

**Date: 20090212**

**Docket: A-31-08**

**Citation: 2009 FCA 43**

**CORAM: NOËL J.A.  
NADON J.A.  
PELLETIER J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

**Appellant**

**and**

**MARGARET MCKAY**

**Respondent**

Heard at Edmonton, Alberta, on February 11, 2009.

Judgment delivered at Edmonton, Alberta, on February 12, 2009.

**REASONS FOR JUDGMENT BY:**

**NOËL J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
PELLETIER J.A.**

**Date: 20090212**

**Docket: A-31-08**

**Citation: 2009 FCA 43**

**CORAM: NOËL J.A.  
NADON J.A.  
PELLETIER J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

**Appellant**

**and**

**MARGARET MCKAY**

**Respondent**

**REASONS FOR JUDGMENT**

**NOËL J.A**

[1] This is an appeal from a decision of Little J. of the Tax Court of Canada (the Tax Court Judge) allowing the appeal brought by Ms. McKay (the respondent) with respect to an assessment issued for her 1995 taxation year on the basis that the income which she earned was exempt from taxation by virtue of section 87 of the *Indian Act*, R.S.C. 1985, c. I-5 (the Act).

[2] The appellant contends that in reaching this conclusion the Tax Court Judge made a palpable and overriding error and misconstrued section 87 of the Act.

[3] It is sufficient to recall that during the 1995 taxation year, the respondent worked as a Communications Officer for the Salt River First Nation and earned employment income from that source. The Band Office where she performed her duties was located in the town of Fort Smith. The respondent also lived in Fort Smith. She received her employment income from the Salt River First Nation by cheque in Fort Smith and kept her money in a bank in the town of Fort Smith.

[4] Her employment duties were varied. She created a monthly newsletter called “On the Bandwagon” using computer software. She interviewed people, including elders, the chief and council members of the Band. She prepared articles on First National programs for families and new mothers. She also delivered and mailed the newsletter to members of the Salt River First Nation.

[5] Although the respondent also earned employment income from the Government of the Northwest Territories, no evidence was tendered at trial with respect to the work that she performed to earn this income.

[6] After having found that the lands on which the Band Office of the Salt River First Nation and the place where the respondent performed her employment duties were situated on a reserve (Reasons, paras. 47 and 48), the Tax Court Judge held that there was a discernible nexus between the employment income and the reserve (Reasons, para. 49). He also found that the activities of the respondent were not connected to the commercial mainstream (Reasons, para. 50).

[7] The Tax Court Judge went on to conclude that the respondent's income from the Salt River First Nation and the Government of the Northwest Territories was property situated on a reserve and therefore exempt from taxation by virtue of section 87 of the Act.

[8] The evidence establishes that the Band Office of the Salt River First Nation was located on a lot in the town of Fort Smith that was not yet a reserve, but was going to become a reserve in the future.

[9] The confusion appears to result from the fact that there is a reserve called Salt Plains Reserve which is located outside of the town of Fort Smith on the banks of the Salt River. At times, the respondent and her witnesses referred to the Salt Plains Reserve as the "Salt River reserve", rather than by the name that was designated by Order in Council. Regardless of what the reserve 30 miles from the town of Fort Smith is called, the record establishes that the Band Office was not on a reserve.

[10] The Tax Court Judge committed a palpable and overriding error when he connected the respondent's employment income to a reserve that did not exist. Absent this error he could not have reached the conclusion that he did. Similarly, there was no basis for the Tax Court Judge's conclusion that the income earned from the Government of the Northwest Territories was located on a reserve since there was no evidence as to how this income was earned.

[11] I would allow the appeal, set aside the decision of the Tax Court Judge, and giving the judgment which he ought to have given, I would deny the respondent's appeal from the assessment issued with respect to her 1995 taxation year on the basis that the income that she earned does not come within section 87 of the Act. As no costs were sought, I would make no order as to costs.

“Marc Noël”

---

J.A.

“I agree.  
M. Nadon J.A.”

“I agree.  
J.D. Denis Pelletier J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-31-08

**(APPEAL FROM A JUDGEMENT OF JUSTICE LITTLE OF THE TAX COURT OF CANADA DATED DECEMBER 18, 2007, NO. 98-1003(IT)I).**

**STYLE OF CAUSE:** HER MAJESTY THE QUEEN  
IN RIGHT OF CANADA and  
MARGARET MCKAY

**PLACE OF HEARING:** Edmonton, Alberta

**DATE OF HEARING:** February 11, 2009

**REASONS FOR JUDGMENT BY:** Noël J.A.

**CONCURRED IN BY:** Nadon J.A.  
Pelletier J.A.

**DATED:** February 12, 2009

**APPEARANCES:**

Bonnie Moon FOR THE APPELLANT

Margaret McKay ON HER OWN BEHALF

**SOLICITORS OF RECORD:**

John H. Sims, Q.C. FOR THE APPELLANT  
Deputy Attorney General of Canada