Docket: 2016-942(IT)I

BETWEEN:

ANGELA CHAO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ORDER

For the reasons set out in the attached Reasons for Order, the application is dismissed.

There will be no costs on the application.

Signed at Ottawa, Ontario, this 12th day of October 2018.

"Gaston Jorré"

Jorré D.J.

Citation: 2018 TCC 202
Date: 20181012
Docket: 2016-942(IT)I

BETWEEN:

ANGELA CHAO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Jorré D.J.

[1] The circumstances of this application are unusual.

[2] There were two issues in this appeal from a reassessment of the Appellant's 2010 taxation year. First, whether or not the Minister of National Revenue (the "Minister") erred in denying some $1149[1] in employment expenses claimed by the Appellant. Second, whether or not the Minister erred in denying a claimed GST/HST rebate of $277.46.

[3] The matter was heard under the informal procedure. The Appellant's Notice of Appeal was a very short paragraph of seven lines of text. The Further Amended Reply to Notice of Appeal[2] sets out in Section C, Issues to be Decided, that the issues were "whether the Appellant: b) is entitled to deduct the Employment Expenses in the 2010 taxation year; and c) is entitled to claim the GST rebate in the 2010 taxation year."[3]

[1] This was claimed on line 229 of the Tax Return. See Exhibit R-3.
[2] Filed with the consent of the Appellant on 16 February 2018.
[3] Presumably because of a typo, there was no "a)". Most of the facts assumed by the Minister related to the employment expenses. The last two subparagraphs of the Minister's assumptions of fact were that "j) the Appellant

[4] I dismissed the appeal with respect to the employment expenses and, on the basis that the Respondent had conceded the issue, allowed the rebate claimed.

[5] The Respondent has made an application to have the judgment varied. The Respondent submits that the rebate was never conceded and that there can be no rebate except to the extent that certain employee expenses may be deducted pursuant to the *Income Tax Act*.[4] The Respondent further submits that, given my finding that there were no deductible employment expenses, the judgment should be varied to dismiss the appeal in its entirety.

[6] The Appellant opposes the application on the basis that the Respondent conceded the issue.

[7] Prior to the start of evidence there was the following exchange:[5]

> MS. LIDHAR: In regards to the GST rebate, this morning Mr. Sone provided me with the required form that was required to be filed. So we're going to amend our pleadings to suggest that we're no longer putting that in issue, the rebate amount. In the event that they are found to be entitled to claim the expenses.
>
> JUSTICE JORRE: Okay. So the quantum of the GST rebate is not in issue, but the eligibility is?
>
> MS. LIDHAR: No, Your Honour, the eligibility of the rebate we're going to concede, given we've now received the requisite form that should have been filed.
>
> JUSTICE JORRE: Okay. I misunderstood.
>
> MS. LIDHAR: Just the expenses will be in issue today.
>
> JUSTICE JORRE: So you're conceding the 27746 GST rebate?[6]
>
> MS. LIDHAR: Correct.

[8] The hearing of the matter took all day. The above excerpt took up about 41 seconds of the recording of the trial. In argument the Respondent did not address the rebate.[7]

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claimed a GST rebate of $277.46 in the 2010 taxation year; and k) the Appellant did not incur any eligible employment expenses in respect of her claim for the GST rebate."

[4] This requirement is in the definition of B in the formula contained in subsection 253(1) of the *Excise Tax Act*.

[5] This is at pages 5 and 6 of the 176 page transcript.

[6] Clearly, 27746 has to be understood as $277.46.

[9] At the beginning of my notes I wrote that the Respondent had conceded the rebate issue and in preparing my reasons I proceeded on that basis.[8]

[10] For reasons that will become apparent below it is useful to note the following: First, in Ontario prior to July 1, 2010, there was only the GST at a 5% rate; with the arrival of the HST from 1 July 2010 onwards, there was a combined rate of 13% (5% federal, 8% Ontario).

[11] Second, the claimed employment expenses in issue were for an amount of $1,149. If they were all incurred before July and were all subject to GST, the total GST in respect of those expenses would be $57.45. If they were all incurred on or after the 1st of July and were all subject to HST, then the total HST would be $149.37. Alternatively, if incurred both before and after July the GST/HST paid on those expenses might be somewhere between those two numbers.

[12] Third, the rebate claimed was $277.46. At a 5% rate, $277 of GST paid requires expenses subject to GST of about $ 5,549 whereas at a 13% HST rate $277 of HST paid requires expenses subject to HST of about $2,134.

[13] Fourth, it would appear that on line 212 of her tax return the Appellant claimed $1,866 in expenses that were not challenged by the Minister.[9] The description for this line is annual union, professional and like dues; such expenses can be employment expenses and are not subject to the prerequisite that there be a T2200 form.[10]

[14] Normally someone who wishes to challenge a judgment must appeal because once the judgment has been rendered the judge becomes *functus officio*; the judge has fulfilled his function and the judge no longer has the power to deal with the matter.

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[7] Indeed, at the end of her argument the Respondent did not ask for the appeal to be dismissed, something consistent with having conceded part of the appeal while disputing the rest. See pages 153 to 170 and 175 to 176 of the transcript.

[8] In writing my reasons for judgment on the appeal, I used my notes, consulted the exhibits and supplemented my notes by listening to portions of the recording; I did not listen to any part of the recording of the hearing prior to the start of evidence until after receiving the application. I had not ordered the transcript because I saw no need for it. After receiving this application, I listened to the portion of the recording of the hearing prior to the start of evidence and I ordered the transcript.

[9] See Exhibit R-3, which is an "Option C" printout.

[10] Subsection 8(10) of the *Income Tax Act* does not apply to the types of expenses set out in subparagraph 8(1)(i)(i) or (iv) to (vii) of the *Income Tax Act*.

[15] There are only very limited exceptions to this rule. For example, if the Court has not yet fulfilled all its functions, it may complete them. If judgment is rendered on the substance of the matter but the court defers costs to later, the court may still deal with costs after rendering judgment. Similarly, where the court has dealt with all but one of the issues; it may in that case deal with the outstanding issue.[11]

[16] Other examples of the limited exceptions are the ability of the Court to correct errors arising from accidental slips or omissions and the ability to revoke judgments obtained by fraud.

[17] While this Court is a statutory court and therefore it can only hear cases that fall within the statutory subject matter jurisdiction conferred on it, it is also a superior court of record.[12]

[18] Unlike a provincial superior court, this Court does not have a residual jurisdiction for subject matters not assigned by legislation to other courts as well as a subject matter jurisdiction that is, in part, the result of the *Canada Act, 1867*.[13] However, as a superior court of record, this Court does have inherent powers with respect to its practice and procedure to the extent that the relevant practice and procedure is not provided for in legislation.

[19] As such, given that neither legislation nor the *Tax Court of Canada Rules (Informal Procedure)* make any provision for circumstances where judgments may be varied, it is well settled that this Court does have the ability to deal with such questions. The provisions of the general procedure rules together with jurisprudence of this Court applying those rules as well as the jurisprudence of other courts applying similar rules serve as a useful guide.

[20] The relevant rules of the *Tax Court of Canada Rules (General Procedure)* are:

> **168. Reconsideration of a Judgment on an Appeal** — Where the Court has pronounced a judgment disposing of an appeal any party may within ten days after that party has knowledge of the judgment, move the Court to reconsider the terms of the judgment on the grounds only,
>
> (a) that the judgment does not accord with the reasons for judgment, if any, or

[11] See, for example, Rule 168(b) of the *Tax Court of Canada Rules (General Procedure)*.
[12] See section 3 of the *Tax Court of Canada Act*.
[13] The Constitution limits to some extent what subject matter jurisdiction can be conferred on courts that are not superior courts.

> (b) that some matter that should have been dealt with in the judgment has been overlooked or accidentally omitted.
>
> . . .
>
> **172. Setting Aside, Varying or Amending Accidental Errors in Judgments — General** — **(1)** A judgment that,
>
> (a) contains an error arising from an accidental slip or omission, or
>
> (b) requires amendment in any matter on which the Court did not adjudicate,
>
> may be amended by the Court on application or of its own motion.
>
> **(2)** A party who seeks to,
>
> (a) have a judgment set aside or varied on the ground of fraud or of facts arising or discovered after it was made,
>
> (b) suspend the operation of a judgment, or
>
> (c) obtain other relief than that originally directed,
>
> may make a motion for the relief claimed.

[21] No question of fraud arises so let us consider whether:

i. the judgment does not accord with the reasons for judgment;
ii. some matter that should have been dealt with in the judgment has been overlooked or accidentally omitted;
iii. the judgment contains an error arising from an accidental slip or omission;
iv. the judgment requires amendment in any matter on which the Court did not adjudicate; or
v. the judgment should be varied on the ground of facts arising or discovered after it was made?

[22] Clearly, the judgment accords with the reasons which state that the Respondent conceded the rebate and allowing the rebate in the judgment is not an accidental slip or omission.

[23] Has the rebate been overlooked or omitted or is there some other matter on which the Court did not adjudicate?

[24] Adjudicate means to decide judicially.[14] The reasons and the judgment both deal with the rebate issue. Clearly the rebate issue has not been overlooked and has been adjudicated.

[25] The situation here does not fit within the last category: facts discovered after the hearing that could not have been discovered with reasonable efforts. There is no question here of facts arising after the hearing.

[26] Accordingly, the application must fail because I have completed my function and this is not a situation falling within the recognised exceptions to the finality of judgments.[15]

[27] Even if that were not the case, there are two additional reasons that would have led me to the same conclusion.

[28] I would note that, at this point in time after reading the transcript and having heard and read the Respondent's submissions, I can accept that the Respondent probably did not intend to concede the $277.46 rebate issue.

[29] What matters however is not what was intended but what was done. For the following reasons, I am satisfied that, at the start of the hearing, the Respondent conceded the issue.

[30] At the beginning of the transcript excerpt above, after stating that just that morning the Respondent had been provided with the relevant form, the Respondent says ". . . we're going to amend our pleadings to suggest that we're no longer putting that in issue, the rebate amount." The Reply to Notice of Appeal frames the issues as whether the Appellant:

i. ". . . is entitled to deduct the Employment Expenses in the 2010 taxation year"; and
ii. ". . . is entitled to claim the GST rebate in the 2010 taxation year."

[31] The absence of a form for the rebate is not set out as an issue; indeed, the notice of appeal contains no reference either as an allegation or as an assumed fact

[14] See the definition of adjudicate and the Canadian Oxford Dictionary, second edition, 2004.
[15] Stated in more traditional language, I am *functus officio*.

of the absence of a form.[16] That is clearly a concession of the rebate; there is no issue in respect of a form to concede.

[32] The next sentence in the transcript "In the event that they are found to be entitled to the expenses" introduces ambiguity into what has just been said. This results in me asking a question and the Respondent's answer together with my comment on the answer over the next six lines.

[33] The Respondent then says "Just the expenses will be an issue today." Given that the case was framed as having two issues, the logical way to understand this is that the Respondent was abandoning the rebate issue.

[34] I then asked "So you're conceding the 27746 GST rebate?" and receive the answer "Correct."

[35] Those last two lines clearly concede the rebate.

[36] Given that the rebate issue was conceded, we are clearly not in a situation where this Court should vary the outcome even if it could.

[37] In these circumstances there is one other reason for dismissing the application even if the rebate had not been conceded in circumstances where it would appear to have been conceded: a potential fairness issue.

[38] In considering whether the Court should vary or amend a judgment when the circumstances fall into one of the exceptions to the finality of judgments, other considerations may be relevant such as fairness to the other party.

[39] The Respondent's submissions are, of course, correct that no GST or HST rebate is possible if there are no expenses deductible under the *Income Tax Act*.

[40] However, while I found that none of the $1,149 employment expenses in issue were deductible,[17] there were some $1,866 in employment expenses claimed on line 212 and allowed by the Minister.

[41] Earlier in these reasons, I pointed out that the maximum possible GST or HST on the $1,149 of employment expenses claimed on line 229 of the

[16] The form in question would be a GST 370.
[17] These were the employment expenses claimed on line 229 as shown on the "Option C" printout that is Exhibit R-3.

Appellant's tax return would be, at most, $149.37 of HST. In fact the number is most likely much less, perhaps $60 or $70, even if they had been valid employment expenses, given that almost all of the claimed expenses were in the first half of the year.[18]

[42] This leaves the question what was the remaining $200 or so of the claimed rebate in relation to?[19]

[43] Was it mostly in relation to something other than the claimed $1,149 of employment expenses in issue, perhaps the $1,866?[20]

[44] As a result of a question I asked during the submissions on the application made by teleconference, the agent for the Appellant made mention of the $1,866 and referred to it as union dues. While we do not have any evidence at the hearing as to the nature of the $1,866, we do know that it was claimed and allowed.[21]

[45] In written submissions, the Respondent stated that it is for the Appellant to demonstrate the claim and bring the receipt to support that claim.

[46] However, given that the rebate claim was conceded, and even if it were the case that the claim only appeared to have been conceded, there was no reason to bring forth evidence with respect to the $1,866 given that the expense itself had been allowed.[22]

[47] As a result, before any variation could be considered and even it could otherwise be varied, fairness would require the matter be reopened to explore what the $1,866 was and whether the Appellant paid any GST or HST on the amount.

[48] If it could otherwise be varied and if I had a request before me to reopen the matter, I would not in the circumstances do so at this point considering the circumstances including the modest amount at stake and considering subsection 18.15(3) of the *Tax Court of Canada Act* which says:

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[18] See paragraph 40 of the Reasons for Judgment in this matter.

[19] This was one unexpressed consideration underlying what I said in note 50 of the Reasons for Judgment in this matter.

[20] Mathematically, at 13% HST on $1,866 would be about $243. As I observed above, these kinds of expenses are not subject to the requirement of a T2200 form.

[21] Generally, union dues, if that is what the amount is, would not be subject to GST or HST, but the question is whether it was really union dues or something else falling into the categories that would be reported on that line and that had in fact attracted GST or HST. We simply do not know based on the evidence.

[22] The Respondent in written submissions also made reference to the GST Form 370 and what was not filled in on the form. That evidence is not before the Court as the form was not filed in evidence.

> Notwithstanding the provisions of the Act under which the appeal arises, the Court is not bound by any legal or technical rules of evidence in conducting a hearing and the appeal shall be dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit.

[49] For these reasons, the application will be dismissed.

Signed at Ottawa, Ontario, this 12th day of October 2018.

"Gaston Jorré"

Jorré D.J.

CITATION:	2018 TCC 202
COURT FILE NO.:	2016-942(IT)I
STYLE OF CAUSE:	ANGELA CHAO v. THE QUEEN
SUBMISSIONS BY TELECONFERENCE:	July 17, 2018
RESPONDENT'S AND APPELLANT'S WRITTEN SUBMISSIONS FILED ON:	August 10, 2018
REASONS FOR ORDER BY:	The Honourable Gaston Jorré, Deputy Judge
DATE OF ORDER:	October 12, 2018

REPRESENTATIVES:

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Counsel for the Respondent:	Kieran Lidhar

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