Docket: 2018-3112(IT)I

BETWEEN:

ALEXANDER MARINO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 19, 2020 at Vancouver, British Columbia

Before: The Honourable Justice K.A. Siobhan Monaghan

Appearances:

Counsel for the Appellant:	Drew Gilmour Darryl Way
Counsel for the Respondent:	Kieran Meehan

JUDGMENT

In accordance with the attached Reasons for Judgment:

The appeal from a reassessment made under the *Income Tax Act* for the Appellant's 2012 taxation year is dismissed, without costs.

Signed at Ottawa, Canada, this 10th day of July 2020.

"K.A. Siobhan Monaghan"

Monaghan J.

Citation: 2020 TCC 50
Date: 20200710
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BETWEEN:

ALEXANDER MARINO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Monaghan J.

I. BACKGROUND FACTS

[1] Mr. Marino is an individual who lives in Calgary, having immigrated to Canada from the United States on July 2, 2012. At least for the period from 2002 until he immigrated to Canada in 2012, Mr. Marino was not resident in Canada. Rather, during 2002 to 2011 was attending university on a full-time basis in the United States, starting with University of Pittsburgh; followed by Duquesne University and finally University of Florida. Mr. Marino paid tuition to these universities, totalling a little more than US$159,000 over the 2002 to 2011 period. The parties agree this is approximately $179,000.[1]

[1] Mr. Marino's claim in his tax return was apparently slightly higher than the amount his counsel determines should have been claimed based on average Bank of Canada exchange rates but the difference is less than $30 and nothing turns on that. For the record, Mr. Marino was prepared to accept the lower amount.

[2] The three US universities provided Mr. Marino with signed copies of the forms prescribed under *Income Tax Act*[2] (the "*Act*") for purposes of the tuition and education tax credits found in sections 118.5 and 118.6 of the *Act.* The three universities are listed in Schedule VIII of the *Income Tax Regulations*[3] as that Schedule read in 2012.[4]

[3] After immigrating to Canada, Mr. Marino filed Canadian income tax returns for 2002 to 2011 under Part I of *Act*. Mr. Marino filed the 2009 to 2011 returns in 2013 and the 2002 to 2008 returns in early 2016. In other words, all of the returns were filed after Mr. Marino became a resident of Canada, but on the basis that he was neither a resident of Canada nor a deemed resident of Canada (*i.e.*, Non-Resident – Section 115 Income Tax Returns) in those years. The 2002 to 2011 returns were assessed and reassessed on the basis that Mr. Marino had no tax payable under the *Act*.

[4] In his tax return for the 2012 taxation year, in computing his non-refundable tax credits, Mr. Marino claimed unused tuition tax credits carryforward based on tuition paid to the US universities in 2002 to 2011 when he was not a Canadian resident and had no source of income in Canada. The Minister reassessed Mr. Marino for his 2012 taxation year to disallow the claimed tuition tax credits and to reduce his tuition and education tax credit carryforward amount[5] to nil. On October 6, 2016, the Minister reassessed Mr. Marino's 2012 taxation year to reduce any previously allowed tuition and education carryforward amounts to nil.[6]

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[2] *Income Tax Act*, RSC 1985, c 1 (5th Supp). Unless otherwise stated all references to statutory provisions are references to provisions of the *Act*.

[3] *Income Tax Regulations*, CRC c 945.

[4] Schedule VIII was repealed in 2018. Schedule VIII, and section 3503 (also repealed in 2018) of the *Income Tax Regulations* prescribed universities outside Canada that were qualified donees for purposes of subsection 149.1(1).

[5] Although the Agreed Statement of Facts refers only to the tuition tax credit carryforward amount, in the relevant years the relevant term was "unused tuition and education tax credits".

[6] The Reply indicates that (i) the Minister initially assessed the 2002 to 2011 returns as filed and that the 2012 return was initially assessed on May 24, 2013; (ii) the Minister reassessed the Appellant's 2012 taxation year on July 15, 2013 to disallow the unused tuition tax credits claimed; (iii) the Minister reassessed the Appellant's 2005, 2006, 2007, 2008, and 2011 returns on October 6, 2016 to disallow the tuition and education amounts from previous years; and (iv) the Minister reassessed the Appellant's 2012 taxation year on October 6, 2016 to reduce the unused tuition and education tax credit carryforward amount to nil.

Mr. Marino objected to that reassessment but it was confirmed in 2018 and Mr. Marino filed this appeal.

[5] The parties agree that Mr. Marino was not required to file a Canadian income tax return for any of the 2002 to 2011 years. They also agree he had no taxable income earned in Canada and no taxes payable under the *Act* in those years.

II. OVERVIEW OF THE TUITION TAX CREDIT RULES

[6] Before I address the issue at the heart of this appeal, it is perhaps worth summarizing the relevant provisions. Subject to certain conditions, section 118.5 permits an individual to reduce the individual's tax payable under Part I of the *Act* for a particular taxation year by deducting a portion of tuition paid to a post-secondary institution for that taxation year. (For simplicity, I am going to refer to this deduction in computing tax payable as the tuition tax credit.)

[7] Where the individual is not able to use the credit in the particular taxation year, again subject to certain conditions, the individual may transfer the credit to a common-law partner or spouse[7] or a parent or grandparent[8] (each a "designated person") or may carry forward[9] the unused tuition tax credits[10] to be used by the individual in a future taxation year.

[8] Mr. Marino relies on these provisions. To simplify his position, Mr. Marino paid tuition to universities in the US in respect of 2002 to 2011, that tuition entitled him to a tuition tax credit in each of 2002 to 2011, he was unable to use that credit in computing his tax payable under Part I of the *Act* in those years, he did not transfer the credits to a designated individual in any of those years, and accordingly he has unused tuition tax credits available to him in 2012.

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[7] Sections 118.8 and 118.81.

[8] Sections 118.9 and 118.81.

[9] Section 118.61.

[10] Prior to 2017, when the education and textbook credits were eliminated, section 118.61 provided for a computation of an individual's "unused tuition, textbook and education tax credits". Although that is the term that applied in 2012, and continued to be used in section 118.61, because only tuition tax credits are relevant to this appeal, for simplicity in these reasons I often use the phrase "unused tuition tax credits".

III. ISSUES IN DISPUTE

[9] The parties filed an Agreed Statement of Facts.[11] No other evidence was tendered at the appeal. This appeal turns purely on a question of law: was Mr. Marino entitled to a tuition tax credit in each of 2002 to 2011 as a result of tuition paid to universities in the United States in those years, which credits result in Mr. Marino having an unused tuition tax credit balance at the end of 2011 that he is able to deduct in computing his tax payable in 2012 once he became resident in Canada.

[10] At the hearing, a second issue arose which might be described as procedural. Counsel for the Appellant sought to limit the arguments the Respondent could advance in support of the reassessment because of the manner in which the Reply was drafted. My reasons for disagreeing with Appellant's counsel on this second issue follow my analysis of the main issue in dispute in this appeal: whether Mr. Marino is entitled to a tuition tax credit in each of 2002 to 2011.

IV. ISSUES NOT IN DISPUTE

[11] In addition to the facts agreed by the parties, the parties agree on several other matters relevant to this appeal.

[12] The parties agree that the 2012 taxation year, the taxation year in which Mr. Marino sought to apply the unused tuition tax credits, is the relevant taxation year for purposes of this appeal. In other words, notwithstanding that the Minister may have assessed and reassessed Mr. Marino's tax returns for 2002 to 2011, and that those assessments and reassessments addressed unused tuition tax credits, the year in which the credits were sought to be applied to reduce tax payable is the only year properly the subject of appeal.[12]

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[11] Some matters in the Agreed Statement of Facts might more appropriately be described as mixed questions of fact and law, or conclusions of law, including, for example, whether Mr. Marino was resident in Canada in 2002 to 2011. However, I have accepted the Agreed Statement of Facts and there is no suggestion that the conclusions that are not purely factual are inappropriate based on the facts.

[12] The assessments for the years before 2012 were nil assessments (*i.e.*, assessments under which no tax was owing), Mr. Marino being a non-resident with no taxable income earned in Canada. Nil assessments cannot be appealed: *Canada* v. *Interior Savings Credit Union*, 2007 FCA 151 [*Interior Savings*]. Therefore, as the parties have agreed, the proper year to appeal is the one in

[13] The parties also agree that the only part of section 118.5 that potentially applies to Mr. Marino is paragraph 118.5(1)(b).[13] It provides that where an individual was a student in full-time attendance at a university outside Canada in a course leading to a degree at any time during a taxation year, in computing tax payable by that individual for that taxation year, the individual may deduct a portion of the tuition paid to the university in respect of the year.[14] The parties agree that Mr. Marino was a student in full-time attendance at a university outside Canada in a course leading to a degree in each of 2002 to 2011.

[14] Finally, the parties agree that subsection 118.5(1), which deals with tuition tax credits in a particular taxation year, and section 118.61, which describes the computation of and use of unused tuition tax credits, may apply to non-residents.

V. POSITIONS OF THE PARTIES

[15] The disagreement in this case relates to whether subsection 118.5(1) and section 118.61 apply to all non-residents (the Appellant's position) or only to those non-residents who are taxpayers in the years for which tuition is paid and for whom that year is a taxation year – in other words those non-residents who are subject to Part I of the *Act* in the year for which the tuition is paid (the Respondent's position).

[16] The Respondent's position is that where a non-resident individual is not required to file an income tax return under Part I of the *Act* for a particular year, because that individual was not employed in Canada, did not carry on business in Canada, and did not dispose of taxable Canadian property, that individual is not a taxpayer for purposes of the *Act*, and that year is not a taxation year of that individual. Moreover, such an individual is neither required nor able to compute

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which the credits are applied and, if available, would affect tax payable: *Aallcann Wood Suppliers Inc.* v. *R*, 94 DTC 1475 (TCC) and *Interior Savings*.

[13] Paragraph 118.5(1)(a) is limited to students enrolled at post-secondary institutions in Canada and, by virtue of subsection 118.5(2), students who are deemed residents of Canada under section 250 and attend post-secondary institutions outside Canada. Paragraph 118.5(1)(c) is limited to individuals who reside in Canada close to the border between Canada and the US and commute to the US to attend a post-secondary institution. Paragraph (b) was amended effective in late 2011 but not in a way that affects Mr. Marino. Prior to the amendment, the tuition had to be in respect of a course of at least 13 consecutive weeks, but thereafter the 13 weeks is reduced to 3 weeks.

[14] With certain exceptions not relevant in this appeal.

tax payable under Part I. Therefore, the Respondent submits, even where the individual pays tuition to an eligible education institution for that year, such an individual has no tuition tax credit for that year under section 118.5 and no unused tuition tax credits at the end of that year under section 118.61 to carry forward.

[17] In other words, putting that in the context of Mr. Marino, because Mr. Marino did not earn income in Canada in any of 2002 to 2011,[15] none of 2002 to 2011 is a taxation year for Mr. Marino and filing a return for those years is not sufficient to constitute him a taxpayer. Therefore, Mr. Marino cannot compute tax payable under Part I of the *Act* for any of those years, and has no amount under section 118.5 for those years. If he has no amount under section 118.5 for those years, he has no amount to add to his unused tuition tax credit in any of those years and has no unused tuition tax credit balance at the end of 2011. To support this position, the Respondent relies heavily on *Oceanspan Carriers Limited* v. *Canada.*[16]

[18] Mr. Marino's position is that each of 2002 to 2011 is a taxation year, the tuition tax credit provisions do not require him to be a taxpayer and the text, context and purpose of the legislation support his position that he had an unused tuition tax credit in each of 2002 to 2011, and a balance of unused tuition tax credits at the end of 2011. That balance is deductible by him in computing his tax payable in 2012 (and future taxation years) pursuant to section 118.61 of the *Act*. Nothing in the *Act* bars him from accumulating the credits and deducting them in 2012.

[19] Mr. Marino's position is that he did not need to be a taxpayer in 2002 to 2011 because section 118.5 refers to an individual, not a taxpayer. Furthermore, he argues that, notwithstanding *Oceanspan*, each of 2002 to 2011 are taxation years for him by virtue of section 250.1. Counsel for Mr. Marino suggests that section 250.1 deems a non-resident person to have a taxation year and thus, he submits, each of 2002 to 2011 are taxation years for Mr. Marino even if he was not then a taxpayer. Accordingly, Mr. Marino meets the requirements of section 118.5 in each of 2002 to 2011. Mr. Marino has unused tuition tax credits at the end of each of 2002 to 2011, and those unused tuition tax credits are added in computing his unused tuition tax credits at the end of each of those years so that he has unused

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[15] He was not employed in Canada, did not carry on business in Canada and did not dispose of taxable Canadian property.

[16] *Oceanspan Carriers Ltd* v. *Canada*, [1987] 2 FC 171 (Appeals Division) [*Oceanspan*].

tuition tax credits at the end of 2011. Mr. Marino may use part of his unused tuition tax credits to reduce his tax payable in 2012, when he is subject to Canadian income tax.

[20] Mr. Marino asserts that no provision in the *Act* precludes him from accruing tuition tax credits when he is non-resident or from deducting the unused tuition tax credits in 2012. He suggests that sections 118.5 and 118.61, interpreted textually, contextually and purposively, support his position.

VI. PRINCIPLES OF STATUTORY INTERPRETATION

[21] In this case there is no dispute regarding the facts. Rather, this appeal turns on the interpretation of the relevant statutory provisions, subsections 118.5(1) and 118.61(1). As noted, the parties disagree on the meaning to be given to these provisions.

[22] There is no doubt that the provisions in the *Act* must be interpreted using the textual, contextual and purposive principle described by the Supreme Court of Canada in *Canada Trustco Mortgage Co.* v. *Canada*[17] as follows:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play [sic] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[18]
>
> [Emphasis added.]

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[17] *Canada Trustco Mortgage Co* v. *Canada*, 2005 SCC 54.

[18] *Ibid*, at para 10.

[23] Thus, the language of a statutory provision is to be interpreted alongside its context and legislative purpose.[19] Where the words used are capable of more than one meaning, the ordinary meaning of the words, while relevant, will play a lesser role in the interpretive process than the context and purpose of the statutory provisions. The context includes not only the surrounding language (*i.e.*, the language of the specific provision) but also the broader context of the related provisions and the *Act* as a whole.

VII. STATUTORY LANGUAGE TO BE INTERPRETED

[24] Subsection 118.5(1) provides in part as follows:

> Subject to subsection (1.2), for the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted,

Subsection 118.61(1) provides in part as follows:

> In this section, an individual's unused tuition, textbook and education tax credits at the end of a taxation year is the amount determined by the formula A + (B-C) – (D+E)
>
> where
>
> A. is the amount determined under this subsection in respect of the individual at the end of the preceding taxation year;
>
> B. is the total of all amounts each of which may be deducted under section 188.5 or 118.6 in computing the individual's tax payable under this Part for the year; . . .

[25] Two terms used in these provisions that the parties focused on were "taxation year" and "individual".

> *(a) Taxation Year: Can Mr. Marino have a taxation year in a period when he is a non-resident who is not subject to Part I?*

[26] Subsection 118.5(1) is concerned with an individual who is enrolled at an educational institution during a taxation year and has paid tuition in respect of that

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[19] *Lawyers' Professional Indemnity Company* v. *The Queen* 2020 FCA 90 at para 31.

taxation year.[20] Because "taxation year" is defined in the *Act*,[21] the statutory meaning must be used. In the context of an individual, in 2002 to 2012 the definition read as follows:

> In this Act, except as expressly otherwise provided, a "taxation year" is
>
> . . .
>
> (b) in the case of an individual (other than a testamentary trust), a calendar year.

[27] Taxpayer is defined as including any person whether or not liable to pay tax.[22]

[28] Read literally, then, one might argue that Mr. Marino is a taxpayer and that each of 2002 to 2011 is a calendar year and so a taxation year for him.

[29] However, in *Oceanspan,* the Court determined that a non-resident with no source of income in Canada, was not a "taxpayer" and therefore did not have a taxation year. In asserting that Mr. Marino does not have a taxation year, and so is not within subsection 118.5(1), the Respondent relies on *Oceanspan*.

[30] *Oceanspan* bears some similarity to this appeal. The appellant corporation sought to deduct non-capital losses incurred before it became a resident of Canada, and during a period when it carried on no business in Canada. The appellant corporation argued that non-capital losses incurred before it became resident in Canada were deductible against income it earned after it became resident, because although not taxable in Canada before it became resident, in those years it nonetheless was a taxpayer as defined in the *Act* which had a taxation year. Taxpayer was defined in the *Ac*t then, as it is now, as any person whether or not liable to pay tax.[23] In the case of a corporation, taxation year was defined in the *Act* then, as it is now: a taxation year in the case of a corporation is a fiscal period. The

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[20] The preamble of subsection 118.5(1) states "For the purpose of computing the tax payable under this Part by an individual for ***a*** taxation year". Each of paragraphs 118.5(1)(a), (b) and (c) refer to the individual being a student "during ***the*** year" or "at any time in ***the*** year" and "tuition paid in respect of ***the*** year." These references to "the year" are clearly the taxation year identified in the preamble.

[21] Subsection 249(1).

[22] Subsection 248(1).

[23] Subsection 248(1).

appellant corporation argued it had a taxation year because it had a fiscal period, and it was a taxpayer notwithstanding that it was not liable to pay tax in Canada.

[31] The Federal Court (Appeals Division) disagreed, concluding that the appellant corporation was not a taxpayer and therefore could not have a taxation year. Because it had no income derived from Canadian sources in those years, it was not required to compute its taxable income, and was not "liable to pay tax in Canada".[24] Urie, J. went on to state the following:

> . . .The definition of "taxpayer", properly understood in its context in the whole of the scheme of the Act, shows, indisputably in my view, that it refers to resident individuals or corporations *who may be liable to pay tax at some time* whether or not they are, at any given time, liable therefor. A non-resident without income from Canadian sources can never be liable to pay tax under the Act on its foreign income. It is not, therefore, a corporation contemplated by the definition of "taxpayer" in the Act. By the same token, as a non-resident corporation, any losses which it may have incurred as a result of its business activities outside of Canada are irrelevant under the Act . . .
>
> I find further support for this view in the following. Until it becomes a "taxpayer" a non-resident corporation does not have *"[f]or purpose of this Act*", a "taxation year" within the meaning of paragraph 249(1)(a) of the Act, *supra*. When it becomes a resident, the Act becomes applicable to it because it becomes liable to pay tax. It is then that it becomes a "taxpayer" by definition. Before that, that term had no application to it. Consequently, until then, the definition of "taxation year" was inapplicable to it.
>
> . . . a non-resident not carrying on business in Canada cannot have a taxation year *for Canadian tax purposes*. I fail to understand how it can be given one retroactively. The appellant's contention, thus, cannot withstand analysis.[25]
>
> [Emphasis added.]

[32] Put simply, counsel for the Respondent argues that none of 2002 to 2011, the only years in respect of which Mr. Marino paid tuition, were taxation years for Mr. Marino. Because an individual may have an amount described in paragraph 118.5(1)(b) only where the individual has paid tuition in respect of a taxation year, Mr. Marino has no unused tuition tax credits to carry forward from any of 2002 to 2011.

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[24] *Supra* note 16 at para 13.

[25] *Ibid*., at paras 13-15.

[33] In contrast, counsel for Mr. Marino submits that section 250.1 has expanded the definition of taxation year and deems a non-resident to have a taxation year. Thus, he submits, section 250.1 overrules *Oceanspan* insofar as that case stands for the proposition that a year in which a non-resident is neither liable nor potentially liable to tax in Canada is not a taxation year. Accordingly, each of 2002 to 2011 is a taxation year for Mr. Marino, notwithstanding that he was not a resident of Canada and had no income earned in or taxable income earned in Canada in any of those years.

[34] Section 250.1, added to the *Act* with effect from December 17, 1999, states:

> For greater certainty, unless the context requires otherwise,
>
> a) a taxation year of a non-resident person *shall be determined*, except as otherwise permitted by the Minister, in the same manner as the taxation year of a person resident in Canada; and
>
> b) a person for whom income for a taxation year is determined in accordance with the Act includes a non-resident person.
>
> [Emphasis added.]

[35] I do not agree that section 250.1 has the effect of deeming every non-resident person to have a taxation year. First, the provision does not deem a taxation year to exist. When Parliament wishes to deem something in the *Act*, it uses that language,[26] including in the context of the meaning of "taxation year." For example, the *Act* deems a taxation year of a corporation to end where a corporation becomes or ceases to be a Canadian-controlled private corporation,[27] or becomes or ceases to be resident in Canada.[28] The *Act* deems the taxation year of a corporation to end on the last day of a calendar year if the corporation would not otherwise have a taxation year in a calendar year because its fiscal period

[26] There are more than 4,000 references in the Act to deem or deemed.

[27] Subsection 249(3.1).

[28] Paragraphs 128.1(1)(a) and 128.1(4)(a).

exceeds 365 days.[29] An individual is deemed to have a taxation year that ends immediately before the day the individual became a bankrupt.[30]

[36] Secondly, section 250.1 does not say what Mr. Marino suggests it means; that is, it does not say that "every non-resident person has a taxation year which shall be determined", language that might suggest universal application to non-residents. It says "a taxation year of a non-resident shall be determined".

[37] So what is the meaning and purpose of that language? In my view, the language used conveys the limits of the provision's application. When a taxation year of a non-resident must be identified for some reason mandated by the *Act*, but that non-resident would otherwise not have a taxation year by virtue of the *Oceanspan* principle, paragraph 250.1(a) tells us how to determine what that taxation year is for that purpose.

[38] If the non-resident is liable to Canadian tax in the year, the rules in the *Act* dealing with taxation years apply and section 250.1 serves no purpose. In other words, paragraph 250.1(a) applies only to those non-residents for whom a taxation year must be identified for a purpose mandated by the *Act* (including for the purpose identified in paragraph 250.1(b)) but who are not taxpayers and therefore would not otherwise have a taxation year for purposes of the *Act*. It applies where a non-resident must have a taxation year if a provision of the *Act* is to operate as it is intended to operate, including in respect of another taxpayer. It does not operate to give every non-resident a taxation year thereby allowing every non-resident to bring themselves within the scope of the *Act*.

[39] A good example of when section 250.1 operates is subsection 104(13).[31] It provides that in computing income for a taxation year a beneficiary of a trust must include that portion of the trust's income for the trust's taxation year that ends in the beneficiary's taxation year. This provision may apply to a resident beneficiary of a non-resident trust. Under the *Act*, income is computed for a taxation year. However, but for section 250.1, the taxation year of a non-resident trust that is not a taxpayer (because it does not carry on business in Canada and does not dispose of

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[29] Subsection 249(3).

[30] Paragraph 128(2)(d). Additional rules deeming taxation years to end or begin include subsections 249(4) and (4.1) and paragraphs 128(1)(d), 128(2)(d), 128.1(1)(a), and 128.1(4)(a).

[31] It also operates when income of the non-resident must be determined, for example as provided in various provisions of Part XIII of the *Act*.

taxable Canadian property) would be unclear. Yet, identifying a taxation year for the non-resident trust is necessary in order to compute its income, a mandatory step to be taken in the determination of the amount to be added to the resident beneficiary's income.

[40] But I do not agree that section 250.1 gives every non-resident a taxation year merely so any provision of the *Act* can apply to that non-resident. Thus, while a non-resident must have a taxation year to be within section 118.5, nothing in section 118.5 requires that it apply to a non-resident who does not otherwise have a taxation year. Section 250.1 does not in my view fill that gap to bring every non-resident within section 118.5.

[41] In conclusion, because section 118.5 requires an individual to be a student during a taxation year and for tuition to have been paid in respect of that taxation year, a student is not entitled to a tuition tax credit in any year that is not a taxation year. I agree with counsel for the Respondent that because Mr. Marino was not a taxpayer under the *Oceanspan* interpretation of that term in any of 2002 to 2011, none of those years was a taxation year for him. Accordingly, section 118.5 does not apply to him in any of 2002 to 2011. Because Mr. Marino had no tuition tax credits in any of 2002 to 2011, he had no unused tuition tax credits at the end of 2011 available for deduction in computing his tax payable in 2012. This is sufficient to dismiss the appeal.

(b) Individual: Is Mr. Marino an individual within the meaning of subsection 118.5(1)?

[42] However, even if my conclusion regarding the scope and effect of section 250.1 is incorrect, and each of 2002 to 2011 is a taxation year of Mr. Marino, I nonetheless would dismiss the appeal. Applying the principles of statutory interpretation, section 118.5 does not apply to any non-resident individual, but rather is limited to (resident or) non-resident individuals who are potentially liable to Canadian tax in the taxation year (*i.e.*, are taxpayers within the *Oceanspan* meaning of that term in the relevant year). Let me explain my reasons for that conclusion.

[43] Let's assume for purposes of this analysis that by virtue of section 250.1 each of 2002 to 2011 is a taxation year of Mr. Marino. Mr. Marino then argues that because the preamble of subsection 118.5(1) uses the term "individual", rather than taxpayer, that provision applies to him in each of 2002 to 2011 so that he has a tuition tax credit in each of 2002 to 2011. Moreover, Mr. Marino argues,

section 118.61 refers to an individual's unused tuition tax credits so Mr. Marino, as an individual, has unused tuition tax credits at the end of 2011, being the total of the credits accumulated in 2002 to 2011.

[44] In my view, the reference to an "individual" rather than a "taxpayer" in sections 118.5 and 118.61 does not mean that the tuition tax credit is available to any individual who otherwise meets the relevant conditions (*e.g.*, type of post-secondary institution and nature of the program).

[45] Where the application of a provision is limited to a particular kind of taxpayer that is readily identified by another term (individual, trust, or corporation), the choice to use that other term may reflect nothing more than what might be termed sensible drafting; the limited application of the provision is evident from the use of a more specific term. The *Act* is replete with provisions that do not use the term taxpayer, but clearly apply and are relevant only to taxpayers. This is in part due to the structure or architecture of the *Act*.

[46] In the case of section 118.5, it is found in subdivision a of Division E of Part I. The title of Division E is "Computation of Tax" and the title of subdivision a is "Rules Applicable to Individuals".[32] Not surprisingly, the provisions in that subdivision use the term individual rather than taxpayer. Similarly, the provisions in subdivision b, titled "Rules Applicable to Corporations," use corporation rather than taxpayer. In contrast, in subdivision c, titled "Rules Applicable to All Taxpayers" the term taxpayer tends to be used. The context in which the word is used is important.

[47] Moreover, the meaning to be given to the word "individual" as it is used in subsection 118.5(1) must be determined by considering the purpose for which it is used and the surrounding language. The first question to be asked is whether the word "individual" in these provisions has any ambiguity. Must it mean any individual or might it mean only a subset of individuals? In considering this question my first observation is that "individual" is not used as the subject of

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[32] *Kaiser* v. *Minister of National Revenue*, 91 DTC 1057, relied on the following quote from "The Interpretation of Legislation in Canada" by Pierre A. Côté respecting the potential value of headings:

> [. . .] headings are part of a statute and thus relevant to its construction. Headings may help to situate a provision within the general structure of the statute: they indicate its framework, its anatomy. Headings may also be considered as preambles to the provisions they introduce.

section 118.5. Subsection 118.5(1) does not say, for example, "an individual has a tuition tax credit" or even "the tuition tax credit of an individual at the end of a taxation year is."[33] Rather the word individual is used to modify the purpose for which subsection 118.5(1) is applicable.

[48] Subsection 118.5(1) applies for one purpose only: "for the purpose of computing the tax payable by an individual for a taxation year." This expression of purpose is key; in my view, it informs the meaning to be given to "individual" in subsection 118.5(1). Which individuals is subsection 118.5(1) concerned with? Not all individuals; only those individuals who are captured by Part I of the *Act* in the taxation year and thus are capable of computing tax payable under Part I for the taxation year.[34]

[49] Division A of Part I of the *Act* identifies who is required to compute tax payable; it describes the universe of persons who are potentially liable to pay tax under Part I.

[50] Subsection 2(1) provides that income tax shall be paid on the taxable income for each taxation year of *every person resident in Canada at any time in the year*. Thus, every individual resident in Canada at any time in the year is potentially liable to pay income tax and so must compute his or her tax payable under Part I.[35] He or she is an individual to whom the *Act* applies every year.

[51] Subsection 2(3) states that where a person not taxable under subsection 2(1) for a taxation year, was employed in Canada, carried on business in Canada or disposed of taxable Canadian property at any time in the year or in a prior year, an income tax shall be paid on the person's taxable income earned in Canada for the year determined in accordance with Division D. While subsection 2(3) does not

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[33] In contrast, this alternative approach is taken in subsection 118.61(1), but as discussed below, unless section 118.5 applies, section 118.61 is irrelevant.

[34] Some credit provisions use the phrase "an individual's tax payable under this Part for a taxation year" rather than "tax payable by an individual for a taxation year" but, in my view, both phrases have the same meaning. What is consistent (and important) is that the word "individual" modifies "tax payable under this Part for a taxation year".

[35] This is not to suggest that every person resident in Canada must file a return or that every person resident in Canada will have an amount of pay tax under Part I. Whether a return is required is determined by Division I of Part I. Whether income tax is in fact payable is determined based on a determination of that person's taxable income: see subsections 2(1) and (2) and 117(2).

expressly state it applies to non-residents, it is clear that it applies only to non-residents because subsection 2(1) applies to every person resident in Canada. However, unlike subsection 2(1), which applies to every resident, subsection 2(3) applies to only a subset of non-residents: those who were employed in Canada, carried on business in Canada, or disposed of taxable Canadian property in the year or in a previous year. Only those non-residents are potentially liable to tax under Part I and only those non-residents may compute their tax payable under Part I.[36] Only those non-residents are persons to whom Part I of the *Act* applies in the relevant year.

[52] This analysis was applied in *Oceanspan:*

> . . . it is necessary to revert to first principles as disclosed by the schemed of Divisions A to D inclusive, of the Act, the most basic of which is that both residents and non-residents are liable to pay tax on income earned from a source inside Canada. A non-resident who has no income from any source in Canada is not liable to pay tax in Canada. Both residents and non-residents who derive income from Canadian source are included, by definition, in the term "taxpayer", whether liable to pay tax or not. Their income is computed in accordance with Division B. By virtue of subsection 2(2) to ascertain their "taxable income" they are entitled to deductions and exemptions referred to in the Division C. It is only at the conclusion of that exercise that it is determined whether or not they are "liable to pay tax". It follows that a corporate non-resident which has no income derived from Canadian sources, is not required to compute its taxable income . . . and thus, has no need to utilize the deductions permitted by Division C . . . Such a corporation is not "liable to pay tax".[37]

[53] In other words, a person will not be an individual for purposes of section 118.5 in a particular year unless that individual is a taxpayer in that year because the individual is described in subsection 2(1) or 2(3) and is potentially liable to tax in Canada under Part I. In simple terms, individual in section 118.5 means an individual who is a taxpayer because only a taxpayer computes tax payable under Part I.

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[36] Again this is a separate exercise from a determination that there is an amount of tax to be paid under Part I. That is dependent on whether the non-resident has a positive amount of taxable income earned in Canada in the taxation year.

[37] *Supra* note 16 at para 12. See also *Lea-Don Canada Limited* v. *MNR* [1971] SCR 95 at page 99.

[54] This view is reinforced by subsection 117(2), also found in subdivision a of Division E. It states:

> The tax payable under this Part by an individual on the individual's taxable income or taxable income earned in Canada, as the case may be (in this subdivision referred to as the "amount taxable") for a taxation year is. . .

[55] This language identifies which individuals ***may*** have a "tax payable under Part I". It is the same individuals identified by subsections 2(1) and 2(3): every individual resident in Canada in a taxation year computes tax payable on the individual's taxable income in that year but only those non-resident individuals who were employed in Canada, carried on business in Canada or disposed of taxable Canadian property in a year compute tax payable on their taxable income earned in Canada for the year. In other words, unless a non-resident individual is described in subsection 2(3), none of Part I applies to the individual. That individual has nothing to compute under subsection 117(2).

[56] For the above reasons, the only individuals who potentially qualify for a tuition tax credit in a particular year are those individuals who are subject to Part I in the year – that is, individuals who are resident in Canada or who are obliged to determine their taxable income earned in Canada under Division D because subsection 2(3) requires them to do so. Only those individuals compute their tax payable under Part I by virtue of subsection 117(2) and so only those individuals may be eligible to deduct an amount under subsection 118.5(1).[38]

[57] Thus, regardless of whether section 250.1 has the effect of treating 2002 to 2011 as taxation years for Mr. Marino, in my view subsection 118.5(1) nonetheless does not apply to him in any of those years. A non-resident individual will be an individual to whom subsection 118.5(1) may apply in a taxation year only where that individual is an individual described in subsection 2(3) (*i.e.*, is a taxpayer) in that year. Mr. Marino was not such an individual in any of 2002 to 2011.

(c) "Taxation year" and "individual" in the context of subsection 118.61(1)

[58] Where a tuition tax credit is not deductible in the year it arises, it may be carried forward and deducted in a future taxation year. Subsection 118.61(1) describes an individual's unused tuition tax credits at the end of a taxation year. Mr. Marino asserts this provision gives him unused tuition tax credits at the end of

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[38] *Ibid.*

2011 that he may carry forward and deduct in computing his tax payable in the 2012 taxation year when he was resident in Canada.

[59] In the preamble of subsection 118.61(1), "individual" modifies the phrase "unused tuition tax credits at the end of a taxation year." At first blush, this may suggest any individual who has a taxation year may have an unused tuition tax credits balance at the end of that year. But, read in context, it is clear that is not the case.

[60] An individual's unused tuition tax credits are computed only at the end of a taxation year and according to a formula: A + (B-C) - (D + E). In simple terms, an individual's unused tuition tax credits at the end of a particular taxation year are the unused tuition tax credits at the end of the preceding taxation year, increased by the individual's tuition tax credit for the particular taxation year, and decreased by the total of the tuition tax credits deducted by the individual in the particular taxation year or transferred in that year by the individual to a designated person.

[61] The formula for computing an individual's unused tuition tax credits provides that the maximum amount that may be added to increase an individual's unused tuition tax credits at the end of a particular taxation year is:

> B the total of all amounts each of which may be deducted under section 118.5 or 118.6 in computing the individual's tax payable under this Part [Part I] for the year.

[62] The year referred to in B is the particular taxation year. Mr. Marino argues he is able to add an amount in accordance with B for each of 2002 to 2011 because they are taxation years and section 118.5 applied to him in each of those years.

[63] I have already concluded that none of 2002 to 2011 were taxation years for Mr. Marino. But, even if they were, for the reasons I have already given, section 118.5 did not apply to Mr. Marino in any of 2002 to 2011. The amount added to an individual's unused tuition tax credit in a particular taxation year is entirely dependent on an amount being computed under section 118.5 for that year for that individual. But, Mr. Marino had no such amounts in those years and so no amount for B in the formula for any of those years.

VIII. CONTEXT: OTHER RELATED PROVISIONS OF THE ACT

[64] In coming to my view of the proper interpretation to be placed on sections 118.5 and 118.61 as they apply to Mr. Marino, and to determine whether my interpretation is consistent with the principles of statutory interpretation, I also have considered related provisions. Although many of these provisions do not apply to Mr. Marino, they are relevant to the textual, contextual and purposive analysis of the tuition tax credit provisions that Mr. Marino seeks to rely on. For the reasons described below, in my view those provisions support my conclusion.

(a) Section 118.94

[65] Section 118.94 precludes non-resident individuals from claiming certain tax credits provided by the *Act* unless all or substantially all of their income for the year is included in computing their taxable income earned in Canada. Counsel for Mr. Marino points out that section 118.94 does not refer to sections 118.5 or 118.61 and accordingly does not limit Mr. Marino's ability to claim the credits.

[66] In particular, he argues that the limitations on the credit for tuition paid to foreign institutions together with the exclusion of section 118.5 from section 118.94 indicate that Parliament chose to permit non-residents, in Mr. Marino's circumstances, to accumulate credits and carry them forward until such time as they have Canadian source income. As I understood this argument, neither paragraph 118.5(1)(a) nor (c) could apply to a non-resident[39] so that extending the most restrictive tuition tax credit provision (*i.e.*, paragraph 118.5(1)(b)) to non-residents is consistent with what counsel describes as Parliament's choice to permit non-residents who have no connection to Canada in the tuition year to earn and carry forward tuition tax credits until such time if, as and when they become resident in Canada and have income earned in Canada.

[67] I agree that paragraph 118.5(1)(b) is the most restrictive of the tuition tax credit provisions: it is available only where the foreign institution is a university; only when the course leads to a degree; only where attendance is full-time and, in the years relevant to this appeal, only where the course was at least 13 consecutive weeks in duration. But, with respect, I do not see anything in the language that supports his position. Paragraph 118.5(1)(b) applies to residents, so the restrictions are not limited to non-residents. Secondly, paragraph 118(1)(a) is not exclusively available to residents of Canada. That is, nothing precludes a non-resident individual who attends an educational institution in Canada in that year from

[39] Other than deemed residents under section 250 in the case of paragraph 118.5(1)(a).

claiming the tuition tax credit made available under paragraph 118.5(1)(a) if the non-resident meets the qualifications for that credit and is an individual described in subsection 2(3) in the relevant year.[40]

[68] Interestingly, when section 118.94 was first enacted, it applied to the tuition tax credit but that changed effective with the date that section 118.94 came into force. That history is worth reviewing.

[69] Before the tax reform that occurred in 1987-1988, tuition paid to a post-secondary institution was deductible in computing income. The relevant provisions were found in section 60 of the *Act*, in subdivision e of Division B of Part I. Paragraph 60(1)(e) of the pre-1988 *Act* was concerned with tuition paid to universities outside Canada – and so corresponds to paragraph 118.5(1)(b). Paragraph 60(1)(f) of the pre-1988 *Act* was concerned with tuition paid to Canadian post-secondary institutions – and so corresponds to paragraph 118.5(1)(a). Paragraph 60(1)(g) was concerned with persons deemed resident in Canada – and so corresponds to paragraph 118.5(1)(c).

[70] Non-residents who are (potentially if not actually) liable to tax under Part I of the *Act* must compute their taxable income earned in Canada. Subsection 115(1) explains how a non-resident makes that computation. In simplified terms, paragraph 115(1)(a) provides that a non-resident individual computes his or her income under section 3 – and so on the same basis as a resident – but as if the non-resident individual had no income other than income from employment in Canada, income from a business carried on by the individual in Canada, and taxable capital gains from dispositions of taxable Canadian property. Therefore, for so long as tuition was a deduction in computing income, a non-resident individual who was required to compute taxable income earned in Canada was entitled to deduct the tuition in computing taxable income earned in Canada, on the same basis as a resident person was permitted to deduct tuition in computing income, provided that the relevant conditions relating to that deduction were satisfied (*e.g.*, nature of institution and course of study).

[71] In addition, by virtue of paragraphs 115(1)(d), (e) and (f) as they existed before the 1987-88 tax reform, a non-resident with taxable income earned in

[40] For example, the non-resident individual might have employment income from a part-time job at the Canadian educational institution while a student bringing the individual within Part I.

Canada was entitled to certain deductions in computing taxable income.[41] Some of those deductions were available only where all or substantially all of the non-resident's income for the year was included in the non-resident's taxable income earned in Canada.[42] But that limitation applied only to certain deductions in computing taxable income, not to the deductions, including the tuition deduction, relevant to computing income.

[72] As part of the 1987-88 tax reform, the tuition deduction and several other deductions were converted to non-refundable tax credits. Therefore, the deductions were moved from Division B of Part I, which deals with the computation of income, to Division E of Part I which deals with the computation of tax. The purpose of converting the deductions into non-refundable credits was so that the reduction in tax payable would be the same for all taxpayers regardless of their income. At the same time, the *Act* was amended to permit a student unable to use the tuition credit to transfer it to a spouse, common-law partner, parent or grandparent.

[73] Section 118.94 was introduced to the *Act* as part of the 1987-88 tax reform. It replicated for tax credits the "all or substantially all" limitation in paragraph 115(1)(f) that applies to deductions in computing taxable income, but included the tuition tax credit in the list of provisions subject to that limitation, notwithstanding that it had been a deduction in computing income (not taxable income). In 1990 section 118.94 was amended to delete the reference to section 118.5, effective from the date it had come into force. The explanatory note accompanying this amendment states:

> This amendment ensures that the 90% rule does not apply to the tuition fee and CPP/UI contribution tax credits. The removal of this limitation in respect of these credits is consistent with the treatment of tuition fees and CPP/UI contributions prior to tax reform, where such amounts were allowed as deductions in computing net income and were not subject to the 90% rule that was applicable to certain deductions allowed in computing taxable income.

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[41] Paragraphs 115(1)(d), (e) and (f) as they exist in the current Act also extend certain deductions in computing taxable income available to residents to non-residents required to compute taxable income earned in Canada.

[42] See paragraph 115(1)(f). Paragraph 115(1)(f) remains virtually unchanged since before tax reform but applies to deductions, not credits.

[74] Thus, the reason section 118.94 does not apply to the tuition tax credit is so that non-residents are in the same position following the conversion of the tuition deduction to a tuition tax credit as they were when it was a deduction in computing income.

[75] This history also confirms my interpretation of section 118.5. When tuition was a deduction in computing income, a non-resident individual who was employed in Canada, carried on business in Canada or disposed of taxable Canadian property was required to compute taxable income earned in Canada in the manner provided in subsection 115(1). As noted above, if the non-resident individual met the conditions for the tuition deduction, the deduction was available to the non-resident. However, if the non-resident individual was not within subsection 2(3), the individual did not compute taxable income earned in Canada and no tuition deduction would have been available.

[76] The stated purpose of the conversion of deductions was tax fairness: "personal tax credits provide the same reduction of tax payable for all taxpayers, regardless of their income level"[43] Nothing suggests an intention to extend the credits to persons who would not have been entitled to a tuition deduction because they were outside the scope of the *Act*.

[77] Mr. Marino's counsel observed that the limitation in section 118.94 applies to a transfer of the tuition tax credit to a non-resident designated person, but not to the tuition credit itself or the unused tuition tax credits provision. He suggests this evidences a policy decision to permit persons neither resident in Canada nor subject to Part I in a year to accumulate and carry forward unused tuition tax credits from that year.

[78] I agree that an individual not resident in Canada at any time in a year may have a tuition tax credit available for carry forward to future years without regard to what portion of his or her total income is Canadian-sourced. But, not all non-resident individuals may do so - only those non-resident individuals described in subsection 2(3) in the relevant year (*i.e.*, those with a Canadian source of Part I income).

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[43] Department of Finance, *Supplementary Information Relating to Tax Reform Measures*, (Ottawa: 16 December 1987) at 5-8.

[79] I also agree that where a non-resident student has taxable income earned in Canada[44] but is unable to use the tuition tax credit in computing tax payable on that taxable income, Canada, via section 118.94, precludes a transfer of the credit to a non-resident designated person who happens to have some taxable income in Canada in that year, unless that income represents all or substantially all of the designated person's income. But in my view, neither of those conclusions is inconsistent with my interpretation of the provisions.

[80] Mr. Marino's counsel also observes that section 118.94 applies to the education and textbook credits, so Parliament turned its mind to the question of when a non-resident was required to have Canadian source income in order to qualify for a credit. By excluding section 118.5 from section 118.94, he argues, Parliament evidenced an intention to permit non-residents like Mr. Marino to accumulate credits, without any regard to income, to use in later years when the non-resident has income taxable in Canada.

[81] Section 118.94 is an acknowledgement that non-residents may be entitled to various credits, including the tuition tax credits, provided for in Division E of Part I. So, I agree that section 118.94 is not a bar to Mr. Marino's claim.[45] However, saying that section 118.94 does not prohibit Mr. Marino from claiming the credit is not the same as saying he therefore is entitled to the credit.

[82] Section 118.94 is not necessary if the condition it imposes is that the non-resident have taxable income earned in Canada in the year. On my reading, that condition is contained directly within sections 118.5, 118.61, and the other provisions providing credits in Division E, subdivision a. Section 118.94 has a different purpose. It imposes an additional condition, not applicable to resident individuals, on a non-resident who has taxable income under Part I for the taxation year and seeks to claim certain credits in computing that tax payable (including the education and textbook credit in the relevant years and transferred tuition tax

[44] Perhaps because the student was employed in Canada in the same year the student attended university.

[45] Counsel for the Respondent agreed with this notwithstanding that the Reply states section 118.94 applies to deny Mr. Marino the tuition tax credits. Later in these reasons, I will address the Appellant's objection to the Respondent's arguments supporting the assessment on a basis other than section 118.94.

credits).[46] That condition does not apply to every credit (*e.g.*, it does not apply to the tuition tax credit or the charitable donation credit). But, the imposition of an additional condition for certain credits is as far as section 118.94 goes.

[83] Put another way, even where a non-resident meets the conditions of section 118.94, that is of no assistance where the non-resident does not meet the conditions of the relevant credit. A non-resident individual only need be concerned about section 118.94 after the individual has determined the conditions of the specific credit they seek to claim are met.

(b) Section 118.91

[84] Section 118.91 addresses the availability of tax credits for individuals who are resident in Canada for part of a taxation year, but non-resident for the other part of the year. To compute such an individual's tax payable under Part I for the year, the two periods are treated separately – as if each period was its own taxation year. Section 118.91 then specifies how the various credits are to be treated in each of those two periods.

[85] Section 118.91 specifically addresses the availability in the two periods of the various credits, and applies to the tuition tax credit in section 118.5. Paragraph 118.91(a) applies in respect of that part of the year that the individual is non-resident (the "non-resident period") and provides that the relevant credits are computed as though the non-resident period were the whole taxation year.[47] Paragraph 118.91(b) applies to the periods in the year throughout which the individual is resident in Canada (the "resident period"), again, computed as though the resident period were the whole taxation year, but with additional conditions imposed.[48]

[86] In a sense, section 118.91 is easiest understood by applying paragraph (b) before paragraph (a). Paragraph (b) applies to the period or periods throughout the year in which the individual is resident in Canada. It specifies that the tuition tax credit may be deducted in respect of the resident period only where it may

[46] In 2012, section 118.6 provided a similar deduction in computing tax related to the textbooks and attendance at a post-secondary institution, but those credits were not claimed by Mr. Marino and those provisions have since been repealed.

[47] Paragraph 118.91(a).

[48] Subparagraph 118.91(b).

reasonably be considered wholly applicable to the resident period, and is to be computed as if that period were the whole taxation year.

[87] Paragraph (a) applies to the period not referred to in paragraph (b). The only condition it imposes is that the non-resident period be considered a separate taxation year.

[88] So what does this mean? The tuition tax credit available to an individual in a taxation year is dependent on the individual being a student during that taxation year[49] and the tuition being paid in respect of that taxation year.[50] Section 118.91 requires the non-resident period and the resident period be treated as separate whole taxation years for purposes of determining entitlement to the various credits, including the tuition tax credit. An individual who was a full-time student in and paid tuition only for the non-resident period, but was not a person described in subsection 2(3) in that period, would not be entitled to a deduction under section 118.5 in computing tax payable in the year.

[89] However, section 118.91 would not preclude a non-resident who was described in subsection 2(3) in the non-resident period (and so able to compute taxable income earned in Canada for the non-resident period) from deducting a tuition tax credit in the year if the non-resident otherwise met the conditions for the credit in that non-resident period.

[90] Unused tuition tax credits from prior years are not restricted by section 118.91. In particular, section 118.91 is not referred to in paragraph 118.91(b) dealing with the resident period, with the result that if an individual has unused tuition tax credits available, the "normal" rules applicable to their deduction apply. Thus, if the individual had unused tuition tax credits from prior years, the individual would not be precluded from deducting those credits in computing tax payable for the year in which the individual is resident for part of the year and non-resident for another part of the year.

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[49] Paragraph 118.5(1)(b) applies where the individual was a student "during the year". "The year" in that paragraph refers to the "taxation year" for which tax payable is being computed, as described in the preamble of subsection 118.5(1). Thus, for the purpose of section 118.91, when computing income for the resident period, a part-year resident should treat that period as the whole taxation year, and can claim the tuition tax credit with respect to tuition paid for that resident period only if enrolled in an educational institution during that period.

[50] *Ibid*. ("the amount of any fees for the individual's tuition paid in respect of *the year* [. . .]").

[91] So what does this tell us about Mr. Marino's case? Mr. Marino became a resident of Canada in the middle of 2012. Thus, in 2012 he had a non-resident period (January 1 to July 1) and a resident period (July 2 to December 31). Had Mr. Marino been a full-time student at one of the US universities in his non-resident period[51] and paid tuition in respect of that period, section 118.91 would preclude him from deducting a tuition tax credit when computing his tax payable for 2012, because he was not a full-time student in the resident period, he did not pay tuition in respect of his resident period and it cannot be said that the tuition was "wholly applicable" to his resident period. This would be true notwithstanding that he may have significant Canadian tax to pay in respect of the resident period. But, if he had been a non-resident described in subsection 2(3) in his non-resident period, he would have been entitled to deduct any tuition credit related to the non-resident period in computing his tax payable for 2012.

[92] Given that context, the purpose of section 118.91 insofar as it applies to the tuition tax credit can only be to preclude a credit from being earned in a non-resident period, unless the individual is one to whom the *Act* applies in that period (*i.e.*, was a person described in subsection 2(3) in that period).

[93] This rule cannot serve merely to delay the deduction of a tuition tax credit related to the non-resident period until a later taxation year in which the individual is resident throughout the year. First, there would be no apparent reason to do so. Moreover, such an interpretation would run contrary to another principle embodied in the tuition tax credit rules: an individual is not permitted to carry forward unused tuition tax credits from a particular taxation year to the extent that the student has tax payable in that year (*i.e.*, has income in that year). If the student chooses not to claim the tuition tax credit that relates to the particular taxation year to reduce the tax otherwise payable by the student in that year (perhaps because the student has other credits that fully offset tax payable), the credit may be lost.[52] In other words, students are compelled to use tuition tax credits as soon as they are able to do so.

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[51] There is no suggestion he was a student at any time in 2012. This analysis is simply illustrative.

[52] See C in subsection 118.61(1). Similarly, an individual's unused tuition tax credits balance is reduced each taxation year by the individual's tax payable under Part I in that year computed before certain other available credits are taken (*i.e.*, where the individual has income) whether the individual chooses to deduct the unused credit or not. See D in subsection 118.61(1), paragraph 118.61(2)(b), section 118.92 and *Zhang* v. *The Queen* 2017 TCC 258 (IP).

[94] Moreover, if Mr. Marino's position is correct, why would there be a restriction on claiming the tuition tax credit under section 118.91 but not on the unused tuition tax credits? This only makes sense if the purpose of the provision is to preclude a non-resident not otherwise within the scope of Part I of the *Act* in a period when he or she is not resident to use tuition paid in respect of that period as a credit against Canadian income tax arising during the resident period.

[95] Again, the intent of the legislation is evident: a non-resident is not permitted a tuition tax credit in respect of tuition incurred in respect of a period before the individual becomes resident unless the individual is within subsection 2(3) in that period and so may compute taxable income earned in Canada in that period.

(c) Sections 118.8 to 118.9

[96] The 1987-88 tax reform also resulted in the introduction of provisions permitting an individual to transfer the credit to a spouse, common-law partner, parent or grandparent because "often a student is unable to make full use of the tuition credit. Making it transferable means that any unused credit will reduce the taxes of the parent, grandparent or spouse supporting the student".[53]

[97] Where an individual is unable to use (or fully use) the tuition tax credit in the year it arises, the individual has a choice: to transfer the tuition tax credit that the individual cannot use in that year to a designated person or carry it forward to use in a future year. Because the amount that may be transferred to a designated person is limited, an individual may opt to transfer some of the credit to a designated person and carry forward the balance. However, a credit may be transferred to a designated person only in the year in which it arises; unused tuition tax credits (*i.e.*, carry forward balances) may not be transferred to a designated individual.

[98] While the amount of available tuition tax credit that a person (student) may transfer to a designated person is limited by section 118.81, the starting point for the calculation of the transferrable amount is "the total of all amounts that may be deducted by the person [the student] under section 118.5 in computing the person [student]'s tax payable under Part I for the year."[54] In other words, the starting

[53] Department of Finance, Technical Notes – Section 118 (1988).

[54] In 2002 to 2009 the provision referred to amounts deductible under sections 118.5 and 118.6. The latter provision was concerned with education tax credits, now repealed. For simplicity, I have not referred to that provision here.

point for the determining the tuition tax credit that may be transferred to a designated person in a year is identical to the amount that would be added to the student's unused tuition tax credit for that year under B of the formula in section 118.61. Moreover, the amount that may be transferred to a designated person is reduced by the student's tax payable computed without reference to certain other tax credits.[55] In other words, the student must use the credit first.

[99] So why is this relevant to the analysis? To accept Mr. Marino's position, any non-resident student attending a foreign university in a program that meets the conditions of paragraph 118.5(1)(b) would be entitled to transfer tuition tax credits to a Canadian-resident grandparent every year that the student attended the program. Under his reading, this would be true regardless of whether the student or the student's parents ever had any income from a source in Canada, or elsewhere for that matter. Now imagine if that Canadian resident grandparent had several non-resident grandchildren attending universities in foreign jurisdictions, each of whom was able to transfer the credit to the Canadian-resident grandparent.

[100] I have no doubt that Parliament did not intend that when it introduced the transfer provisions. Yet, if I accepted Mr. Marino's reading of subsection 118.5(1) that result would follow: Mr. Marino would have a tuition tax credit in 2002; because he could not use it in that year he could transfer a portion of it to a Canadian-resident parent or grandparent. (The limitation in section 118.94 does not apply if the parent or grandparent is resident in Canada.)

[101] In contrast, consistent with my reading of section 118.5, an individual (student) who is not potentially liable to tax in Canada in a year, because that person is neither resident in Canada nor a non-resident described in subsection 2(3) of the *Act*, has no amount computed under section 118.5, and so no amount that may be deducted under that provision. As a result, that individual has no amount to add to his unused tuition tax credit under section 118.61 and no amount that may be transferred to a designated individual under section 118.81. Under this interpretation, non-resident individuals other than those described in subsection 2(3) would enjoy no advantage over resident individuals or non-resident individuals described in subsection 2(3).

[102] In coming to this conclusion about the scope of the transfer provisions, I have considered *Cristofaro* v. *ARQ*,[56] which considered a similar issue under

[55] See B of the formula in (a) of section 118.81.

[56] *Cristofaro* c. *Agence du revenu du Québec*, 2020 QCCQ 1461 [*Cristofaro*].

Quebec's *Taxation Act*.[57] To simplify the facts in that case, Mr. Cristofaro and his daughter were both residents of Ontario for tax purposes. However, Mr. Cristofaro, as a partner of a national professional firm, earned business income in Quebec and accordingly filed a Quebec tax return in respect of that income as he was required to do. In computing his tax payable, Mr. Cristofaro claimed an amount in respect of tuition his daughter paid to a university in Scotland. The deduction was first denied on the basis that his daughter had not filed a Quebec income tax return, a precondition to the transfer of the credit specified in section 776.41.21 of the *Taxation Act* (Quebec). She therefore filed a Quebec tax return, notwithstanding that she had no obligation to do so, because she was not resident in Quebec and did not derive any income from Quebec. Revenu Quebec nonetheless rejected Mr. Cristofaro's claim of the transferred tuition credit on the basis that his daughter was not liable for or subject to Quebec tax. The Court rejected that argument on the basis that it was enough that the parent was liable for Quebec tax and that the daughter could at some point in the future be liable to Quebec tax. The Court accepted that nothing precluded the daughter from filing a Quebec return and concluded the result was consistent with the text and policy of the provision in the *Taxation Act* (Quebec).[58]

[103] The *Cristofaro* case dealt with different facts and different legislation: both individuals were resident in Canada;[59] the tuition credit was transferred, not carried forward; and the language of the Quebec legislation, while similar, is not the same as the language of the *Act*. Thus, in my view, the case is distinguishable. But, regardless, it is not binding and it does not change my view of the proper application of sections 118.5 and 118.61 of the *Act* to Mr. Marino.

(d) Subsection 128(2)

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[57] *Taxation Act*, CQLR c l-3 [*Taxation Act (Quebec)*].

[58] The judge stated (at para 57): "The Court reaches the same conclusion on a reading of the text in light of its purpose, that is reflective of the policy objective in play, that of encouraging persons who pay taxes in Quebec to support their children in their studies, provided certain conditions are met. In that light, a generous interpretation should be given, so long as the words permit, and the Court should not read in restrictions that are not to be found in the legislator's choice of the words used and those not used." By contrast, the (federal) *Act* reflects a different policy in the context of a transfer of a credit to a non-resident designated person, by expressly denying the credit unless the designated person derives all or substantially all of their income from sources in Canada.

[59] The *Taxation Act* (Quebec) has different income computation rules applicable to persons not resident in Canada and to persons not resident in Quebec but resident in Canada.

[104] Subparagraph 128(2)(g)(iii) provides for the cancellation of all tuition tax credits at the end of the taxation year immediately preceding the individual being discharged absolutely from bankruptcy. Counsel for Mr. Marino suggested that when Parliament intended to stop a credit, it introduced a rule to do so. He suggested that the fact that there is no rule to reduce unused tuition tax credits to nil on becoming resident supports Mr. Marino's position.

[105] I agree no rule reduces an individual's unused tuition tax credits to nil on the individual becoming resident. But, I do not think that supports Mr. Marino's position. Rather, consistent with my reading of the provisions, a rule that reduces the unused tuition tax credits to nil on becoming resident (i) is not necessary for a non-resident individual who, like Mr. Marino, was not a person described in subsection 2(3) prior to becoming resident, because such individual does not have unused tuition tax credits to reduce and (ii) presumably was not considered appropriate for those non-residents who, prior to becoming resident, accumulated credits in years when they were resident in Canada or years in which they were non-residents described in subsection 2(3).

IX. OTHER POLICY ARGUMENTS RELATING TO CARRYFORWARD PROVISIONS

[106] As counsel for Mr. Marino has observed, the carry-forward period for the tuition tax credit is not limited. He suggested that this factor, coupled with the purpose of the carry-forward, supports Mr. Marino's position: the policy of the tuition tax credit is to permit all individuals subject to Canadian tax to reduce that tax for tuition paid where the post-secondary education is being used to earn income in Canada. In other words, he argues, Canada has decided to provide tax relief for a portion of the costs incurred by Mr. Marino to enable him to contribute to the Canadian economy and earn income in Canada subject to Canadian tax without regard to whether Mr. Marino is a person described in section 2 of the *Act* in the year those costs are incurred. However, other than pointing to the words of the legislation and some statements made when the carry-forward provisions were introduced, he offered no evidence supporting that policy.

[107] Nothing in the text of the tuition tax credit rules requires the taxpayer to connect the education, the cost of which gives rise to the credit, to a particular source of taxable income. The credit is available to Canadian residents and non-residents described in subsection 2(3) regardless of the source of income giving rise to tax under Part I.

[108] Assuming the conditions for a credit are satisfied, a Canadian resident student who is neither employed nor earns income in Canada nonetheless (i) is entitled to a tuition tax credit in the years he or she is resident, (ii) may transfer all or a portion of that credit to a designated person in that year, and/or (iii) may carry forward any unused credit under section 118.61 to be applied against Part I tax on income from any Canadian source in future taxation years. This includes a student who emigrates from Canada immediately on completion of post-secondary education to pursue employment or other income earning activities entirely outside Canada so that the education Canada subsidized contributes to the economy of another jurisdiction.

[109] A court always must consider how much weight to give to statements made in the House of Commons and explanatory notes. While such statements may provide insight into Parliament's intention, they are rarely dispositive of the issue.

[110] The carry-forward of tuition tax credits was introduced in the 1997 Federal Budget. In his budget speech of February 18, 1997, Paul Martin, The Minister of Finance said the following:

> Canadians know that a better education equals better jobs. This is true for our young people who are in school. It is also true for those already in the workforce whose continued employment is increasingly dependent on lifelong learning.
>
> . . .
>
> Furthermore, under the current rules, some students or their parents cannot take advantage of [the education and tuition credits] because they do no have sufficient income in a particular year to utilize them. This is often the case, for instance, for those students who do no have supporting parents or for people who enroll in an education program later in life. Therefore we are changing the rules so that those who are not able to use these credits in the year of study will now be able to do so by carrying them forward to offset against future income. [60]

[60] *House of Commons Debates*, 35th Parl, 2nd Sess, Vol 134, No 132 (18 February 1997) at 8293 (Minister of Finance: Paul Martin). See also Budget Plan 1997 at pages 94 and 180. The Budget Plan of February 18, 1997 contains statements to a similar effect (at p 180):

> While the tuition and education credits may only be claimed in the taxation year to which they relate, most students are able to use them fully or transfer them to a supporting individual. However, some students are unable to use these credits fully, either because they have low incomes, relatively high tuition fees, no supporting individual, or supporting individuals who themselves have low incomes in the year. In the case of workers taking upgrading courses or returning

[111] But it is critical to view these statements in the context in which they were made. The text is framed in the context of Canadians and Canadian young people. The credit is a deduction in computing tax payable – and that is the context in which "because they do not have sufficient income in a particular year" is used. Nowhere is there a reference to non-residents.

[112] Before the addition of the carryforward, a tuition tax credit not used by the individual in the year, and not transferred to a designated person in the year, was lost. Therefore, prior to the introduction of a carryforward system, the rules did not allow non-residents with no income in Canada to a tuition tax credit (because the credit had to be used in the year). The addition of the carry-forward was not intended to change, and did not change, who was entitled to a credit – only the use to which those credits could be put.

[113] In my view, the Government's statements suggest nothing more than an intention to allow individuals who had an entitlement to the credit in the year, but who were unable to take advantage of the credit in the year because of insufficient income, to carry them forward. Nothing suggests an intention or objective of permitting individuals who had no credit because of no connection to Canada to thereafter be able to accumulate a credit and carry it forward until such time as such individuals might be potentially liable to tax in Canada.

> to studies after a period in the workforce, there may be no supporting individual with sufficient taxable income in that year to benefit from a transfer. To permit all students to take full advantage of the tuition and education credits, the budget proposes to allow the student to carry forward these credits indefinitely until they have sufficient tax liability to make use of them.
>
> The carry-forward will apply with respect to tuition and education amounts earned in 1997 and subsequent taxation years. Any amounts not used by the student, and not transferred to a supporting individual, will be automatically carried forward for future use by the student. The unused amounts transferred to a supporting individual cannot exceed the total tuition and education amounts arising in that year, and will continue to be limited to $5,000 per year. However, amounts carried forward will be available for the student's own use in any subsequent year. Students will be required to provide the necessary information to establish a carry-forward. Revenue Canada will keep track of a student's unused amounts and report them on the student's notice of assessment.

Again, this language must be read in context of the provisions as they then existed. At that time the rules did not allow non-residents with no income in Canada to a tuition tax credit (because the credit had to be used in the year).

[114] To put it bluntly, on Mr. Marino's reading, a non-resident individual who immigrates to Canada in retirement, decades after attending university in a foreign jurisdiction,[61] and having earned hundreds of thousands of dollars of income in the foreign jurisdiction, would be entitled to the credit simply because he or she immigrated to Canada. I see no evidence of the carry-forward policy extending that far.

X. SECONDARY ISSUE: APPELLANT'S OBJECTION TO RESPONDENT'S ARGUMENT

[115] The Reply to the Notice of Appeal states that the Respondent is relying on sections 118.5, 118.6, 118.61, 118.94 and subsections 118.6(1), 118.6(2), 248(1) and 250(1) of the *Act*. However, under the heading "Grounds Relied and Relief Sought", the Respondent suggests that it is section 118.94 that precludes non-residents from claiming the tuition tax credits and education tax credits provided under sections 118.5 and 118.6, respectively. This is clearly not correct because section 118.94 does not refer to section 118.5.

[116] Counsel for the Respondent does not dispute that. Rather, his argument at the appeal was based on sections 118.5 and 118.61 and *Oceanspan*. He argued that because Mr. Marino was a non-resident who had no income from Canadian sources in 2002-2011, those years were not taxation years for Mr. Marino such that, on immigrating to Canada, he had no unused tuition tax credits.

[117] Counsel for Mr. Marino objected to this argument and grounds of appeal on the basis that it was not raised in the Reply, the appeal was heard on the basis of an Agreed Statement of Facts and had he known this would be argued he might have brought additional evidence. I did not accept that submission and permitted the Respondent to proceed with his argument.

[118] First, this appeal was instituted and heard under this Court's informal procedure for tax appeals. Subsection 18.15(3) of the *Tax Court of Canada Act* provides that an appeal under the informal procedure is to be "dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit".

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[61] Assuming the university was attended in the period following 1997, the year in which the carry-forward became available.

[119] Secondly, the Reply identifies sections 118.5 and 118.61 as among the statutory provisions relied on.[62] The Reply also refers to subsection 248(1), which contains the definition of "taxpayer", irrelevant to section 118.94. If the Respondent were relying solely on the argument that section 118.94 precluded the credit, reference to other provisions would not be necessary.

[120] The portion of the Reply addressing the grounds relied on includes the statement "As the Appellant is not entitled to claim the tuition and education amounts pursuant to sections 118.5, 118.6 and 118.94 of the Act, the Appellant does not have any carryforward tuition amounts available for the 2012 taxation years under section 118.61 of the Act."[63]

[121] While I agree with counsel for Mr. Marino that the drafting of the Reply leaves much to be desired,[64] I am not satisfied that the Respondent is advancing an alternative or new argument, or is advancing arguments Mr. Marino could not foresee based on the Reply and Agreed Statement of Facts. In fact, counsel for Mr. Marino spent considerable time explaining why Mr. Marino was entitled to the credit. Those explanations went far beyond stating section 118.94 did not apply to preclude the credit.

[122] Therefore, on one view, the Respondent might be seen as not advancing a new argument but as responding to Mr. Marino's argument that he is within the scope of sections 118.5 and 118.61, by pointing out why, in the Respondent's view, he is not. I favour that view.

[123] But even if the Respondent might be seen as seeking to advance an additional argument to support the reassessment, subsection 152(9) of the *Act* expressly permits the Respondent to do so at any time after the normal reassessment period, unless there is evidence that the taxpayer is no longer able to

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[62] It also refers to section 118.6 and subsection 250(1).

[63] Reply at para 25.

[64] Paragraph 23 of the Reply states the Appellant was not considered to be either a deemed or factual resident of Canada. Paragraph 24 then states "As such, section 118.94 of the Act precludes non-residents from deducting deductions such as tuition and education amounts under sections 118.5 and 118.6 of the Act". Mr. Marino's counsel emphasised "as such" as indicating that section 118.94 was the sole ground relied on. While I find the use of "as such" odd given the contents of paragraph 23 and agree the Reply is not well drafted, I do not accept the Appellant's counsel's view that this means the only ground advanced is section 118.94.

provide without leave of the Court and it is not appropriate for the Court to order that evidence be provided.

[124] In *Walsh* v. *Canada*,[65] the Federal Court of Appeal outlined a three-part test that must be passed before the respondent will be allowed to rely on subsection 152(9) to amend its pleadings to add additional arguments, as follows:

> a) the respondent cannot include transactions which did not form the basis of the taxpayer's reassessment;
>
> b) the right of the respondent to present an alternative argument in support of an assessment is limited by paragraph 152(9)(*a*) and (*b*), which speak to the prejudice to the taxpayer; and
>
> c) the respondent cannot use subsection 152(9) to reassess outside the limitations described in subsection 152(4) or to collect tax exceeding the amount of the assessment under appeal.[66]

[125] In Mr. Marino's case, neither (a) nor (c) is an issue. The Respondent is not seeking to add any new transactions and is not seeking additional tax beyond that under appeal. Thus, assuming that the Respondent is making a new or alternative argument, the only test we need to consider is whether Mr. Marino is prejudiced by the alternative argument. In considering this question, subsection 152(9) asks me to consider whether there is relevant evidence that Mr. Marino is no longer able to adduce without leave of the Court and it is not appropriate in the circumstances for the Court to order that the evidence be adduced.

[126] Counsel for Mr. Marino suggested that had he known that the Respondent would rely on *Oceanspan* and provisions other than section 118.94, he might have called additional evidence to demonstrate that Mr. Marino had connections to Canada in 2002 to 2011 rather than proceed purely on an Agreed Statement of Facts. For example, he suggested he might lead evidence that Mr. Marino was hired by the Canadian law firm where he is currently employed before he immigrated to Canada and did some work for it, albeit only remotely from the US. In other words, he was not employed in Canada, although employed by a Canadian firm. Given the reasons for my conclusion that Mr. Marino has no unused tuition tax credits, evidence of that nature is not relevant.

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[65] *Walsh* v. *Canada*, 2007 FCA 222.

[66] *Ibid*., at para 18.

[127] The Agreed Statement of Facts is clear that Mr. Marino was neither resident nor deemed resident of Canada in 2002 to 2011, he had no taxable income earned in Canada in those years, and had no taxes payable in Canada in those years. In my view, those are the only relevant facts to the question before me. Once those facts are agreed, there is nothing else that needs to be considered. Put another way, in my view, the only relevant connection to Canada is being within subsection 2(3) in the relevant year. Thus, even if Mr. Marino had tendered evidence establishing other connections, my decision would have been the same.[67]

[128] Accordingly, even if the Respondent should be considered to have advanced an alternative ground to support the reassessments, Mr. Marino has not established that there is any other relevant evidence or any prejudice to Mr. Marino. Accordingly, the Respondent is not confined to relying on section 118.94 in support of the reassessment. [68]

XI. CONCLUSION

[129] In my view, the interpretation I have given to sections 118.5 and 118.61 is consistent with the text, context and purpose of those provisions. Therefore, for the above reasons, Mr. Marino's appeal of the reassessment of his 2012 taxation year is dismissed. Each party will bear their own costs.

Signed at Ottawa, Canada, this 10th day of July 2020.

"K.A. Siobhan Monaghan"

Monaghan J.

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[67] The Respondent's arguments are legal arguments based on the existing evidence. See *Canada v. Global Equity Fund Ltd.*, 2012 FCA 272, leave to appeal to SCC denied April 11, 2013, 2013 CanLII 18834 (SCC).

[68] I also observe that this appeal is governed by the Informal Procedure Rules. While those rules impose a deadline for filing a Reply, the only consequence of failing to meet that deadline is that the allegations of fact in the Notice of Appeal are presumed to be true. Thus, the Respondent might have filed the Reply on the eve of the appeal with that consequence. But, if the facts alleged in the Notice of Appeal, many of which appear in the Agreed Statement of Facts, were all true that would not change my decision.

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