Docket: 2007-2584(IT)I

BETWEEN:

LANDMARK AUTO SALES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 4, 2008 at Victoria, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

Agent for the Appellant:	Catherine L. Henderson
Counsel for the Respondent:	Christa Akey

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2002 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 28th day of February, 2008.

"G. A. Sheridan"

Sheridan, J.

Citation: 2008TCC121
Date: 20080228
Docket: 2007-2584(IT)I

BETWEEN:

LANDMARK AUTO SALES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Landmark Auto Sales Ltd., is appealing the reassessment of the Minister of National Revenue of its 2002 taxation year. The Appellant is seeking to have the Minister of National Revenue apply to the tax owing in other taxation years a credit amount of $5,842.96 shown in the Notice of Reassessment for its 2002 taxation year.

[2] The Appellant is a small used car business. Catherine Henderson, the spouse of its owner and director, represented the Appellant and testified at the hearing. Ms. Henderson was the bookkeeper for the Appellant during the years in question.

[3] The Appellant's difficulties began with its failure to file income tax returns for certain years, 2002 being the only one under appeal.

[4] In April 2005, following the Appellant's failure to comply with requests to file its returns, the Minister made an arbitrary assessment[1] of the Appellant's 2002 and 2003 taxation years. The total amount assessed for 2002 was $5,720.95, which included federal and provincial tax, interest and a late-filing penalty.

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[1] Pursuant to subsection 152(7) of the *Income Tax Act.* See Exhibit A-5.

[5] After discussions between its principals and the Collections department of the Canada Revenue Agency, in July 2005 the Appellant began making monthly payments of $2,200 towards its outstanding tax liability pending the filing of its returns. The Appellant made six such payments in 2005.

[6] On September 26, 2006, the Appellant filed its 2002 income tax return.

[7] On November 24, 2006, the Minister issued a Notice of Reassessment[2] based on the Appellant's return. Certain adjustments were made to the arbitrary assessment of April 2005, including the cancellation of the late filing penalty. The Notice of Reassessment concluded with the following descriptions and amounts:

Result of this Reassessment:	$	5,842.96	Cr
Prior balance:	$	787.07	
Total balance:	$	787.07	

[8] The Appellant does not dispute the amounts shown in the Notice of Reassessment but is asking this Court to direct the Minister to apply the $5,842.96 credit to the tax owing in other taxation years. In particular, the Appellant anticipates tax liability in respect of certain unpaid GST remittances[3].

[9] The Minister submits that the appeal ought to be dismissed on two grounds: first, that on a proper reading of the Notice of Reassessment for the 2002 taxation year, no federal tax has been assessed and accordingly, it is a 'nil' assessment from which there can be no appeal. Secondly, even if the appeal were valid, the Respondent argues that, because the Appellant did not file its returns within the time required by subsection 164(1) of the *Act*, the Minister is without statutory authority to refund the $5,842.96 credit amount shown in the Notice of Reassessment.

[10] The Respondent called Wendy Faddis, an Appeals Officer with some 16 years experience, to explain the calculations set out in the Notice of Reassessment. Ms. Faddis was a knowledgeable witness who took great care in explaining the details of the documents pertaining to the assessment and reassessment.

<u>Analysis</u>

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[2] Exhibit A-4.

[3] Exhibit A-7.

[11] This matter first came before me in the form of an application by the Respondent to dismiss the Appellant's appeal on the basis that it was based on a 'nil' assessment. As it was not clear from the affidavit evidence in support of the Respondent's application that no tax had been assessed in respect of the Appellant's 2002 taxation year, I dismissed[4] the Respondent's application.

[12] Having now heard the evidence and considered the applicable provisions of the *Act* and the relevant jurisprudence, I regret to say that there is no basis upon which the Appellant's appeal can be allowed. I use the word 'regret' because there is no question that the Appellant paid to the Minister the $5,842.96 shown as a credit balance in its 2002 Notice of Reassessment or that there is tax owing in other years not under appeal. Worse, the Appellant can ill afford to pay such a large amount for no purpose. Losing that amount will no doubt mean hardship for Ms. Henderson and her family.

[13] In her testimony, Ms. Faddis reviewed the amounts shown in the Notice of Reassessment. She confirmed that the credit amount of $5,842.96 had accrued as a result of the monthly payments of $2,200 paid in the period between the issuing of the arbitrary assessment and the filing of the Appellant's 2002 income tax return. She explained that the "Prior balance" of $787.07 shown as owing (notwithstanding the credit amount) was in respect of the 2003 taxation year which, by the time of the 2002 Notice of Reassessment, had already been assessed. The credit could not be applied to that amount because the Appellant had filed its 2002 income tax return beyond the period within which the Minister was permitted to refund overpayments pursuant to subsection 164(1):

> If the return of a taxpayer's income for a taxation year has been made within 3 years from the end of the year, the Minister
>
> (*a*) may,
>
> (i) before mailing the notice of assessment for the year, where the taxpayer is a qualifying corporation (as defined in subsection 127.1(2)) and claims in its return of income for the year to have paid an amount on account of its tax payable under this Part for the year because of subsection 127.1(1) in respect of its refundable investment tax credit (as defined in subsection 127.1(2)), refund all or part of any amount claimed in the return as an overpayment for the year, not exceeding the amount by which the total

[4] By Order dated December 13, 2007.

determined under paragraph (*f*) of the definition "refundable investment tax credit" in subsection 127.1(2) in respect of the taxpayer for the year exceeds the total determined under paragraph (*g*) of that definition in respect of the taxpayer for the year,

(ii) before mailing the notice of assessment for the year, where the taxpayer is a qualified corporation (as defined in subsection 125.4(1)) or an eligible production corporation (as defined in subsection 125.5(1)) and an amount is deemed under subsection 125.4(3) or 125.5(3) to have been paid on account of its tax payable under this Part for the year, refund all or part of any amount claimed in the return as an overpayment for the year, not exceeding the total of those amounts so deemed to have been paid, and

(iii) on or after mailing the notice of assessment for the year, refund any overpayment for the year, to the extent that the overpayment was not refunded pursuant to subparagraph (i) or (ii); and

(*b*) shall, with all due dispatch, make the refund referred to in subparagraph (*a*)(iii) after mailing the notice of assessment if application for it is made in writing by the taxpayer within the period within which the Minister would be allowed under subsection 152(4) to assess tax payable under this Part by the taxpayer for the year if that subsection were read without reference to paragraph 152(4)(*a*).

[14] Given that the Appellant's return for its December 31, 2002 year end was filed on September 26, 2006, there is no question that it is out of time to seek a refund under subsection 164(1). Further, because the Appellant is a corporate rather than an individual taxpayer, it cannot take advantage of the relief offered to individual taxpayers in subsection 164(1.5) which, notwithstanding a late filing, permits the Minister in certain circumstances to refund an overpayment.

[15] Ms. Henderson has no legal background. She made a great effort, however, to research the provisions of the *Act* in the hope of finding something to permit the recovery of the Appellant's overpayment. She argued that the Minister could apply the credit amount to the Appellant's other debts under subsection 164(2):

(2) Application to other debts. Instead of making a refund or repayment <u>that might otherwise be made under this section</u>, the Minister may, where the taxpayer is, or is about to become, liable to make any payment to Her Majesty in right of Canada or in right of a province, apply the amount of the refund or repayment to that other liability and notify the taxpayer of that action. [Emphasis added.]

[16] That argument can succeed only if the clause "that might otherwise be made under [section 164]" is ignored. For the Minister to apply the $5,842.96 credit to

other amounts for which the Appellant is or may become liable under subsection 164(2), the refund or repayment must first be "otherwise" payable under section 164. Given that subsection 164(1) prevents the repayment because of the lateness of the filing of the Appellant's returns and that the exception to that rule in subsection 164(1.5) does not apply to corporate taxpayers, there is no refund or repayment that could "otherwise" be made to the Appellant under section 164. Accordingly, subsection 164(2) does not permit the repayment of the credit amount to the Appellant's other tax debts.

[17] Ms. Henderson also directed the Court's attention to a "Statutory Set-Off"[5] signed by the Collections Officer dated November 7, 2005. In this document, the Appellant is named as the "Tax Debtor" and the Canada Revenue Agency is directed to retain $9,049.13 by way of deduction or set-off "from such amounts as may be or may become payable by [the CRA] to the [Appellant]". Ms. Henderson argued that the effect of this document was to authorize the Minister to apply the $5,842.96 credit to the Appellant's other tax debts.

[18] This is a tempting argument but again, one which I think cannot succeed. As of the date of the Statutory Set-Off, November 7, 2005, the Appellant had made four monthly payments of $2,200. At that time, no amounts were "payable" to the Appellant as the Minister was still waiting for the Appellant to file its delinquent returns. At that time, the extent of the Appellant's tax liability was still unknown. When the Appellant did file its 2002 return on September 26, 2006, the time was long past for it to rely on subsection 164(1) to claim a refund of the amounts paid in excess of the tax ultimately assessed in November 2006. Thus, the $5,842.96 credit balance shown in the Notice of Reassessment did not ever "become payable" to the Appellant and accordingly, was never attached (for lack of a better word) by the Statutory Set-Off to permit its application to other tax debts.

[19] To her credit, Ms. Henderson acknowledged that the Appellant's troubles lay in her failure to comply in a timely fashion with the *Act's* filing requirements. I accept her evidence that as a result of her discussions with Canada Revenue Agency officials (in particular, the Collections Officer with whom she had been cooperating to get the Appellant's tax debt paid off), she had understood that any amounts paid in excess of the tax ultimately assessed upon the filing of the 2002 return would be refunded or applied to the Appellant's other tax debts. Unfortunately, what the Collections Officer told her turned out to be if not inaccurate at the time, incomplete.

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[5] Exhibit A-6.

The law is clear that the Minister cannot be bound by erroneous interpretations of the law made by his officials.

Conclusion

[20] Notwithstanding the impression left by the "Prior balance" of $787.07 shown in the Notice of Reassessment, no tax was actually owed for the 2002 taxation year. Further, the Appellant's purpose in appealing is not to dispute the amounts assessed. In these circumstances, there can be no appeal from the assessment[6]. Even if the appeal were valid, there is no statutory provision that authorizes the Minister to make a refund to the Appellant given its failure to file its return within the three-year period set out in subsection 164(1) of the *Act.*

[21] For these reasons, the appeal must be dismissed.

Signed at Ottawa, Canada, this 28th day of February, 2008.

"G. A. Sheridan"

Sheridan, J.

[6] *Interior Savings Credit Union v. R.*, [2007] 4 C.T.C. 55 (F.C.A.) at paragraphs 15-19.

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REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	February 28, 2008

APPEARANCES:

Agent for the Appellant:	Catherine L. Henderson
Counsel for the Respondent:	Christa Akey

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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