Docket: 2007-2106(IT)I

BETWEEN:

NORALYN C. BALUYOT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on September 25, 2007 at Windsor, Ontario

Before: The Honourable Justice Valerie A. Miller

Appearances:

Agent for the Appellant:	John Mill
Counsel for the Respondent:	Andrew Miller

JUDGMENT

The Respondent's motion is granted and the Appellant's appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 8th day of November, 2007.

"V.A. Miller"

V.A. Miller, J.

Citation: 2007TCC682
Date: 20071108
Docket: 2007-2106(IT)I

BETWEEN:

NORALYN C. BALUYOT,

Appellant,

and

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REASONS FOR JUDGMENT

V.A. Miller, J.

[1] This motion is for an Order to dismiss the Appellant's appeal from a reassessment for the 2005 taxation year on the basis that this Court does not have the jurisdiction to hear the appeal. The only issue under appeal involves the calculation of the Ontario Foreign Tax Credit ("OFTC") which was reduced from $4,948.63 to $3,433.63. According to the Notice of Reassessment dated November 6, 2006 there are nil federal taxes payable.

[2] The Appellant has opposed the motion on several grounds. The Appellant's counsel stated that the issue involved the calculation of the foreign tax deduction under subsection 126(1) of the *Income Tax Act* (the "*Act*"). In this regard, he referred to the appeal of *Wencheng Zhang v. The Queen* (2005-3867(IT)I) which, he said, was identical to the present appeal and had been heard by Justice Sheridan. As a result, my decision in this motion was not rendered until the Judgment in *Zhang*, 2007 TCC 634 was issued. I have had the opportunity to read the Reasons for Judgment in *Zhang* and I agree with Justice Sheridan's reasons for dismissing that appeal.

[3] The Appellant's counsel stated that generally there is no appeal to the Tax Court of Canada from an assessment where there are no federal taxes payable. However, he argued that there is an exception to this rule when there is a tax credit at

issue. He relied on the decisions in *Joseph Fontana v. The Queen*, 2007 TCC 450 and *Joshi v. The Queen*, 2004 TCC 757 (*Joshi #2*) to support his submissions.

[4] The decision in *Fontana* does not assist the Appellant. In that appeal the Respondent brought a motion to quash the appeal on the basis that it was moot. Justice Sheridan specifically stated that the issue in *Fontana* did not involve a nil assessment and that the Respondent acknowledged that the Court had jurisdiction to hear that appeal.

[5] The Federal Court of Appeal in *Interior Savings Credit Union v. Canada*, [2007] FCA 151 at paragraphs 28 to 33 has stated that the decision in *Joshi #2* was incorrect:

> [28] However, in *Joshi v. The Queen*, 2005 DTC 22 (*Joshi #2*), a case which apparently involves the husband of the appellant in *Joshi #1*, the Tax Court (O'Connor J.) did hold that a nil assessment can be appealed. The following five decisions were quoted in support of that proposition: *Joshi #1*, *Martens*, supra, *Aallcann Wood Suppliers*, supra, *Liampat Holdings Ltd. v. Canada*, [1995] F.C.J. No. 1621 and *Bruner v. Canada*, 2003 F.C.J. No. 144 (FCA). We have already seen that *Joshi* #1 is not authority for the proposition that a nil assessment can be appealed. In my respectful view, the same applies to the other cases relied upon by O'Connor J.
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> [29] In *Martens* the Tax Court refused to strike out a nil assessment on the basis that the subject matter of the appeal came within a statutory exception to the normal rule. Rip J. (as he then was) explained that although the assessment did not assess any taxes, it did set out an amount which the Minister had the duty to determine and with respect to which a special right of appeal had been created. After quoting the relevant provisions, he said (at p. 1384):
>
> > 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.
> >
> > 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.
>
> 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.
>
> 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 is what the appellant has done. He need not wait for a future taxation year to dispute the determination.
>
> [Emphasis added]

[30] *Aallcann Wood Suppliers* is a decision by Bowman J. (as he then was) which stands for the proposition that in the absence of a binding loss determination by the Minister pursuant to subsection 152(1.1) of the Act, it is open to a taxpayer to challenge the Minister's calculation of a loss for a particular year in an another year in which the loss impacts on the taxes assessed. The reasoning of the Court is set out in the following passage (at pp. 1475-76):

> The Minister's position in the original reply to the notice of appeal that the Minister's ascertainment of a loss for a particular taxation year is immutable unless a loss determination is made under subsection 152(1.1.) is, however, wrong. It is true that this court cannot make a formal loss determination under subsection 152(1.1.). That is the Minister's function. If such a loss determination is made it is valid and binding unless challenged by way of objection or appeal and, if it is sustained on appeal, it stands. The purpose of subsection 152(1.1.) is to permit a taxpayer to have its loss for a year determined definitively and, if necessary, to have the Minister's determination reviewed by the court. One of the reasons for the enactment of subsection 152(1.1.) was that no appeal lies from a nil assessment. In the absence of a binding loss determination under subsection 152(1.1.), it is open to a taxpayer to challenge the Minister's calculation of a loss for a particular year in an appeal for another year where the amount of the taxpayer's taxable income is affected by the size of the loss that is available for carry-forward under section 111. **In challenging the assessment for a year in which tax is payable** on the basis that the Minister has incorrectly ascertained the amount of a loss for a prior or subsequent year that is available for deduction under section 111 in the computation of the taxpayer's taxable income for the year under appeal, the taxpayer is requesting the court

> to do precisely what the appeal procedures of the Income Tax Act contemplate: to determine the correctness of an assessment of tax by reviewing the correctness of one or more of the constituent elements thereof, in this case the size of a loss available from another year. **This does not involve the court's making a determination of loss under subsection 152(1.1.) or entertaining an appeal from a nil assessment. It involves merely the determination of the correctness of the assessment for the year before it.**
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> [Emphasis and double Emphasis added]

The year in issue was not a nil assessment year since as is indicated, the taxpayer was "challenging the assessment for a year in which tax is payable, …". Bowman J. simply held that all elements relevant to the determination of the taxes assessed for that year, including the Minister's calculation of a loss in another year, were properly in issue.

[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*.

[32] Lastly, O'Connor J. in *Joshi #2* indicates that the recent decision of this Court in *Bruner*, supra, (at para. 9) "… seems to have broadened the cases in which the Court may review a nil assessment taxation year …". However, *Bruner* gives effect to the rule that no appeal lies from a nil assessment or from an assessment where the amounts assessed are not in dispute. The dispositive portion of the reasons reads (at para. 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, […] or would increase the taxpayer's liability for tax. When the respondent took the position that there was no amount in dispute, the Tax Court judge should have applied the nil assessment jurisprudence and quashed the Notice of Appeal.

[33] There is therefore no authority for the proposition advanced in *Corriveau, Joshi #2* and in the decision under appeal that a nil assessment can be appealed.

[6] The tax credit at issue in this appeal is the OFTC, which is a credit against Ontario tax and is granted under subsection 4(6) of the *Ontario Income Tax Act*. As a result, it is a provincial tax and the Tax Court of Canada does not have jurisdiction to pronounce on the validity of an assessment of provincial income taxes (See *Sutcliffe* v. *The Queen*, [2005] 1 C.T.C. 149 at paragraph 14 and *Hennick* v. *Canada*, [1998] T.C.J. No. 562 at paragraph 9.).

[7] The Appellant's final ground for opposing the motion to dismiss was that the issue under appeal involved the calculation of the amount of tax payable under the Federal Act. Pursuant to subsection 23(2.1) of the *Ontario Income Tax Act* there is no appeal from an assessment in respect of the computation of the amount of tax payable under the Federal Act to the Ontario Superior Court of Justice. He argued that by implication the Tax Court of Canada has jurisdiction to hear the present appeal.

[8] I disagree with the Appellant. The Tax Court of Canada is a statutory Court and its jurisdiction is limited by statute (See *Little* v. *The Queen*, [2007] 2 C.T.C. 2062). Section 12 of the *Tax Court of Canada Act* provides for the matters over which this Court has jurisdiction as follows:

> **12.(1)** The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.
>
> **Jurisdiction**
>
> **(2)** The Court has exclusive original jurisdiction to hear and determine appeals on matters arising under the *War Veterans Allowance Act* and the *Civilian War-related Benefits Act* and referred to in section 33 of the *Veterans Review and Appeal Board Act.*
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> **Further jurisdiction**
>
> **(3)** The Court has exclusive original jurisdiction to hear and determine questions referred to it under section 51 or 52 of the *Air Travellers Security Charge Act*, section 97.58 of the *Customs Act*, section 204 or 205 of the *Excise Act, 2001*, section 310 or 311 of the *Excise Tax Act*, section 173 or 174 of the *Income Tax Act* or section 62 or 63 of the *Softwood Lumber Products Export Charge Act, 2006.*

[9] The Respondent's motion is granted and the Appellant's appeal for the 2005 taxation year is dismissed.

Signed at Ottawa, Canada this 8th day of November, 2007.

"V.A. Miller"

V.A. Miller, J.

CITATION:	2007TCC682
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APPEARANCES:

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