

Docket: 2009-3678(IT)I

BETWEEN:

PETER J. FORRESTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 5, 2010, at Calgary, Alberta.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Robert Neilson

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* in respect of the 2001 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed this 22nd day of December 2010.

"François Angers"

Angers J.

Citation: 2010 TCC 608
Date: 20101222
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PETER J. FORRESTER,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal concerning the appellant's 2001 taxation year. On March 1, 2007, the Minister of National Revenue (the "Minister") assessed the appellant for his 2001 taxation year pursuant to subsection 152(7) of the *Income Tax Act* (the "Act") since no return had been filed by the appellant for the taxation year in question.

[2] In assessing the appellant for the 2001 taxation year, the Minister included employment income of \$136,000 and interest income of \$36.00 and assessed federal tax in the amount of \$30,958, provincial tax in the amount of \$12,313, a late filing penalty of \$7,356 and arrears interest in the amount of \$21,226. No credit on account of instalments was allowed.

[3] On March 27, 2008, the appellant filed a return of income for the 2001 taxation year. In that return, he reported gross professional income of \$109,355 and net professional income of \$101,999. He claimed a deduction in the amount of \$1,496 for Canada Pension Plan contributions. He calculated his federal tax to be \$20,414 and his provincial tax to be \$8,106, but most importantly, he claimed a credit in the amount of \$30,100 for income tax paid by instalments.

[4] On May 23, 2008, the Minister reassessed the appellant for his 2001 taxation year as follows:

- 1) He deleted employment income of \$136,000.
- 2) He included gross professional income of \$109,355 as reported.
- 3) He included net professional income of \$101,999 as reported.
- 4) He reduced federal tax assessed by \$9,859 from \$30,958 to \$21,099.
- 5) He reduced provincial tax assessed by \$3,400 from \$12,313 to 8,913.
- 6) He reduced late filing penalty assessed by \$2,254 from \$7,356 to \$5,102.
- 7) He reduced arrears interest which had accrued to the date of the reassessment by \$9,043 from \$29,314 to \$20,271.

[5] The Minister did not allow a credit for income tax in the amount of \$30,100 paid by instalments as the appellant had not made any instalment payments on account of his income tax liability for the 2001 taxation year. Nor did the Minister allow the deduction of Canada Pension Plan contributions payable on self-employed earnings as the appellant did not file his income tax return for that taxation year within the four-year time limit, which is not disputed by the appellant.

[6] The appellant admits that his 2001 return of income was required to be filed on June 15, 2002 and that he failed to meet that requirement. He did file on March 27, 2008. The appellant is appealing the assessment on the basis that he did make instalment payments in 2001 on account of his income tax liability for the 2001 taxation year and that the interest and penalty assessed by the Canada Revenue Agency ("CRA") were thus improperly assessed as the CRA did not take the instalment payments made in 2001 into consideration.

[7] The respondent's position is that this Court cannot grant any relief with respect to the assessment of interest and a penalty nor with respect to the issue of whether the appellant did make any instalment payments on account of his income tax liability for the 2001 taxation year.

[8] The appellant is a lawyer. Prior to 2001, he incorporated Peter J. Forrester Professional Corporation at the request of a law firm he was about to join. In those years, his wife did all his bookkeeping and that of his professional corporation until they were divorced. For the 2001 taxation year, his professional corporation made payments to the Canada Customs and Revenue Agency (as it was then called) on what he called the payroll account of his professional corporation, and he understood those payments to have been on account of his personal income tax instalments withheld by his professional corporation.

[9] The appellant's professional corporation never filed a return of income for the 2001 taxation year nor did it issue to the appellant a T4 slip for that taxation year

indicating the amount of tax deducted at source. The professional corporation is now dissolved.

[10] After having filed his Notice of Objection to the assessment under appeal, the appellant received a letter from Revenue Canada (Exhibit R-3) saying that they had reviewed his objections, and on the issue of the instalment payments, they wrote that it appeared that payments of approximately \$28,515 for 2001 had been made to his corporate payroll account. The CRA then went on to write that this is not an issue normally addressed in the objection process but said that they would still review the issue on the condition that certain documents be provided, particularly copies of the instalment cheques, and that if it was determined that the instalments were clearly on account of payroll, he (the appellant) might be entitled to claim an amount for taxes deducted at source. They (the CRA) would only consider such a claim if the professional corporation issued and filed a T4 Summary and T4 Supplementary (T4 slip) for the period in question, and once that was done, a reassessment of the appellant's tax return might then be required in order to recognize the T4 slip showing the tax deducted and to remove or adjust the net professional income reported in the amended return. The letter also explains that as things then stood, the interest and the late filing penalty were to be confirmed as assessed.

[11] The appellant has submitted a statement of account (Exhibit A-1) for his professional corporation showing that payments were made at different times in 2001, but no one from the CRA was called to explain the statement. The appellant relies on this document and submits it as proof that he did make instalment payments on behalf of his professional corporation on its payroll account and that these payments were for income tax deducted for him at source.

[12] The appellant's accountant testified that he prepared the appellant's 2001 tax return and that he received from the CRA in March 2008 the information he used to claim the tax credit of \$30,100, namely the amount of the instalments paid by the appellant's professional corporation.

[13] The issues before this Court are whether the Court can grant the appellant any relief with respect to the assessment of interest and a penalty and whether this Court has jurisdiction to grant any relief with respect to the tax credit of \$30,100, being the amount paid by his professional corporation on account of his income tax liability for the 2001 taxation year.

[14] The last issue could be worded differently as being whether the determination whether taxes have been paid is beyond the scope of an assessment and accordingly

outside the jurisdiction of the Tax Court of Canada. The reason, obviously, for posing the question in that fashion rests on the description of the powers and jurisdiction of this Court found in paragraph 171(1) of the *Act*, which reads as follows:

171(1) 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.

[15] It therefore follows that for this Court to have jurisdiction, the issue must relate to the assessment and to taxes paid or withheld that form part of that assessment. There are somewhat contradictory lines of case law leading to different conclusions regarding whether payments of tax owing form part of an assessment. The appellant relied on and cited *Aallcann Wood Suppliers Inc. v. The Queen*, 94 DTC 1475, as authority for the proposition that an appellant is permitted to challenge the assumptions of the Minister in appealing an assessment. The facts in *Aallcann* are not similar to the facts here. In *Aallcann*, the taxpayer wanted to appeal the determination of losses for the 1988 taxation year in order to be able to carry the losses back to previous years, but was precluded from doing so because 1988 was a nil assessment year. Judge Bowman, as he then was, held that this Court could determine the amount of losses for the 1988 taxation year in an appeal with respect to another year to which these losses were applied. So, *Aallcann* stands for the proposition that the Tax 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 (See *Liampat Holdings Limited v. The Queen*, 96 DTC 6020).

[16] There is a more recent line of cases that supports the proposition that an assessment does not include amounts withheld at source thus issues with respect to such amounts do not fall within this Court's jurisdiction. In *Valdis v. The Queen*, [2001] 1 C.T.C. 2827, Judge Hamlyn stated at paragraph 17:

. . . In my view, under subsection 152(1), an "assessment" is stipulated by Parliament to "assess the tax for the year ... if any, payable" and not to assess the tax for the year owing by a taxpayer after source deductions withheld by an employer are subtracted from exigible tax as assessed for the year. I conclude it cannot be said that income tax withheld by an employer is a constituent element of an assessment that can be appealed under section 169. . . .

[17] In *Neuhaus v. The Queen*, 2002 FCA 391, the Federal Court of Appeal held that the matter of amounts paid by way of source deduction is a collection problem and as such is not part of an assessment. See also *Boucher v. The Queen*, 2004 FCA 47. Since those two decisions, this Court has consistently held that it does not have jurisdiction to determine whether tax has been withheld at source. See *Curwen v. Canada*, 2005 TCC 226, *Pintendre Autos Inc. v. Canada*, 2003 TCC 818, *Surikov v. Canada*, 2008 TCC 161 and *Welford v. Canada*, 2009 TCC 464.

[18] It therefore follows that any disputes as to amounts paid are collection problems and section 222(2) of the *Act* assigns jurisdiction in such matters to the Federal Court. This Court does not have jurisdiction to grant the relief sought by the appellant, including the waiver of interest and penalties (see *Hardtke v. The Queen*, 2005 DTC 676), such waiver being entirely at the Minister's discretion.

Signed this 22nd day of December 2010.

"François Angers"

Angers J.

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APPEARANCES:

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