Nagel v. The Queen

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File numbers: 2017-401(IT)APP
Judges and Taxing Officers: Dominique Lafleur
Subjects: Income Tax Act

Docket: 2017-401(IT)APP

BETWEEN:

DENISE C. NAGEL,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on January 12, 2018, at Halifax, Nova Scotia

Before: The Honourable Justice Dominique Lafleur

Appearances:

For the Applicant:	The Applicant herself
Counsel for the Respondent:	Laura Rhodes David I. Besler

JUDGMENT

UPON the application for an order extending the time within which an appeal from the reassessment made under the *Income Tax Act* for the 2013 taxation year may be instituted (the "Application");

AND having heard the submissions of the parties and read the material filed;

In accordance with the attached Reasons for Judgment, the Application is dismissed, without costs, and the appeal from the reassessment made under the *Income Tax Act* for the 2013 taxation year is quashed.

Signed at Ottawa, Canada, this 15th day of February 2018.

"Dominique Lafleur"
Lafleur J.

Citation: 2018 TCC 32
Date: 20180215
Docket: 2017-401(IT)APP

BETWEEN:

DENISE C. NAGEL,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lafleur J.

I. OVERVIEW

[1] On January 24, 2017, Denise C. Nagel filed with this Court an application for an order extending the time within which an appeal may be instituted in respect of a tax reassessment made by the Minister of National Revenue (the "Minister") under the *Income Tax Act* (RSC, 1985, c. 1 (5th supp.), as amended) (the "Act"), for the 2013 taxation year. A notice of appeal was attached to the application.

[2] Ms. Nagel was the sole witness at the hearing.

II. FACTS

[3] The evidence submitted at the hearing showed the following:

1. On February 26, 2016, the Minister reassessed Ms. Nagel for the 2013 taxation year and issued a notice of reassessment showing a taxable income and a net federal tax payable of zero (the "First Reassessment"). It indicated that Ms. Nagel "[has] no amount to pay as a result of this reassessment". It also showed that the taxing

province of Ms. Nagel was changed to Saskatchewan and indicated that Ms. Nagel had federal unused tuition and education amounts.

2. A copy of the amended T1 General form—income tax and benefit return—signed by Ms. Nagel and dated May 19, 2016, showed that she was a resident of Saskatchewan on December 31, 2013, and that she did not apply for GST/HST credit.

3. Ms. Nagel served a notice of objection to the First Reassessment on May 24, 2016. By letter dated June 21, 2016, the Canada Revenue Agency (the "CRA") informed Ms. Nagel that her objection was invalid because "[w]hen a client has filed an objection for issues that are not considered part of the assessment of tax, penalty or interest, it cannot be accepted as a Notice of Objection". By letter dated October 28, 2016, the CRA confirmed to Ms. Nagel that Ms. Nagel's province of residence was being changed to Nova Scotia.

4. On November 3, 2016, the Minister further reassessed Ms. Nagel for the 2013 taxation year and issued a notice of reassessment showing a taxable income and a net federal tax payable of zero (the "Second Reassessment"). It indicated that Ms. Nagel "[has] no amount to pay as a result of this reassessment". In the Second Reassessment, Nova Scotia was used as Ms. Nagel's province of residence. In addition, the notice of reassessment indicated that Ms. Nagel had federal unused tuition and education amounts.

III. PARTIES' POSITIONS

[4] In the course of the hearing, Ms. Nagel indicated that she had issues with the reassessments in respect of (i) her province of residence, as she would like to be considered a resident of Saskatchewan, (ii) the federal unused tuition, textbook and education tax credits (subsection 118.61(2) of the Act) as she is not entitled to the credit since she never reimbursed the student loans, and (iii) the goods and services tax (GST) determination.

[5] The Respondent's position is that this Court has no jurisdiction because the First Reassessment and the Second Reassessment are nil reassessments. Consequently, Ms. Nagel can neither object to, nor appeal from, said reassessments and the Respondent asks that her application be dismissed.

[6] Unless otherwise stated, all provisions that follow refer to the Act.

IV. ANALYSIS

[7] Subsection 169(1) provides that where a taxpayer has served a notice of objection to an assessment under section 165, the taxpayer may appeal to this Court to have the assessment vacated or varied after either: a) the Minister has confirmed the assessment or reassessed; b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed. However, no appeal may be instituted after the expiration of 90 days from the day the notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

[8] Subsection 169(1) reads as follows:

169(1) Appeal — 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 after either	**169(1) Appel** — Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation :
(*a*) the Minister has confirmed the assessment or reassessed, or	*a*) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;
(*b*) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,	*b*) après l'expiration des 90 jours qui suivent la signification de l'avis d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation;
but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.	toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été envoyé au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

[9] Subsection 167(1) provides that where an appeal to this Court has not been instituted by the taxpayer under section 169 within the time limited by

that section for doing so, the taxpayer may make an application under section 167 for an order extending the time within which the appeal may be instituted and the Court may make an order extending the time for appealing. Subsection 167(5) sets out the relevant requirements.

1. The application:

[10] Initially, Ms. Nagel brought an application for an order extending the time within which an appeal from the reassessment may be instituted. However, during the hearing, she stated that as she had indicated in her notice of objection that she wished to make a "fuller response after new and additional information has been considered", she is now also applying to this Court for an order to extend the time to object to a reassessment.

[11] Before addressing the application, I have to state my disagreement with the Respondent's approach in her submission relating to the First Reassessment. Since it appears that neither reassessment was issued beyond the "normal reassessment period", as that phrase is defined in paragraph 152(3.1)(*b*), it is my view that the Second Reassessment is the only reassessment to be considered as it rendered the First Reassessment a nullity.

[12] The nullity principle was confirmed by the Federal Court of Appeal in *Lornport Investments v Canada*, [1992] 2 FC 293, 92 DTC 6231 [*Lornport*], and recently reiterated in *Yarmoloy v The Queen*, 2014 TCC 27, 2014 DTC 1058, by former Chief Justice Rip. In *Lornport*, the Federal Court of Appeal states:

> I have come to the conclusion, in the particular circumstances of this case, that the second reassessment, which was vacated by the court order of April 20, 1989, did not supersede and nullify the first reassessment. It seems to me that the court order amounted to judicial recognition that the second reassessment, issued as it was beyond the statutory time limit, was not legally issued. It did not, for that reason, displace and render the first reassessment a nullity. That reassessment continues to subsist, in my opinion.
>
> [Emphasis added.]

[13] I will now examine the application. In considering an application for an extension of time—to object or appeal—the Court must have regard to the statutory time limits as outlined above, provided that there is an assessment or reassessment of tax, interest or penalties payable by a taxpayer.

[14] The difficulty with Ms. Nagel's application is that the Second Reassessment shows that no taxes are payable by her for the 2013 taxation year.

[15] The expression "no tax is payable" is found in subsection 152(4). It reads:

152(4) Assessment and reassessment — The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, . . .	**152(4) Cotisation et nouvelle cotisation** — Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. […]

[Emphasis added.]

[16] Thus, the Minister may make an assessment or reassessment of tax, interest or penalties payable by a taxpayer or notify a person that no tax is payable. Having no tax payable is also referred to as a nil assessment. An appeal must be directed against an assessment and an assessment which assesses no tax is not an assessment.

[17] The general principle that no appeal lies from a nil assessment has its origin in the *Okalta Oils* decision such that a taxpayer can neither object to, nor appeal from, a nil assessment (*Okalta Oils Ltd v Minister of National Revenue*, [1955] SCR 824, 55 DTC 1176; see also *Bormann v The Queen*, 2006 FCA 83 at para 8, 2006 DTC 6147, *Terek v The Queen*, 2008 TCC 665 at para 3, 2009 DTC 1023 [*Terek*]).

[18] In *Faucher v the Queen*, [1994] TCJ No 56 (QL), 94 DTC 1581, Justice Lamarre Proulx summarized the nil assessment principles and explained that "there is no right of appeal from an assessment of a nil amount, or from an assessment of which a reduction is not requested". That case was cited by the Federal Court of Appeal in *The Queen v Interior Savings Credit Union*, 2007 FCA 151, 2007 DTC 5342 [*Interior Savings*]: it is stated, at paragraph 18, that the Court does not have jurisdiction to hear an appeal from a nil assessment where no tax is payable.

[19] Recently, Justice D'Auray of this Court confirmed in *Donaldson v The Queen*, 2016 TCC 5, 2016 DTC 1035, that:

> 9 In *Interior Savings Credit Union v HMTQ*, 2007 FCA 151, the Federal Court of Appeal applied the principles enunciated in *Okalta Oils Ltd*, and held that a taxpayer cannot challenge an assessment where there are no taxes, penalties or interest assessed for the year. Justice Noël, writing for the Court, stated as follows at paragraphs 15 to 17:
>
> > 15 In my respectful view, the Tax Court Judge erred in dismissing the Crown's Motion to strike. The Minister's power and duty under subsection 152(1) of the Act is to "... assess the tax for the year, the interest and penalties, if any, ...". The taxpayer's right to object (ss 165(1)) and to appeal to the Tax Court of Canada (ss 169(1)) can only be exercised in order "... to have the assessment vacated or varied ...". It follows that unless the taxpayer challenges the taxes interest or penalties assessed for the year, there is nothing to appeal and indeed no relief which the Tax Court can provide (*Chagnon v. Normand* (1889), 16 S.C.R. 661 (S.C.C.), at 662).
> >
> > 16 The Tax Court Judge properly notes in his reasons that the assessment before him was not a nil assessment. However, he goes on to state that even if it was a nil assessment, he would nevertheless allow the appeal to continue. The expression nil assessment does not appear anywhere in the Act. When dealing with a situation where a person owes no taxes, the Act authorizes the Minister to issue a notice "that no tax is payable" (subsection 152(4)).
> >
> > 17 Nonetheless, the term nil assessment is often used in the case law to identify an assessment which cannot be appealed. There are two reasons why a so-called nil assessment cannot be appealed. First, an appeal must be directed against an assessment and an assessment which assesses no tax is not an assessment (see *Okalta Oils Ltd. v. Minister of National Revenue* (1955), 55 D.T.C. 1176 (S.C.C.) at p. 1178: "Under these provisions, there is no assessment if there was not tax claimed"). Second, there is no right of appeal from a nil assessment since: "Any other objection but one related to an amount claimed [as taxes] was lacking the object giving rise to the right of appeal ..." (*Okalta Oils*, *supra*, at p. 1178).
> >
> > […]
>
> [Emphasis added.]

[20] Justice Pelletier of the Federal Court of Appeal stated in *Canada (Attorney General) v Bruner*, 2003 FCA 54 at para 3, [2003] GSTC 28, that:

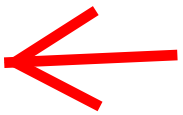
> 3 . . . Consequently, a taxpayer is not entitled to challenge an assessment where the success of the appeal would either make no difference to the taxpayer's liability for tax or entitlement to input tax credits or refunds, or would increase the taxpayer's liability for tax. . . .

[21] This comment was confirmed by the same court in *Interior Savings*, *supra*, where Justice Noël specified at paragraph 31 that:

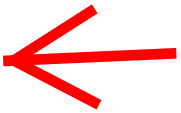
> 31 In *Liampat Holdings Ltd.*, Counsel for the taxpayer relied on *Aallcann Wood Suppliers* to argue that a nil assessment could be appealed. The Federal Court (Cullen J.) held that Counsel had misconstrued *Aallcann Wood Suppliers* (at para. 8):
>
> > I take Aallcann to mean that this Court has jurisdiction to consider a nil assessment year where the computations from the nil assessment year have an actual impact on another taxation year; it does not give the Court jurisdiction to consider a nil assessment directly.
> >
> > [Emphasis added]
>
> This is an accurate statement of the rule set out in *Aallcann Wood Suppliers*.

[22] All those cases stand for the proposition that a nil assessment issue may not be heard if the success of the appeal would not make any difference as to the taxpayer's liability for tax in the taxation year in issue or a subsequent year.

[23] Over the years, Parliament has legislated some exceptions to the general principle to allow objections to, and appeals from, loss determinations made at the taxpayer's request (subs 152(1.1)), from a determination of disability tax credit eligibility (subs 152(1.01)), and from a determination that a taxpayer is entitled to certain types of credits (subs 152(1.2) and para 152(1)(*b*)).



[24] With respect to a refundable tax credit, it was ruled that a taxpayer had a right to appeal from a nil assessment in order to contest the Minister's determination of the amount of tax deemed by subsection 127.1(1) to have been paid on account of tax under Part I for the year, as such determination impacted the potential refund the taxpayer was entitled to (*Martens v Minister of National Revenue* (10 May 1988), Winnipeg 86-519(IT) (TCC), online: TCC <https://www.scitax.com/pdf/Dckt_NA_10-May-1988.pdf> at paras 8 to 11).



[25] However, none of the exceptions provided for in the Act applies in Ms. Nagel's case: they do not include the tuition, textbook and education tax credits (subs 118.61(2); and see *Terek*, *supra*). Furthermore, with respect to the GST/HST credit, as Ms. Nagel did not apply for an amount under subsection 122.5(3) (as it read in 2013) by checking the box on the T1 return

filed, the Minister did not make a determination under subsection 122.5(3) and did not issue a notice of determination, and, accordingly, none of the exceptions applies.

[26] As the evidence indicated that the Second Reassessment is a nil assessment, Ms. Nagel cannot serve a notice of objection or a notice of appeal to this Court.

[27] For these reasons, the application is therefore dismissed, without costs, and the appeal for the 2013 taxation year is quashed.

2. Jurisdiction of this Court:

[28] The following comments are, therefore, not necessary. Yet, for the enlightenment of Ms. Nagel, I will provide a few explanations about the jurisdiction of this Court. The Tax Court of Canada's jurisdiction, as a statutory court, is found in and limited by section 12 of the *Tax Court of Canada Act* (RSC, 1985, c. T-2), its enabling statute. As to income tax appeals, section 12 of the *Tax Court of Canada Act* provides this Court with exclusive and original jurisdiction to determine the validity and correctness of the assessment of income tax under the Act.

[29] The details pertaining to that statutory jurisdiction and a case decided by the Federal Court of Appeal, *Ereiser v The Queen*, 2013 FCA 20, 2013 DTC 5036, were specifically brought to the attention of Ms. Nagel during the hearing. In that decision, the Federal Court of Appeal stated that:

> 31 Based on these provisions, this Court has held that the role of the Tax Court of Canada in an appeal of an income tax assessment is to determine the validity and correctness of the assessment based on the relevant provisions of the *Income Tax Act* and the facts giving rise to the taxpayer's statutory liability. . . .

[30] Hence, this Court has jurisdiction to hear the case of a taxpayer who has appealed from an assessment or reassessment of tax pursuant to section 169 (the main right of appeal). The combined effect of subsections 169(1) and 171(1) is that this Court may dispose of an appeal from an assessment by dismissing the appeal, or allowing the appeal and vacating the assessment, varying the assessment, or referring the assessment back to the Minister for reconsideration and reassessment.

[31] Again, since no tax is payable under the Second Reassessment, there is no reassessment of tax Ms. Nagel can object to or appeal from.

[32] The concerns that Ms. Nagel noted with respect to the reassessments pertain to: (i) her province of residence, as she would like to be considered a resident of Saskatchewan, (ii) the federal unused tuition, textbook and education tax credits (subsection 118.61(2) of the Act) as she is of the view that she is not entitled to the credit since she never reimbursed the student loans, and (iii) the GST determination. Having addressed the last two points in the previous section of these reasons, I will only address the first one hereunder.

[33] As this Court concluded in *Weinberg Family Trust v The Queen*, 2016 TCC 37 at para 12, 2016 DTC 1039, "[i]t has jurisdiction with respect to provincial tax only to the extent that the jurisdiction is conferred on it by the provinces".

[34] Under the income tax statutes of both provinces of Nova Scotia (*Income Tax Act*, RSNS 1989, c 217, section 2 (definition of "Court") and subsection 64(2)) and Saskatchewan (*The Income Tax Act*, *2000*, SS 2000, c. I-2.01, section 2 (definition of "court") and subsection 98(2)), the jurisdiction to determine residency in a province lies with the Supreme Court of Nova Scotia and the Court of Queen's Bench, respectively, and not with this Court.

Signed at Ottawa, Canada, this 15th day of February 2018.

"Dominique Lafleur"

Lafleur J.

CITATION:	2018 TCC 32
COURT FILE NO.:	2017-401(IT)APP
STYLE OF CAUSE:	DENISE C. NAGEL AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	January 12, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice Dominique Lafleur

DATE OF JUDGMENT:	February 15, 2018

APPEARANCES:

For the Applicant:	The Applicant herself
Counsel for the Respondent:	Laura Rhodes David I. Besler

COUNSEL OF RECORD:

For the Applicant:

Name:	
Firm:	

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada

Martens v. Minister of National Revenue

Ben Martens, Appellant, and Minister of National Revenue, Respondent

Tax Court of Canada

Rip, T.C.J.

Judgment: May 10, 1988

Counsel:

J.E. Hershfield for the appellant.
D. Gibson for the respondent.

1 Counsel for the Minister of National Revenue has brought a motion before this Court to dismiss the appeal of Ben Martens on the basis that the assessment of federal tax of the appellant for 1984 is nil with the consequence that there is no amount of federal tax in controversy.

2 The appellant Ben Martens is a farmer. In filing his income tax return for 1984 he elected in accordance with section 119 of the *Income Tax Act* ("Act") to average his income from farming for the purposes of determining income tax payable for 1984. The appellant argued the four immediately preceding years for which he filed income tax returns were 1979, 1980, 1982 and 1983 and those years only are to be included in the averaging calculation. He was of the view that since his 1981 tax return had been filed late and no federal tax was payable, 1981 ought not to be included as one of the four immediately preceding years for averaging purposes. The Minister reassessed on the basis that the 1981 taxation year is to be included, and 1979 omitted, in the averaging claculation pursuant to section 119. As a result of including income from 1981 and deleting 1979's income, the resulting tax averaging calculation reduces the appellant's investment tax credit available for 1984 and subsequent years.

3 The federal tax reassessed by the Minister for 1984 was nil. The appellant does not dispute the assessment of tax. However he does not agree with the Minister's calculation of refundable investment tax credit deemed to have been paid by him on account of his tax liability pursuant to subsection 127.1(1) which resulted in the nil tax assessment. In the appellant's view the amount of the refundable investment tax credit was $3,361.71; in the respondent's view, the amount is $2,366.24. The appellant has thus appealed the assessment.

4 Counsel for the respondent argued that no appeal lies from a nil assessment. If the Minister and the taxpayer dispute the determination of the refundable investment tax credit in 1984, then in a future year, when tax is assessed because the Minister's determination of the amount of credits being less than that of the taxpayer results in income, the dispute can be resolved by the Courts. This problem is one of timing in his view.

5 Counsel for the appellant submitted that the subject assessment is a different "category" of assessment from the nil assessment the Supreme Court of Canada held is not appealable in *Okalta Oils Limited v. Minister of National*

Revenue, [1955] C.T.C. 271, 55 D.T.C. 1176, followed by the Federal Court of Appeal in *The Queen v. Bowater Mersey Paper Company Limited*, [1987] 2 C.T.C. 159, 87 D.T.C. 5382. His alternative argument was that the subject assessment is not a nil assessment.

6 In my view subsections 152(1) and 152(1.2) support the appellant's right to appeal the subject assessment.

7 Subsections 152(1) and 152(1.2) reads as follows:

> 152 (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine
>
> > (a) the amount of refund, if any, to which he may be entitled by virtue of sections 129, 131, 132 or 133 for the year, or
> >
> > (b) the amount of tax, if any, deemed by subsection 119(2), 120(2), 122.2(1), 127.1(1), 127.2(2), or 144(9) to have been paid on account of his tax under this Part for the year.
>
> 152 (1.2) The provisions of paragraphs 56(1)(I) and 60(o), this Division and Division J, as they relate to an assessment or a reassessment and to assessing and reassessing tax, are applicable, with such modifications as the circumstances require, to a determination or redetermination and to determining and redetermining amounts under this Division, except that subsections (1) and (2) are not applicable to determinations made under subsection (1.1) and, for greater certainty, an original determination of a taxpayer's non-capital loss, net capital loss, restricted farm loss or farm loss for a taxation year may be made by the Minister only at the request of the taxpayer.

8 Subsection 127.1(1) provides the means by which the taxpayer is deemed to pay an amount on account of tax equal to his refundable investment tax credit for the year. The Minister, in accordance with paragraph 152(1)(b), determines the amount of tax deemed to be paid for the year.

9 If the taxpayer does not agree with the Minister's determination of the amount of tax deemed to be paid he has the right to object to and appeal the determination: subsection 152(1.2) grants the taxpayer the right to apply the provisions of Divisions I and J of the Act, which provide, *inter alia*, for the rights to object to an assessment of tax and to appeal such an assessment, or a determination, other than a determination made under subsection 152(1.1). Amounts to be determined by the Minister include the determination of an amount of tax deemed by subsection 127.1(1) to have been paid on account of tax under Part I of the Act for the year.

10 In the matter at bar the Minister has determined the amount of the refundable investment tax credit in 1984 to be $2,366.24 and the appellant wishes to appeal from this determination.

11 The appellant has the right under the provisions of subsection 152(1.2) to contest the determination of the Minister by filing a notice of objection in the manner provided by section 165 and, if not satisfied with the Minister's decision in respect of the objection, file a notice of appeal in the manner provided by section 169. This the appellant has done. He need not wait for a future taxation year to dispute the determination.

12 The motion is dismissed.