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
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> (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
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> (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.
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> 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.