

Docket: 2006-2538(IT)I

BETWEEN:

EDNA M. MCKIM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 11, 2007 at Kingston, Ontario.

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Richard Gobeil

ORDER

The Motion by the Respondent is allowed and the appeal filed by the Appellant is dismissed.

The Appellant is entitled to costs of \$100 in the event that the filing fee of \$100 is not returned to her.

Signed at Ottawa, Ontario, this 14th day of June 2007.

"Wyman W. Webb"

Webb J.

Citation: 2007TCC351
Date: 20070618
Docket: 2006-2538(IT)I

BETWEEN:

EDNA M. MCKIM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Webb J.

[1] The Appellant filed an appeal to the Tax Court of Canada. The only issue in the appeal is whether the Appellant should be assessed and taxed as a resident of the province of Newfoundland and Labrador or as a resident of the province of Ontario. The Respondent has made a motion that the appeal should be dismissed on the basis that the Tax Court of Canada does not have the jurisdiction to deal with this issue.

[2] In *Gardner v. The Queen*, 2001FCA401, the Federal Court of Appeal determined that the Tax Court of Canada did not have the jurisdiction to deal with the issue of whether a particular person was resident in the province of Ontario. The Federal Court of Appeal referred to the following sections of the Ontario *Income Tax Act* (as set out in this decision):

4. (1) in this section,

"income earned in the taxation year in Ontario" means the amount of income that would be determined to be earned in the year in Ontario for the purposes of determining the amount of income earned in the year in a province under section 120 of the Federal Act; ...

"tax payable under the Federal Act" means the amount that, but for section 120 of

the Federal Act, would be the tax payable by an individual under Part I of that Act for the taxation year in respect of which the expression is being applied, computed as if the individual were not entitled to a deduction under section 126, 127, 127.2, 127.4 or 127.41 of that Act.

...

23. (1) A taxpayer who has served a notice of objection to an assessment under subsection 165(1) of the Federal Act, as it applies for the purposes of this Act, may appeal to the Ontario Court (General Division) to have the assessment vacated or varied after either,

(a) the Provincial Minister has confirmed the assessment or reassessed; or

(b) ninety days have elapsed after service of the notice of objection and the Provincial Minister has not notified the taxpayer that the Provincial Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of ninety days [from] the day notice has been mailed to the taxpayer in accordance with subsection 165(3) of the Federal Act, as it applies for the purposes of this Act, that the Provincial Minister has confirmed the assessment or reassessed.

(2) In the course of disposing of an appeal from an assessment under this Act, the Court may make a determination in respect of any question relating to,

(a) the residence of a taxpayer for the purposes of the Act; ...

(b) the amount of income of a taxpayer earned in a taxation year in Ontario for the purposes of section 4;

(c) the amount of tax payable by a taxpayer for a taxation year, based on the amount of tax payable under the Federal Act for that year as defined in section 4;

[3] In this particular case the provincial statute that is in issue is the *Income Tax Act 2000* of the province of Newfoundland and Labrador. Section 62 of that *Act* provides as follows:

(1) Section 169 of the federal Act applies for the purpose of this Act.

(2) An appeal from an assessment under this Act may be taken in respect of a question relating,

(a) in the case of an individual, to the determination of

(i) his or her residence for the purposes of this Act,

- (ii) his or her income earned in the taxation year in the province as defined in paragraph 5(c),
- (iii) the amount of tax payable for a taxation year based on the tax payable under the federal Act for that year as defined in paragraph 5(g), or
- (iv) the amount of his or her adjusted income for the purpose of section 34 of this Act as determined under the definition "adjusted income" in subsection 112.5(1) of the federal Act; and

...

but an appeal from an assessment does not lie in respect of the computation of the tax payable under the federal Act as defined in paragraph 5(g) or of the taxable income of a corporation.

- (3) An appeal to the court shall be instituted by serving upon the minister a notice of appeal in duplicate in prescribed form and by filing a copy of it with the registrar of the court.

In subsection 2(1) of the *Income Tax Act 2000* of the province of Newfoundland and Labrador, "court" is defined as the Trial Division of the Supreme Court.

[4] While the *Income Tax Act 2000* of the province of Newfoundland and Labrador is not as clear as the *Income Tax Act* of the province of Ontario in dealing with the rights of appeal, in my opinion the provisions of section 62 of the *Income Tax Act 2000* of the province of Newfoundland and Labrador still restrict the right of appeal, as it relates to the question of whether or not a particular individual is resident in the province of Newfoundland and Labrador for the purposes of the provincial *Income Tax Act 2000*, to the courts of the province of Newfoundland and Labrador.

[5] Subsection 62(1) of the *Income Tax Act 2000* of the province of Newfoundland and Labrador does provide that section 169 of the federal *Act* applies for the purposes of this *Act*. Subsection 169(1) of the federal *Income Tax Act* provides as follows:

Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied ...

[6] This subsection is not made subject to subsections (2) and (3) and therefore would suggest that an appeal would lie to the Tax Court of Canada in relation to any issue arising under the *Income Tax Act 2000* for the province of Newfoundland and Labrador. However, because "court" is defined in the *Income Tax Act 2000* for the province of Newfoundland and Labrador as the Trial Division of the Supreme Court of the province of Newfoundland and Labrador and subsection 62(3) specifically provides an appeal to the court (which would mean the Trial Division of the Supreme Court of Newfoundland and Labrador) this must mean that appeals in relation to the issues defined in subsection 62(2) of the provincial statute would lie to the Trial Division of the Supreme Court of province of Newfoundland and Labrador. If all appeals of any matter related to the *Income Tax Act 2000* for the province of Newfoundland and Labrador were to lie to the Tax Court of Canada, why were subsections 62(2) and (3) added to the *Income Tax Act 2000* for the province of Newfoundland and Labrador?

[7] It seems clear from the provincial statute that appeals do lie to the Trial Division of the Supreme Court of the province of Newfoundland and Labrador. To conclude that appeals would also lie to the Tax Court of Canada for the same issues that could be appealed to the Trial Division of the Supreme Court of Newfoundland and Labrador would result in an unusual situation where two courts would have overlapping jurisdiction. In my opinion this is not the intended result of the provisions of section 62 of the *Income Tax Act 2000* of the province of Newfoundland and Labrador and therefore, in my opinion, the rights of appeal on the matters listed in subsection 62(2) of the *Income Tax Act 2000* of the province of Newfoundland and Labrador lie exclusively to the Trial Division of the Supreme Court of the province of Newfoundland and Labrador.

[8] Since a determination of whether a particular individual is resident within the province of Newfoundland and Labrador is one of the matters listed in subsection 62(2), in my opinion, an appeal of this matter lies exclusively to the

Trial Division of the Supreme Court of the province of Newfoundland and Labrador.

[9] As a result, the Crown's motion is granted and the Appellant's appeal is dismissed on the basis that this Court does not have the jurisdiction to determine whether the Appellant is a resident of the Province of Newfoundland and Labrador or the jurisdiction to determine whether the Appellant is a resident of the Province of Ontario.

[10] However, since the Appellant in this case had received correspondence indicating that if she wished to appeal that her appeal would be to the Tax Court of Canada, the Appellant should be entitled to receive a refund of her filing fee of \$100. In the event that this is not refunded then the Appellant should be entitled to costs of \$100.

Signed at Ottawa, Ontario, this 14th day of June 2007.

"Wyman W. Webb"

Webb J.

CITATION: 2007TCC351
COURT FILE NO.: 2006-2538(IT)I
STYLE OF CAUSE: EDNA M. MCKIM AND THE QUEEN
PLACE OF HEARING: Kingston, Ontario
DATE OF HEARING: June 11, 2007
REASONS FOR JUDGEMENT BY: The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT: June 14, 2007

APPEARANCES:

For the Appellant: The Appellant herself
Counsel for the Respondent: Richard Gobeil

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

For the Respondent: John H. Sims, Q.C.
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