

Docket: 2006-2175(IT)G

BETWEEN:

ON-LINE FINANCE & LEASING CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on October 15, 2009, and decision rendered orally on
October 16, 2009, at Vancouver, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant: John C. Drove

Counsel for the respondent: Carl Januszczak
Andrew Majawa

ORDER

UPON motion made by the respondent requesting an order quashing the
appeals for 2001, 2002 and 2004;

AND UPON hearing submissions of the parties;

The respondent's motion is granted.

All without costs.

Signed at Ottawa, Canada, this 30th day of October 2009.

"Patrick Boyle"

Boyle J.

Citation: 2009 TCC 565
Date: 20091030
Docket: 2006-2175(IT)G

BETWEEN:

ON-LINE FINANCE & LEASING CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

(Delivered from the Bench October 16, 2009, at Vancouver, British Columbia
and modified for clarity and accuracy.)

Boyle J.

[1] The taxpayer has instituted appeals in this Court in respect of its 2000 through 2004 taxation years. According to counsel and a brief review of the pleadings, the issues in each year are related and essentially the same. The trial is scheduled to be heard over four days next month.

[2] The Crown has brought a motion to quash the appeals for 2001 and 2002 on the basis that the appeals purport to be from nil assessments, and in respect of taxation years for which the taxpayer did not request that loss determinations under subsection 152(1.1) be made. The Crown's motion also requests that the taxpayer's appeal for 2004 be quashed on the basis that the taxpayer did not file an objection to the notice of loss determination issued by the Canada Revenue Agency (the "CRA") in respect of that year.

[3] The taxpayer agrees that 2004 is for that reason not properly before the Court and should be quashed, and I will so order.

[4] The Crown acknowledges that the taxpayer's appeals for its 2000 and 2003 taxation years are properly before the Court. I will therefore confine my reasons to the intervening years, 2001 and 2002.

[5] By letter dated January 27, 2006, the taxpayer made a request to the CRA that loss determinations be made for each of the years 2000, 2001, and 2002. The taxpayer had previously made a loss determination request for 2004 and, at that time, the taxpayer had already commenced an appeal of its 2003 taxation year. Three days later the taxpayer rescinded its loss determination requests for 2001 and 2002 because it was advised by the CRA auditor to do so, since the prior year, 2000, was to be the subject of a loss determination and the following year, 2003, was the subject of an appeal. That this advice came from the CRA auditor appears to be fully corroborated by her answers on discovery, especially to questions 290 through 293.

[6] Notwithstanding that the taxpayer withdrew its 2001 and 2002 loss determination requests on the advice of, if not at the request of, the CRA, the Crown is now moving to quash the taxpayer's appeals for those years prior to the hearing of the issues on the basis that the CRA assessments were nil assessments and no loss determinations were made, and thus, no loss determinations were objected to. It is the Crown's position that any remedy for the advice or request from the CRA to the taxpayer to withdraw the 2001 and 2002 loss determination requests, or for any understanding that the CRA would deal with those two years nonetheless, must be brought in the Federal Court and not the Tax Court of Canada. It does occur to me that the Crown's position might better have been put forward at the hearing of the appeal next month.

[7] The Crown's position in bringing and maintaining this motion certainly does not look good on the CRA given the CRA's direct involvement in the withdrawal of the loss determination requests. However poorly that may look on the tax administration, it does not disentitle the Crown to the relief it is seeking on this motion. This Court does not, at least as a general rule, have jurisdiction to hear appeals from nil assessments; see for example the decision of the Federal Court of Appeal in *The Queen v. Interior Savings Credit Union*, 2007 FCA 151, 2007 DTC 5342. This Court's jurisdiction is expressly limited by subsection 169(1) to hearing appeals for taxation years in which an amount of tax has been assessed and in respect of which the taxpayer has filed a notice of objection.

[8] By virtue of subsections 152(1.1) and (1.2), this Court also has jurisdiction to hear appeals for taxation years in respect of which a nil assessment has been issued only if the Minister has made a loss determination for that year at the taxpayer's request and if the taxpayer has filed a notice of objection thereto.

[9] I am therefore required to allow the Crown's motion and quash the appeals instituted by the taxpayer in respect of its 2001 and 2002 taxation years.

[10] The Tax Court of Canada does not have any jurisdiction to order the CRA to abide by any understanding it may have reached with the taxpayer, nor to order it to exercise its discretion to voluntarily reassess or to allow further loss determination requests be filed for 2001 and 2002. Jurisdiction in these matters remains with the Federal Court. It is noted that the Canadian Bar Association wrote a submission to the Minister of Justice dated March 13, 2008, recommending that the Tax Court's jurisdiction to deal with such tax related matters be expanded. However, unless and until the Minister of Justice acts on such a proposal, this Court will continue to send litigants such as the taxpayer to the Federal Court for the further relief requested at the hearing of this motion.

[11] In any event, I will be quashing the taxpayer's 2001 and 2002 appeals. The trial judge will be left dealing with the issues for 2000 and 2003. I fully expect taxpayer's counsel will be mindful of the issues relating to the 2001 and 2002 losses in dealing with the years on either side of that period. Indeed, it may well prove that the CRA auditor was correct in thinking that the 2001 and 2002 losses can effectively be dealt with in dealing with the other years.

[12] The taxpayer's appeals for 2001, 2002 and 2004 are quashed. In the circumstances I make no award of costs on this motion.

Signed at Ottawa, Canada, this 30th day of October 2009.

"Patrick Boyle"

Boyle J.

CITATION: 2009 TCC 565

COURT FILE NO.: 2006-2175(IT)G

STYLE OF CAUSE: ON-LINE FINANCE & LEASING CORPORATION v. HMQ

PLACE OF HEARING: Vancouver, British Columbia

DATES OF HEARING: October 15 and 16, 2009

REASONS FOR ORDER BY: The Honourable Justice Patrick Boyle

DATE OF ORDER: October 30, 2009

APPEARANCES:

 Counsel for the appellant: John C. Drove

 Counsel for the respondent: Carl Januszczak
 Andrew Majawa

COUNSEL OF RECORD:

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