Docket: 2015-1592(IT)I

BETWEEN:

NICHOLAS BEGGS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-1593(IT)I

AND BETWEEN:

ERIK CHRISTOPHER SYLVAN STEWART,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-1594(IT)I

AND BETWEEN:

GARY GERARD WILLIAM JOHN O'TOOLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-1595(IT)I

AND BETWEEN:

ROGER FRANK KING,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-1596(IT)I

AND BETWEEN:

ROBERT JAMES TOWNSEND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-1597(IT)I

AND BETWEEN:

STEPHEN RICHARD HACKETT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-1599(IT)I

AND BETWEEN:

HACKETT SONGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

(collectively the "Appellants").

Motion to dismiss the appeals heard on common evidence
on October 8, 2015 in Montreal (Quebec).

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Richard Dermer
Counsel for the Respondent:	Alain Gareau Marissa Figlarz

ORDER

The motion for an order to dismiss the appeals on the grounds that the Tax Court of Canada does not have jurisdiction over the subject matter of the appeals is allowed. The appeals from a decision issued February 17, 2015 by the Non-Resident Audit section of the Rulings Directorate of the Canada Revenue Agency, regarding the denial of secondary withholding waivers requested in respect of the 2014 Canadian performances of the non-resident musical entertainer, Steve Hackett, are dismissed in accordance with the attached reasons for order.

Signed at Ottawa, Canada, this 20th day of January 2016.

"Réal Favreau"

Favreau J.

Citation: 2016 TCC 11
Date: 20160120
Dockets: 2015-1592(IT)I,
2015-1593(IT)I, 2015-1594(IT)I,
2015-1595(IT)I, 2015-1596(IT)I,
2015-1597(IT)I, 2015-1599(IT)I

BETWEEN:

NICHOLAS BEGGS,
ERIK CHRISTOPHER SYLVAN STEWART,
GARY GERARD WILLIAM JOHN O'TOOLE,
ROGER FRANK KING,
ROBERT JAMES TOWNSEND,
STEPHEN RICHARD HACKETT,
HACKETT SONGS LTD.,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Favreau J.

[1] This motion to dismiss the appeals was heard on common evidence. On September 10, 2015, the Respondent filed a motion to dismiss the appeals based on the grounds that the Tax Court of Canada does not have jurisdiction over the subject matter of the appeals. Alternatively, if the motion is dismissed, the Respondent is seeking an order granting the Respondent 60 days to file and serve the reply to the notice of appeal filed by each of the Appellants.

[2] The grounds for the motion are as follows:

1. On October 15, 2012, Ram Management Inc. submitted a tax waiver application on behalf of Hackett Songs Ltd. regarding withholdings for fees

to be paid to non-resident employees and sub-contractors for services rendered in Canada between November 26 and December 11, 2014.

2. On November 19, 2014, the Canada Revenue Agency's ("CRA") Non-Resident Audit section issued a decision regarding the withholding waiver. This decision mandated that withholding be applied to payments made to the employees and subcontractors.

3. On February 17, 2015, CRA confirmed its decision of November 19, 2014.

4. On April 16, 2015, the Appellants filed Notices of Appeal with this Court regarding the denial of the withholding waiver request.

5. The Respondent makes the within application for an order dismissing the Appeal on the ground that this court does not have jurisdiction over the subject matter of the Appeal.

6. The relief sought by the Appellants is effectually to overturn CRA's decision with respect to waiver eligibility, however, this relief is not within the jurisdiction of this Court.

7. According to section 152 of the *Act*, the Minister shall, with due dispatch, examine a taxpayer's income for a given taxation year and assess the tax, the interest and penalties, if any.

8. Section 165 of the Act, provides that a taxpayer may object to the Minister's assessment by filing a Notice of Objection, in writing, which sets out the reasons for the objection and the relevant facts.

9. Where a taxpayer has served a Notice of Objection to an assessment under section 165 of the Act, section 169 of the Act provides the right to appeal to this Court.

10. Section 171 of the Act provides that this Court may dismiss the appeal or allow it, in order to vacate the assessment, vary the assessment or refer the assessment back to the Minister for reconsideration and reassessment.

11. The decision rendered on November 19, 2014 and its confirmation on February 17, 2015, which denies the waiver request are not an assessment as contemplated by section 152 of the Act. Such decision by the Minister may not be objected to pursuant to section 165 of the Act or be appealed to this Court pursuant to section 169 of the Act.

12. No assessments have been issued to the Appellants with regard to their 2014 taxation year.

13. This Court does not have jurisdiction to grant the relief sought in this Appeal as no assessments have been issued with respect to the Appellant's (*sic*) 2014 taxation year.

Factual Background

[3] The following facts set out in section B of the notice of appeal filed by each appellant are not opposed:

1. On October 15, 2015, the Appellant Hackett Songs LTD applied for an R-105 tax waiver regarding fees it was contracted to receive for performances of Steve Hackett taking place in Canada between November 26 and December 11, 2014. Hackett Song LTD concurrently applied for secondary withholding tax waivers for fees to be paid to its employee (Appellant Stephen Richard Hackett) and sub-contractors (Appellants Nicholas Beggs, Erik Christopher Sylvan Stewart, Gary Gerard William John O'Toole, Roger Frank King, and Robert James Townsend) for these same performance dates (the "Application").

2. Per the CRA's determination in the Waiver Decisions, Stephen Richard Hackett earned $4,374 USD ($4,991 CAD), Nicholas Beggs earned $3,888 USD ($4,437 CAD), Erik Christopher Sylvan Stewart earned $3,888 USD ($4,437 CAD), Gary Gerard William John O'Toole earned $3,888 USD ($4,437 CAD), Roger Frank King earned $4,374 USD ($4,991 CAD) and Robert James Townsend earned $3,888 USD ($4,437 CAD) for their respective services in Canada.

3. Based on this determination, no withholding tax should have been required on any of the individual Appellants' fees given these fees all fall within the CRA's allowance for non-resident artists, granting a waiver to individuals less than $5,000 CAD per year pursuant to the CRA's guidelines for Treaty-Based Waivers Involving Regulation 105 Withholding (the "Guidelines").

4. In the course of discussions with the CRA regarding the Application however, it was discovered that board and lodging as well as transportation expenses paid on the Appellants' behalf were included as income in determining the Appellants' eligibility for a waiver. While such amounts may be included as income pursuant to the Guidelines, The Income Tax Act clearly exempts such amounts from being included as income where they are

required for work at a special work site, as was the case for the Appellants, pursuant to section 6(6) of the Act.

5. While the CRA did not require tax to be withheld from the benefit amounts described in Section 4 herein, the consideration of these amounts in the Application wrongly disqualifies the individual Appellants from a waiver of withholding tax to which they were duly entitled based on Canadian tax law, and further created undue burden on both the individual Appellants, who would have to file T1 returns to recover tax amounts withheld in violation of the Act, and on Hackett Songs LTD, which would have to withhold, remit, and account for such withheld tax amounts.

6. In addition to the CRA'S Waiver Decisions and subsequent ruling being made in violation of the Act, the time and burden that would be placed on the Appellants as a result of such decisions is also contrary to the general treatment in Canadian tax law and international tax treaties of Non-Resident Individuals and Corporations having no permanent establishment in Canada and doing business in Canada for limited periods of time, and is disproportionate to the intended effects of withholding and other tax evasion prevention measures in Canadian tax laws.

7. In addition to the issue of lawfulness of withholding tax mandated by the Waiver Decision and subsequent ruling, the Appellants made a similar application to the CRA for a waiver of withholding tax in 2013. All the Appellants were part of this 2013 application, earned similar salaries, and had similar amounts paid on their behalf for transportation, board, and lodging. In the course of the 2013 application, the CRA did not consider the Appellants' benefits as income, and all Appellants were all granted a full waiver of withholding tax. It should be noted here that all relevant guideline, law, regulation, and treaty provisions applicable in 2014 were also in force in 2013, and that both the 2013 and 2014 applications were processed by the same Tax Services Office. This inconsistent application by the CRA of its own Guidelines prevented the Appellants from appropriately planning their Canadian remuneration and tax liability 2014.

The Issue

[4] The issue is to determine whether a denial of a tax waiver application can be considered an assessment for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) as amended (the "*Act*").

Position of the Parties

A. The Appellants' Position

[5] The Appellants argued that the CRA's decision regarding the tax waiver application should be considered as an assessment because it is in essence a determination of the tax liability of the Appellants which is equivalent to an assessment.

[6] The Appellants also argued that if the denial of a tax waiver application is treated as not being an assessment, they would have no way to appeal the Minister of National Revenue's decision.

B. The Respondent's Position

[7] The Respondent's position is that the Tax Court of Canada (the "Court") does not have jurisdiction over the subject matter of the appeals. The Appellants are, in fact, asking this Court to overturn CRA's decision to deny the applications of the non-resident tax waivers. It is the Respondent's position that this relief is not within the jurisdiction of this Court.

[8] According to the Respondent, the decision of the Minister of National Revenue dated November 19, 2014 and its confirmation dated February 17, 2015 denying the tax waiver applications are not an assessment pursuant to section 152 of the *Act*.

The Applicable Legislation

[9] Section 152 of the *Act* imposes on the Minister of National Revenue, the obligation with all due dispatch, to examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties and determine the amount of refund to the taxpayer and the amount of tax deemed to be paid on account of the taxpayer's tax payable under Part I of the *Act* for the year.

[10] Subsection 152(1) of the *Act* reads as follows:

> **Assessment** – 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 the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or
>
> (b) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.8(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.

[11] Subsection 169(1) of the *Act* provides that where a taxpayer has served a notice of objection to an assessment under section 165 of the *Act*, the taxpayer may appeal to this Court to have the assessment vacated or varied.

[12] Susbsection 169(1) reads as follows:

> **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
>
> (a) the Minister has confirmed the assessment or reassessed, or
> (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,
>
> 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.

[13] When an appeal is filed, the Tax Court of Canada may dispose of the appeal by dismissing it or by allowing it by vacating, varying or referring back the assessment to the Minister. These options are provided for by subsection 171(1) of the *Act* in the following manner:

> **Disposal of appeal** – The Tax Court of Canada may dispose of an appeal by
>
> (a) dismissing it; or
> (b) allowing it and
> (i) vacating the assessment,

> (ii) varying the assessment, or
> (iii) referring the assessment back to the Minister for reconsideration and reassessment.

[14] Pursuant to paragraph 153(1)(*g*) of the *Act* and section 105 of the *Income Tax Act Regulations* (the "*Regulations*"), a withholding tax of 15% is required from the payment of fees, commissions or other amounts paid or allocated to a non-resident person in respect of services provided in Canada. The amount withheld is on account of the payee's potential liability for tax under the *Act*. Paragraph 153(1)(*g*) provides that:

> Every person paying at any time in a taxation year
>
> . . .
>
> (*g*) fees, commissions or other amounts for services, other than amounts described in subsection 212(5.1),
>
> . . .
>
> shall deduct shall deduct or withhold from the payment the amount determined in accordance with prescribed rules and shall, at the prescribed time, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3, as the case may be, and, where at that prescribed time the person is a prescribed person, the remittance shall be made to the account of the Receiver General at a designated financial institution.

[15] To give effect to paragraph 153(1)(*g*) in the context of payments to non-residents, the Governor-in-Council enacted section 105 in the *Regulations* which reads as follows:

> **Non-Residents**
>
> 105(1) Every person paying to a non-resident person a fee, commission or other amount in respect of services rendered in Canada, of any nature whatever, shall deduct or withhold 15 per cent of such payment.

> (2) Subsection (1) does not apply to a payment
>
> (a) described in the definition "remuneration" in subsection 100(1);
> (b) made to a registered non-resident insurer (within the meaning assigned by section 804); or
> (c) made to an authorized foreign bank in respect of its Canadian banking business.

[16] Where a non-resident can demonstrate, based on treaty protection or estimated income and expenses that the normally required withholding is in excess of the ultimate tax liability, the CRA may waive or reduce the withholding accordingly pursuant to the undue hardship provisions of subsection 153(1.1) of the *Act*. Waiver applications must be made on Form R105, Regulation 105 Waiver Application.

Analysis

[17] The term "assessment" is not defined in the *Act*. The 10th edition of Black Law Dictionary defines the term "assessment" as a "determination of the rate or amount of something, such as a tax or damages (assessment of the losses covered by insurance). The other definition given is "imposition of something, such as a tax or fine, according to an established rate; the tax or fine so imposed (assessment of a luxury tax)".

[18] In *McMillen Holdings Ltd. v. Minister of National Revenue*, 1987 CarswellNat 532, Justice Rip (as he then was) considered the meaning of the term "assessment" and came to the conclusion that an "assessment" is a determination of the liability of a taxpayer. The basis of his conclusion was as follows:

> 44 Section 152 states that the Minister shall examine a taxpayer's return of income for a taxation year, assess the tax of the year, interest and penalties and determine any refund or tax paid on account. The term "assessment" or "reassessment" is not defined in the Act except to provide that an assessment includes a reassessment. The terms "reassessment" and "notice of reassessment" were discussed by Mr. Justice Thorson in *Pure Spring Company Limited v. Minister of National Revenue*, [1946] C.T.C. 169 at 198, 46 D.T.C. 844 at 857:
>
> > The assessment is different from the notice of assessment; the one is an operation, the other a piece of paper. The nature of the assessment operation was clearly stated by the Chief Justice of

> Australia, Isaacs, A.C.J., in *Federal Commission of Taxation v. Clarke* (1927), 40 C.L.R. 246 at 277:
>
> > "An assessment is only the ascertainment and fiscation of liability."
>
> a definition which he had previously elaborated in *The King v. Deputy Federal Commission of Taxation (S.A.); ex parte Hooper* (1926), 37 C.L.R. 368 at 373:
>
> > An 'assessment' is not a piece of paper; it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount he sends by post a notification thereof called 'a notice of assessment' ... But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act of operation of the Commissioner."
>
> It is the opinion as formed, and not the material on which it was based, that is one of the circumstances relevant to the assessment. The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.
>
> 45 An assessment by its very nature is a determination of liability of a taxpayer. An amount of money owed to the taxpayer by the Crown on account of interest is not an amount which is subject to an assessment or an assessed amount of money.

[19] This concept of an "assessment" has been followed consistently by the courts and led the courts to conclude that there can be no appeal of a "nil" assessment because the taxpayer has nothing to contest in his appeal to the courts.

[20] In *McIntosh v. Canada*, 2011 TCC 147, Justice D'Arcy referred to Justice Rip's decision in *McMillen Holdings Ltd.* and stated at paragraph 19 that:

> It is clear from these provisions that the jurisdiction of this Court is limited to appeals from an assessment. It is only appeals from an assessment that arise under the *Act* . . .

[21] In *Weyerhaeuser Co. v. Canada*, 2007 TCC 65, Justice Bowie explained the concept of withholding tax and concluded that a withholding of tax is not an assessment. The following extract is particularly relevant:

> 7 Consideration of the purpose of subsection 153(1) leads to the same conclusion. It does not impose a tax; as the respondent quite rightly argues, the purpose of paragraph 153(1)(g) is to ensure that if the non-resident recipient of a payment is, after all the facts are known, liable to pay income tax in Canada, then there will be funds available, in the form of the 15% withheld and remitted, to satisfy the obligation. That is inescapable, as the section does not impose a tax but simply requires withholding "on account of the payee's tax for the year".[5] While I do not have before me all the written contracts between the appellant and its consultants, a perusal of the invoices leads me to conclude that, as one would expect, the appellant's obligation in respect of the disbursements is simply to repay that which the consultant has paid on the appellant's behalf in the course of rendering the service. To withhold 15% from that amount would not at all further the purpose of paragraph 153(1)(*g*), or of the *Act* as a whole. Indeed, the result that would flow from doing so would be quite contrary to the interests of Canadian industry. It is not difficult to foresee that if foreign service providers were to be reimbursed their expenses only to the extent of 85% until such time as they had filed a Canadian income tax return after the year end, and then waited for an assessment and a refund, that would create a considerable disincentive for them to offer their services to Canadian clients. As the purpose of the provision is simply to provide security for tax that may later be assessed, it need only be concerned with providing that security with reference to income earned in Canada as that is what subsection 2(3) of the *Act* taxes.
>
> (Emphasis added).

[22] Therefore, it is clear from this paragraph of Justice Bowie's decision that a withholding of tax is not an assessment. It is only a way for the government to make sure that the tax to which it is entitled to, will be received from non-residents. If the amount of tax withheld exceeds what the taxpayer actually has to pay, then the government will refund the amount in excess to the taxpayer.

[23] If a withholding of tax is not an assessment, a waiver authorizing a Canadian taxpayer to not withhold the 15% on the fees payable to a non-resident is also not an assessment.

[24] In *Big Bad Voodoo Daddy v. Canada*, 2011 TCC 226, I had the occasion to consider how a Regulation 105 waiver works. At paragraph 25, I provided the following explanation:

> Regulation 105 waiver application authorizes the Canadian taxpayer who is about to make a payment to a non-resident for services provided in Canada, to not withhold the 15% tax on the fees payable to the non-resident. As the waiver request is based on an estimation of income versus expenses directly related to services provided in Canada, any changes to the contracted fees or period of service invalidate the waiver. In such a case, the Canadian taxpayer is then responsible for the 15% withholding at source on the gross amount of any payments to the non-resident unless the non-resident files another waiver request with the CRA. The Canadian taxpayer is required to prepare a T4A-NR slip for each non-resident paid and to give to each one a copy of the slip. The T4A-NR will show the fees paid and taxes deducted for the non-resident.

[25] I agree with the Respondent that refusal of a tax waiver application is not an assessment but a discretionary decision of the Minister. After an application by a non-resident is made, the Minister will decide if he agrees that the tax be waived in that particular applicant's situation. As determined by Justice Bowie in *Kravetsky v. Canada*, 99 D.T.C. 451, a judicial review of a discretionary power of the Minister is not within the jurisdiction of this Court. The following extract clearly confirmed that conclusion:

> 3 In the course of argument, counsel indicated to me that the two paragraphs moved against are relied upon only in respect of the relief claimed by paragraph 15(d) of the Notices of Appeal. His position was that an arbitrary and unfair exercise of a discretionary power conferred by statute is subject to judicial review in this Court. He was, however, unable to point to any statutory provision giving this Court such jurisdiction. Indeed, the only authority to which he could refer me was subsection 18(1) of the Federal Court Act. That provision, of course, confers jurisdiction only on the Federal Court of Canada. If the Appellants wish to pursue the remedy claimed in paragraph 14(d) on the basis of the facts that they allege in paragraphs 12 and 13, then they will have to do so in that Court. This Court has only the jurisdiction that is conferred on it by Parliament, either expressly or by necessary implication: see *Lamash Estate v. M.N.R.*[3]

[26] The Appellants submitted that CRA made a determination that they were liable to pay tax in Canada and that, this determination was equivalent to an assessment. I do not agree with this assertion because a waiver is not a determination of the tax liability of a non-resident but it is a decision with regards

to giving permission to a Canadian taxpayer or a non-resident payor to not withhold taxes on amounts payable to a non-resident. The tax liability of the non-resident can only be determined by an assessment after a review of his or her tax return. Even if a waiver was granted in respect of a payment of fees to a non-resident, the non-resident will still have to file a tax return at the end of the year. The only difference is that the non-resident would not have been withheld an amount to be applied on his taxes and will not have to claim a refund for the amount paid in excess.

[27] The Appellants also argued that no appeal would then be available. When the Appellants will file their tax returns, they will each receive a notice of assessment and each of them will be able to appeal this notice of assessment if they do not agree with the assessment. In any event, the Appellants will always have the opportunity to turn themselves to the Federal Court of Canada in order to force the Minister to change its decision as stated by Justice Bowie in *Kravetsky*. I agree with the Respondent that the ministerial decision to grant a waiver would be equivalent of a mandamus.

[28] For the foregoing reasons, the Respondent's motion to dismiss the Appellants' appeals is allowed and the appeals are dismissed.

Signed at Ottawa, Canada, this 20th day of January 2016.

"Réal Favreau"

Favreau J.

CITATION:	2016 TCC 11
COURT FILE NOS.:	2015-1592(IT)I, 2015-1593(IT)I, 2015-1594(IT)I, 2015-1595(IT)I, 2015-1596(IT)I, 2015-1597(IT)I, 2015-1599(IT)I,
STYLES OF CAUSE:	Nicholas Beggs and the Queen, Erik Christopher S. Stewart and the Queen, Gary Gerard W. J. O'Toole and the Queen, Roger Frank King and the Queen, Robert James Townsend and the Queen, Stephen Richard Hackett and the Queen, Hackett Songs Ltd. and the Queen
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	October 8, 2015
REASONS FOR ORDER BY:	The Honourable Justice Réal Favreau
DATE OF ORDER:	January 20, 2016

APPEARANCES:

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