

Docket: 2004-1317(IT)G

BETWEEN:

JOSEPH FONTANA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal called for hearing on June 25, 2007 at Windsor, Ontario

Before: The Honourable Justice G.A. Sheridan

Appearances:

Counsel for the Appellant: Roland Peter Schwalm

Counsel for the Respondent: Daniel Bourgeois

ORDER

Upon the Respondent bringing a motion to quash the Appellant's appeal on the ground that it is moot;

And upon reading the materials filed by the parties, including the affidavit of Jo-Ellen Mutnjakovic and having heard her testimony on cross-examination;

And having heard the submissions of counsel;

IT IS HEREBY ORDERED THAT:

1. The Respondent's motion is dismissed, with costs to be determined by the trial judge at the hearing of this appeal. The Registry is directed to set this matter down for hearing on a peremptory basis in Windsor, Ontario.

Signed at Ottawa, Canada, this 2nd day of August 2007.

"G.A. Sheridan"

Sheridan J.

Citation: 2007TCC450
Date: 20070802
Docket: 2004-1317(IT)G

BETWEEN:

JOSEPH FONTANA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Sheridan, J.

[1] The Appellant's appeal of the assessments of the Minister of National Revenue of his 2001 and 2002 taxation years disallowing the amounts claimed as an Overseas Employment Tax Credit was called for hearing on June 25, 2007. At the commencement of the appeal, the Respondent moved for the quashing of the appeal on the ground that it was moot. The Respondent's motion record had been duly filed on June 15, 2007.

[2] Counsel for the Respondent advised the Court that the Minister was conceding that errors had been made in the calculation of the amount of Foreign Tax Credits (a related matter) in each of the taxation years and that the appeals ought to be allowed on that basis to permit the Minister to reassess accordingly. In all other respects, he submitted that the Appellant's appeals, even if successful, would not result in any reduction in the Appellant's federal tax liability, over and above the amounts the Crown was conceding. Further, the determination of the Appellant's OETC entitlement was relevant only to the computation of his tax under the *Income Tax Act* of Ontario, pursuant to which a taxpayer may appeal an assessment of provincial tax to the Superior Court of Justice. Accordingly, the Crown took the position that, in these somewhat unusual circumstances, the doctrine of mootness ought to apply to warrant the quashing of the Appellant's appeal.

[3] Counsel for the Respondent referred the Court to the following decisions: *Joseph Borowski v. The Attorney General of Canada*, [1989] 1 S.C.R. 342 (S.C.C.); *Orlando Corporation v. Her Majesty the Queen*, [1994] 1 C.T.C. 2113; *Sanofi-Aventis Canada Inc. et al v. Apotex Inc. and the Minister of Health*, 2006 FCA 328. I am not convinced that the criteria set out in *Borowski* are satisfied in the present case. The other two cases, though helpful from an analytical perspective, are not particularly on point.

[4] While counsel for the Respondent made a compelling argument in support of the Respondent's motion, on balance I remain reluctant to take the drastic step of quashing the Appellant's appeal, thereby denying him his day in Court. As counsel for the Respondent acknowledged, there is no question that this Court has jurisdiction to hear the appeal; nor is there any argument to be made that the Appellant is appealing from a nil assessment. While at the end of the day the amount of tax assessed may only affect the provincial component of the Appellant's tax liability, this question is better adjudicated in a full hearing on the merits. If there are facts or issues that are not in dispute, the parties can advise the trial judge accordingly at the commencement of the hearing. The parties have completed all steps preparatory to litigation and are ready to proceed. For these reasons, I am of the view that justice is better served if the Appellant is given an opportunity to make his case.

[5] The Respondent's motion to quash is dismissed, with costs to be determined by the trial judge at the hearing of the appeal. The Registry is directed to set the appeal down for hearing on a peremptory basis in Windsor, Ontario.

Signed at Ottawa, Canada, this 2nd day of August 2007.

“G.A. Sheridan”

Sheridan J.

CITATION: 2007TCC450
COURT FILE NO.: 2004-1317(IT)G
STYLE OF CAUSE: JOSEPH FONTANA AND HER MAJESTY
THE QUEEN
PLACE OF HEARING: Windsor, Ontario
DATE OF HEARING: June 25, 2007
REASONS FOR ORDER BY: The Honourable Justice G.A. Sheridan
DATE OF ORDER: August 2nd, 2007
APPEARANCES:

Counsel for the Appellant: Roland Peter Schwalm
Counsel for the Respondent: Daniel Bourgeois

COUNSEL OF RECORD:

For the Appellant:

Name: Roland Peter Schwalm

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada