and the appellant wishes to appeal from this determination.
>
> The appellant has the right under the provisions of subsection 152(1.2) to contest the determination of the Minister by filing a Notice of Objection in the manner provided by section 165 and, if not satisfied with the Minister's decision in respect of the objection., file a Notice of Appeal in the manner provided by section 169. This is what the appellant has done. He need not wait for a future taxation year to dispute the determination.
>
> [Emphasis added]

[30] *Aallcann Wood Suppliers* is a decision by Bowman J. (as he then was) which stands for the proposition that in the absence of a binding loss determination by the Minister pursuant to

subsection 152(1.1) of the Act, it is open to a taxpayer to challenge the Minister's calculation of a loss for a particular year in an another year in which the loss impacts on the taxes assessed. The reasoning of the Court is set out in the following passage (at pp. 1475-76):

> The Minister's position in the original reply to the notice of appeal that the Minister's ascertainment of a loss for a particular taxation year is immutable unless a loss determination is made under subsection 152(1.1.) is, however, wrong. It is true that this court cannot make a formal loss determination under subsection 152(1.1.). That is the Minister's function. If such a loss determination is made it is valid and binding unless challenged by way of objection or appeal and, if it is sustained on appeal, it stands. The purpose of subsection 152(1.1.) is to permit a taxpayer to have its loss for a year determined definitively and, if necessary, to have the Minister's determination reviewed by the court. One of the reasons for the enactment of subsection 152(1.1.) was that no appeal lies from a nil assessment. In the absence of a binding loss determination under subsection 152(1.1.), it is open to a taxpayer to challenge the Minister's calculation of a loss for a particular year in an appeal for another year where the amount of the taxpayer's taxable income is affected by the size of the loss that is available for carry-forward under section 111. **In challenging the assessment for a year in which tax is payable** on the basis that the Minister has incorrectly ascertained the amount of a loss for a prior or subsequent year that is available for deduction under section 111 in the computation of the taxpayer's taxable income for the year under appeal, the taxpayer is requesting the court to do precisely what the appeal procedures of the Income Tax Act contemplate: to determine the correctness of an assessment of tax by reviewing the correctness of one or more of the constituent elements thereof, in this case the size of a loss available from another year. **This does not involve the court's making a determination of loss under subsection 152(1.1.) or entertaining an appeal from a nil assessment. It involves merely the determination of the correctness of the assessment for the year before it.**
>
> [Emphasis and double Emphasis added]

The year in issue was not a nil assessment year since as is indicated, the taxpayer was "challenging the assessment for a year in which tax is payable, …". Bowman J. simply held that all elements relevant to the determination of the taxes assessed for that year, including the Minister's calculation of a loss in another year, were properly in issue.

[31] In *Liampat Holdings Ltd.*, Counsel for the taxpayer relied on *Aallcann Wood Suppliers* to argue that a nil assessment could be appealed. The Federal Court (Cullen J.) held that Counsel had misconstrued *Aallcann Wood Suppliers* (at para. 8):

> I take Aallcann to mean that this Court has jurisdiction to consider a nil assessment year where the computations from the nil assessment year have an actual impact on another taxation year; it does not give the Court jurisdiction to consider a nil assessment directly.
>
> [Emphasis added]

This is an accurate statement of the rule set out in *Aallcann Wood Suppliers*.

[32] Lastly, O'Connor J. in *Joshi #2* indicates that the recent decision of this Court in *Bruner*, supra, (at para. 9) "… seems to have broadened the cases in which the Court may review a nil assessment taxation year …". However, *Bruner* gives effect to the rule that no appeal lies from a nil assessment or from an assessment where the amounts assessed are not in dispute. The dispositive portion of the reasons reads (at para. 3):

> Consequently, a taxpayer is not entitled to challenge an assessment where the success of the appeal would either make no difference to the taxpayer's liability, […] or would increase the taxpayer's liability for tax. When the respondent took the position that there was no amount in dispute, the Tax Court judge should have applied the nil assessment jurisprudence and quashed the Notice of Appeal.

[33] There is therefore no authority for the proposition advanced in *Corriveau, Joshi #2* and in the decision under appeal that a nil assessment can be appealed.

[34] It can be seen that in reaching his decision Little J. wanted to provide Interior with certainty as to where its PRA stood in a timely fashion. No doubt this is a valid concern. At the same time, it must be understood that the issue surrounding the PRA will only crystallize in a year in which the

computation of the PRA impacts on the taxes payable. Until that time, no one is bound by these amounts. Little J. was obviously of the view that the Tax Court should be able to provide certainty in the interim. However, this is a matter that can only be addressed by the Parliament.

[35] Applying the established rule, Little J., upon noting that Interior was not taking issue with the taxes assessed, was bound to grant the Crown's motion and strike Interior's Notice of Appeal.

[36] Finally, I would add that Little J., after having dismissed the Crown's motion to strike, fell into error when he ordered that the allegations of fact contained in the Notice of Appeal be presumed to be true. Subsections 44(1) and (2) of the Tax Court Rules provide respectively:

44. (1) A reply shall be filed in the Registry within 60 days after service of the notice of appeal unless	**44.** (1) La réponse à l'avis d'appel doit être déposée au greffe dans les 60 jours suivant la signification de l'avis d'appel, à moins que :
(*a*) the appellant consents, before or after the expiration of the 60-day period, to the filing of that reply after the 60-day period within a specified time; or	*a*) l'appelant ne consente, avant ou après l'expiration de ce délai, au dépôt de la réponse dans un délai déterminé suivant l'expiration de celui-ci;
(*b*) the Court allows, on application made before or after the expiration of the 60-day period, the filing of that reply after the 60-day period within a specified time.	*b*) la Cour ne permette, sur demande présentée avant ou après l'expiration de ce délai, le dépôt de la réponse dans un délai déterminé suivant l'expiration de celui-ci.
44. (2) If a reply is not filed within an applicable period specified under subsection (1), the allegations of fact contained in the notice of appeal are presumed to be true for purposes of the appeal.	**44.** (2) Si la réponse n'est pas déposée dans le délai applicable prévu au paragraphe (1), les allégations de fait énoncées dans l'avis d'appel sont réputées vraies aux fins de l'appel.

[37] As was noted by Paris J. in *Telus Communications (Edmonton) Inc. v. R. (No. 2)*, [2003] G.S.T.C. 183-1 (at paras. 5 and 6):

> The reference in subsection 44(2) to "an applicable period specified under subsection (1)" relates to any one of three periods, namely: within 60 days after the service of the Reply, within the period specified in a consent given by the Appellant, or within the period allowed by the Court for the filing of the Reply.
>
> This means that subsection 44(2) only applies if a Reply is filed outside the sixty-day period and the Appellant does not consent or where there is no order of the court extending that period. Given my order extending the time period for filing a Reply, subsection 44(2) does not apply.

[38] I agree with Paris J.'s reading of subsection 44(2). Given that in this case, Little J. did extend the period within which the Reply could be filed, there was no basis for the issuance of an order that the allegations of fact in the Notice of Appeal be presumed to be true.

[39] For these reasons, I would allow the appeal with costs, set aside the decision of Little J. and giving the order which should have been given, I would grant the Crown's motion to strike out Interior's Notice of Appeal with costs.

"Marc Noël"

J.A.

"I agree
Robert Décary J.A."

"I agree
J. Edgar Sexton J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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