Docket: 2006-1608(IT)I

BETWEEN:

SYED JALALUDDIN AHMAD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 13, 2007, at Kingston, Ontario.

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Nicolas Simard

JUDGMENT

The appeal in relation to the claim for a tax credit pursuant to subsection 118.5(1) of the *Income Tax Act* for 2001 in relation to tuition fees of $4,200 is allowed in full, without costs.

Signed at Halifax, Nova Scotia, this 26th day of June 2007.

"Wyman W. Webb"

Webb J.

Citation: 2007TCC382
Date: 20070626
Docket: 2006-1608(IT)I

BETWEEN:

SYED JALALUDDIN AHMAD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant was unemployed in 2001. He attended the Canadian Transportation Specialist School ("CTS") to learn to be a truck driver and to obtain his Class AZ license to permit him to drive large transport trucks. The tuition cost to attend the school was $4,200. The Appellant paid $200 of this amount and Human Resources Development Canada paid the balance of the $4,000.

[2] The Appellant initially claimed the $4,200 referred to above as an employment expense but the issue before this Court was whether the Appellant was entitled to claim a tax credit pursuant to subsection 118.5 of the *Income Tax Act* ("*Act*") in 2001 based on tuition fees of $4,200.

[3] In the Reply filed by the Respondent, paragraph 1 provides as follows:

> 1. He admits to the following allegation of facts contained in the Notice of appeal:
>
> a) the Minister of National Revenue (the "Minister") denied the tuition fee credit;

b) the Appellant paid the tuition fee to the CTS Truck Driving School (the "CTS")

c) the Minister of Human Resources Development Canada (the "HRDC") did not certify CTS as an educational institution;

d) CTS was a provincial registered school; and

e) HRDC approved the funding of the Appellant to go to CTS.

[4] The Appellant did not, in the Notice of Appeal, allege that "the Minister of Human Resources Development Canada (the "HRDC") did not certify CTS as an educational institution".

[5] Paragraph 8 of the Reply provides as follows:

8. In so reassessing and confirming the tax liability of the Appellant for the 2001 taxation year, the Minister made the following assumptions of fact:

Tuition fees:

a) at all material times, the Appellant attended the CTS from March 24, 2001 to April 24, 2001;

b) during the 2001 taxation year, the Appellant paid CTS an amount of $4,200 in tuition fees;

c) the amount referred to in subparagraph 8 b), herein, was initially claimed as an employment expense by the Appellant;

d) during the 2001 taxation year, the Appellant received $4,000 reimbursement through a job-training program from HRDC; and

e) CTS was not certified by HRDC to be an educational institution providing courses that furnish a person with skills for an occupation;

Employment expenses

f) the Appellant did not provide the Minister with receipts for the rest of the claimed employment expenses in the amount of $450.

[6] The $450 claimed as employment expenses was not raised as an issue by the Appellant in his Notice of Appeal. As noted above, the only issue in this appeal is whether the Appellant was entitled to claim, in 2001, a tax credit pursuant to subsection 118.5 of the *Act* based on tuition fees of $4,200.

[7] From the assumptions of fact made by the Respondent in the Reply and as stated in paragraph 11 of the Reply, it is clear that the Respondent denied the claim for a tuition fee credit on the basis that the educational institution did not satisfy the requirements of subparagraph 118.5(1)(*a*)(ii) of the *Act*. Paragraphs 10 and 11 of the Reply provide as follows:

> 10. He relies on sections 118 and 118.5 of the Act.
>
> 11. He submits that the Appellant is not entitled to an amount of $4,200 for tuition and education amounts in computing his non-refundable tax credits and tax payable for the 2001 taxation year pursuant to subparagraph 118.5(1)(*a*)(ii) of the *Act*, as CTS was not certified by HRDC to be an educational institution providing courses that furnish a person with skills for an occupation:

[8] Therefore the only issue raised by the Respondent in the Reply in relation to sections 118 and 118.5 of the *Act* is whether CTS was "certified by the Minister of Human Resources Development to be an educational institution providing courses ... that furnish a person with skills for, or improve a person's skills in, an occupation". The Respondent did not lead any evidence in relation to this issue and assumed that the Appellant had the onus of proving this.

[9] In the recent decision of the Federal Court of Appeal in *Anchor Pointe Energy Ltd.* 2007 FCA 188 Létourneau J.A. stated that:

> [35] It is trite law that, barring exceptions, the initial onus of proof with respect to assumptions of fact made by the Minister in assessing a taxpayer's liability and quantum rests with the taxpayer. ...
>
> [36] I agree with Bowman A.C.J.T.C., as he then was, that there may be instances where the pleaded assumptions of facts are exclusively or peculiarly within the Minister's knowledge and that the rule as to the onus of proof may work so unfairly as to require a corrective measure: see *Holm et al. v. The Queen, supra,* at paragraph 20.

[10] In this case, certainly the Respondent would be in a better position to prove whether or not the CTS was certified by the Minister of Human Resources

Development than would the Appellant. This was acknowledged by Bowie J. in *Edwards*, [1998] 4 C.T.C. 2906, where he stated as follows:

> 5 The only fact here in issue is whether the School was, at the relevant time, certified by the appropriate Minister. That, of course, is not in any way a matter as to which knowledge of the true facts lies with the taxpayer. To the contrary, it is a matter as to which the knowledge lies entirely with the Crown, and, as appeared from the evidence, that knowledge is not readily available to taxpayers from any primary source that they may themselves consult. Access to it is apparently available, as a practical matter, only by making an oral request to a Revenue Canada office, in person or by telephone, and then accepting the response given as being accurate.
>
> 6 Counsel for the Respondent called Mr. Chiarotto, a Revenue Canada Appeals Officer, to give evidence as to the matter of certification. Mr. Chiarotto produced a photocopy of a printout which he had obtained from the computer system in the Toronto office of Revenue Canada. His evidence was that he made an inquiry of the computer system as to whether or not the School was certified by the Minister of HRD and the printout indicates that it was not, by the fact that the name of the School is not included. The printout does show a number of other institutions with similar names which, according to the witness, are certified. There are a number of problems with this evidence, quite apart from the usual difficulties involved in establishing the accuracy of computer records, which this witness did not address at all.
>
> 7 First, it is not established that the computer was ever furnished with an accurate and complete list of certified institutions. Mr. Chiarotto was frank to acknowledge that although he uses the computer, and the data which it contains, from time to time to ascertain if institutions are certified, he simply takes it as a matter of faith that the data bank is accurate. He has no idea who put the data in, or when. He did not address the question of maintenance of the list, which certainly changes from time to time. He did give some hearsay evidence about having verified the information which he had obtained through the printout by telephoning a Ms. Thibodeau at the Department of Human Resources Development (DHRD) in preparation for giving his evidence. He knew nothing at all about who she is, or what she does in DHRD. He explained that he could not offer the complete list in evidence, because in order to do so it would have been necessary to fax the list, some hundreds of pages, from Ottawa. The only copy of the list in the Revenue Canada offices in Toronto, he said, is out of date. A taxpayer outside the National Capital Region wishing to check whether the institution is certified or not before enrolling for a course could inquire by telephone of Revenue Canada, and would be given the results of a computer search of the same kind that he made for the purpose of testifying. Such a person would

> not, however, be able to see an accurate list of the certified institutions at the Revenue Canada office.
>
> 8 This evidence falls far short of satisfying me on a balance of probabilities that the School was not, during 1995, certified by the Minister of E & I. Mr. Chiarroto was imprecise about the form of the question which he input to the computer. My impression from his testimony is that he inquired and the computer responded as to certification at the time of making the inquiry, which I gather was this week. He made reference in his evidence to certification by the Minister of HRD, an office which came into existence in 1996. I do not believe that he purported to address the situation in 1995, which of course is the relevant time. The Crown's Reply refers to certification by the Minister of E & I, not the Minister of HRD. Apart from all the other frailties of his evidence, it is entirely possible that the School was certified by the Minister of E & I at the time Mr. Edwards attended it in 1995, and has since been decertified for some reason.
>
> 9 I should add that no attempt was made by counsel for the Crown to invoke the provisions of the Canada Evidence Act in this case, and that my comments with respect to the evidence should be read in that light.
>
> 10 The Crown has failed to discharge the onus of establishing that the School was not, during 1995, certified by the Minister of E & I for the purposes of subparagraph 118.5(1)(a)(ii). The appeal is therefore allowed, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to the tuition credit claimed.

[11] There was no evidence before the Court with respect to the availability of the list of certified schools in 2001 and therefore, based on the decision of Bowie J. in *Edwards*, I find that the Respondent had the onus of proving that the School was not certified and since the Respondent did not adduce any evidence in relation to this matter, the Respondent has failed to satisfy this onus of proof.

[12] The Appellant submitted, as an Exhibit, a copy of the “Skills Development Employment Benefit” agreement entered into between Canada Employment Insurance Commission and the Appellant as of March 24, 2001. This was the agreement pursuant to which HRDC paid $4,000 towards the tuition costs for the school. In the upper left hand corner of the first page of the agreement and in the schedules there is a reference to Human Resources Development Canada which certainly suggests that this agreement has been approved by Human Resources Development Canada.

[13] In the recitals to this agreement it is stated that:

> Whereas the **COMMISSION,** pursuant to section 59 of the Employment Insurance Act, has established an employment benefit (i.e. program) known as the "Skills Development Employment Benefit" under which financial assistance may be provided to help persons who qualify as "insured participants" within the meaning of the Act obtain skills for employment;
>
> Whereas the **PARTICIPANT** is an insured participant and has requested assistance from the **COMMISSION** to attend **a course of training that will help the PARTICIPANT obtain skills for employment**;
>
> (emphasis added)

[14] In 2001 subsection 118.5(1)(*a*)(ii) of the *Act* provided, in part, as follows:

> 118.5 (1) For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted,
>
> > (*a*) where the individual was during the year a student enrolled at an educational institution in Canada that is
> >
> > > (i) a university, college or other educational institution providing courses at a post-secondary school level, or
> >
> > > (ii) certified by the Minister of Human Resources Development to be an educational institution providing courses, other than courses designed for university credit, that furnish a person with skills for, or improve a person's skills in, an occupation,
> >
> > an amount equal to the product obtained when the appropriate percentage for the year is multiplied by the amount of any fees for the individual's tuition paid in respect of the year to the educational institution if the total of those fees exceeds $100, except to the extent that those fees
> >
> > ...

[15] In Black's Law Dictionary, 7th ed., the word "certify" is defined as follows:

> To authenticate or verify in writing.

[16] By signing the agreement dated March 24, 2001, the Commission was clearly verifying in writing that the course of training that the Appellant would receive at CTS (which is the school listed in Schedule A to this agreement) would

allow the Appellant to obtain skills for employment and hence an occupation. Since this agreement was executed on paper that clearly identified Human Resources Development Canada, I find that if the onus of proof were on the Appellant to establish that CTS was certified by the Minister of Human Resources Development as required by subparagraph 118.5(1)(*a*)(ii), he has satisfied this onus on the balance of probabilities. The Appellant should be able to assume that if the agreement has been approved by the Department of Human Resources Canada, it has been approved by persons acting on behalf of the Minister of that Department and therefore approved by the Minister of that Department.

[17] Counsel for the Respondent, after all of the evidence had been adduced, informed the Court that an additional issue was being raised. Counsel for the Respondent indicated that he had talked to the Appellant before the hearing about the additional issue and the Appellant had agreed that he could raise it. However, as noted by the Federal Court of Appeal in *Burton* 2006 FCA 67, it is not appropriate for counsel for the Respondent to spring new issues upon a self-represented Appellant in a case governed by the Informal Procedure at the eleventh hour.

[18] The additional issue that Counsel for the Respondent wanted to raise was that the claim for the tuition credit should be denied as a result of the application of subparagraph 118.5(1)(*a*)(iii.1) which provides that a tuition credit cannot be claimed for tuition fees if those fees:

> (iii.1) are fees in respect of which the individual is or was entitled to receive a reimbursement or any form of assistance under a program of Her Majesty in right of Canada or a province designed to facilitate the entry or re-entry of workers into the labour force, **where the amount of the reimbursement or assistance is not included in computing the individual's income**,
>
> (emphasis added)

[19] This paragraph would only apply if the amount of the assistance received by the Appellant was not included in computing the Appellant's income. There was no evidence with respect to whether the amount of $4,000 paid under the agreement referred to above was included in the Appellant's income. Counsel for the Respondent candidly stated this in his argument as if the Appellant had the onus of proving that the amount had been included in his income.

[20] In *Pollock v. The Queen*, [1994] 1 C.T.C. 3, 94 DTC 6050, Hugessen J.A., on behalf of the Federal Court of Appeal, made the following comments:

> Where, however, the Minister has pleaded no assumptions, or where some or all of the pleaded assumptions have been successfully rebutted, it remains open to the Minister, as defendant, to establish the correctness of his assessment if he can. In undertaking this task, the Minister bears the ordinary burden of any party to a lawsuit, namely to prove the facts which support his position unless those facts have already been put in evidence by his opponent. This is settled law.

[21] In *Loewen* 2004 FCA 146, Sharlow J.A., on behalf of the Federal Court of Appeal, made the following comments:

> 11 The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. **If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown.** This is well explained in Schultz v. R. (1995), [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (Fed. C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4 (S.C.C.)).
>
> (emphasis added)

[22] Leave to appeal the decision of the Federal Court of Appeal in *Loewen* to the Supreme Court of Canada was refused (338 N.R. 195 (note)).

[23] Since the Respondent did not make any assumption of fact in relation to the inclusion of the amount referred to in subparagraph 118.5(1)(*a*)(iii.1) in the income of the Appellant, if the Respondent could have raised this issue, the onus of proving that such amount was not included in the income of the Appellant would have rested with the Respondent and since there was no evidence with respect to whether this amount had been included in the income of the Appellant, the Respondent would have failed to satisfy this onus of proof.

[24] As a result the Appellant's appeal is allowed.

Signed at Halifax, Nova Scotia, this 26th day of June 2007.

"Wyman W. Webb"

Webb J.

CITATION:	2007TCC382
COURT FILE NO.:	2006-1608(IT)I
STYLE OF CAUSE:	SYED JALALUDDIN AHMAD AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	June 13, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	June 26, 2007

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Nicolas Simard

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada