Docket: 2015-3124(IT)I

BETWEEN:

JANICE L. CRETE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 9, 2015, at Ottawa, Ontario.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Mélanie Sauriol

JUDGMENT

The appeals from the redetermination made under the *Income Tax Act* for the 2011, 2012 and 2013 base taxation years as well as the Goods and Services Tax Credit for the 2010, 2012 and 2013 taxation years are dismissed, without costs.

Signed at Ottawa, Canada, this 27th day of May 2016.

"Guy Smith"

Smith J.

Citation: 2016 TCC 132
Date: 20160527
Docket: 2015-3124(IT)I

BETWEEN:

JANICE L. CRETE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Smith J.

I. Introduction

[1] Janice Crete (the "**Appellant**") has appealed under the informal procedure from notices of redetermination made by the Minister of National Revenue (the "**Minister**") with respect to the Canada Child Tax Benefit ("**CCTB**") for the 2011, 2012 and 2013 base taxation years as well as the Goods and Services Tax Credit ("**GSTC**") for the 2010, 2012 and 2013 taxation years.

[2] The Minister takes the position that payments made throughout those periods did not account for the fact that the Appellant had been a shared-custody parent since March 27, 2012. She now seeks to recover the overpayments.

[3] The basis for the Appellant's appeal is that she took diligent steps to inform the Minister of her change of status and was given verbal assurances that matters were in order. She argues that she should not now be required to reimburse overpayments received and that it would be unfair that she be held responsible for the Minister's failure to account for her change of status. In essence, she argues that the Minister is estopped from recovering the overpayments. She does not otherwise deny receipt of the overpayments.

[4] The issue is whether the Minister correctly assessed the Appellant pursuant to subsection 160.1(1) of the *Income Tax Act* (the "**Act**") with respect to the excess

payments received by her after the date of separation when she became a shared-custody parent. For reasons set out below, the appeal must be dismissed.

II. Factual background

[5] In order to establish and maintain the redeterminations noted above, the Minister relied on the following assumptions of fact:

1. That the Appellant and her ex-spouse are the parents of J. born in 1999 and S. born in 2001;
2. That on or about November 3, 2014, the Appellant informed the Minister that on March 27, 2012, she had separated from her ex-spouse and that they shared custody of their two children;
3. That since the date of separation, the Appellant and her ex-spouse have shared custody of their two children on a fifty percent basis.

[6] With the exception of the date of notice set out in item 2 above, the Appellant does not dispute these assumptions nor, as indicated above, does she dispute receipt of the overpayments as follows:

GSTC – 2010, 2011 and 2012 taxation years

Taxation years	Amount	Period
2010	$59.73	April 2012
2011	$211.32	July 2013 to April 2014
2012	$102.26	July 2014 to October 2014

CCTB – 2011, 2012 and 20913 base taxation years

Taxation years	Amount	Period
2011	$3,456.50	July 2012 to June 2013
2012	$3,525.50	July 2013 to June 2014
2013	$1,778.76	July 2014 to December 2014

[7] By a further notice of redetermination dated March 15, 2015, the excess CCTB payment for the 2013 base taxation year (July 2014 to February 2015) was reduced to $173.28. That amount is not subject to the current appeal.

[8] The Appellant was the only witness at the hearing. It was her position that she called the Canada Revenue Agency ("**CRA**") on several occasions following

the date of her separation and informed them of her marital status. She was unable to provide the name of any official and acknowledged that she had simply called the so-called "1-800" number. During cross-examinations, she admitted that she had not specifically spoken to anyone in the child benefits section but emphasized that in any event, she had listed her marital status as "separated" in her 2012 tax return.

[9] On May 17, 2013, she received a cheque for $8,790.53 which she deposited in her bank account (she produced the CRA envelope where she had inscribed the date of receipt). According to the Appellant, she immediately called CRA to ensure she was entitled to the monies received and was given assurances that the payment represented a retroactive payment to the date of her separation. In November 2013, she again informed CRA of her marital status and, in due course, filed her income tax return for the 2013 calendar year again confirming that status.

[10] On July 18, 2014, she received a notice confirming her entitlement to the CCTB and related benefits and, in response to a request for confirmation as to her family status, she prepared a hand-written note dated November 3, 2014. It clearly set out her name, her ex-spouse's name, their date of birth and social insurance number as well as the name and date of birth of their children with a clear notation that "neither party pays child support" and that they "share custody of the children 50/50". This document was faxed to CRA.

[11] A similar type-written letter, signed by both the Appellant and her ex-spouse, was later faxed to the attention of "T1 Processing Review Section" on January 18, 2015. It provided as follows:

> Janice Lee Crete (mother) and [name of ex-spouse], father have equally shared custody of both children. The children reside with each parent for 50% of the time. Meaning, the children spend 1 week at a time with each parent. The children spend 7 days with Janice Lee Crete, then 7 days with [name of father]. This continues throughout the year.
>
> There is no support payments required. Neither party pays for support.
>
> Janice Lee Crete is making this claim.

[12] The Appellant's evidence is that this was not the first time she had informed CRA of her change of circumstances. This is apparent given that the CCTB notice of July 18, 2014 for the 2013 base year (issued prior to the redeterminations)

clearly included the notation "separated". Moreover, the Notice of Confirmation of June 26, 2015, included the following acknowledgement:

> We acknowledge that you did notify Canada Revenue Agency of the change in your custody situation prior to the redeterminations. Our records indicate that documentation was received in December 2013 . . .

[13] This was followed by the following notation:

> A review of the facts and documents submitted indicates that you have fifty percent shared custody of your children with your ex-spouse, as of March 27, 2012. Since you are a "shared-custody parent", as defined in section 122.6 of the *Income Tax Act*, you are only entitled to receive half the benefits you would otherwise be entitled to under subsection 122.61(1) of the Act. We confirm that the redeterminations are correct . . .

[14] I have no difficulty in concluding that the Appellant informed CRA of her separation sometime in 2012 (as later confirmed in her income tax return for that year) though it is much less clear if her shared-custody status was communicated to CRA officials during any of those conversations. On balance, I find that the Appellant informed CRA of her shared-custody status in November 2013.

[15] The question is what legal consequence flows from that finding of fact.

III. The Law and Analysis

A. The CCTB (and GSTC) regime

[16] The statutory regime for the CCTB is set out in section 122.6 of the Act. It provides that the benefit is treated as an overpayment of the person's liability under the Act and, if the person is eligible, that amount is paid to the eligible individual as a refund of this overpayment.

[17] The subject provision contains a number of key definitions:

> **"cohabiting spouse or common-law partner"** of an individual at any time means the person who at that time is the individual's spouse or common-law partner and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or common-law partnership, for a period of at least 90 days that includes that time;

"eligible individual" in respect of a qualified dependant at any time means a person who at that time

(*a*) resides with the qualified dependant,

(*b*) is a parent of the qualified dependant who

(i) is the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant and who is not a shared-custody parent in respect of the qualified dependant, or

(ii) is a shared-custody parent in respect of the qualified dependant,

(*c*) is resident in Canada or,

. . .

and for the purposes of this definition,

(*f*) where the qualified dependant resides with the dependant's female parent, the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent,

(*g*) the presumption referred to in paragraph 122.6 eligible individual (*f*) does not apply in prescribed circumstances, and

(*h*) prescribed factors shall be considered in determining what constitutes care and upbringing;

"qualified dependant" at any time means a person who at that time

(*a*) has not attained the age of 18 years,

(*b*) is not a person in respect of whom an amount was deducted under paragraph (*a*) of the description of B in subsection 118(1) in computing the tax payable under this Part by the person's spouse or common-law partner for the base taxation year in relation to the month that includes that time, and

(*c*) is not a person in respect of whom a special allowance under the Children's Special Allowances Act is payable for the month that includes that time;

"shared-custody parent" in respect of a qualified dependant at a particular time means, where the presumption referred to in paragraph (*f*) of the definition

> eligible individual does not apply in respect of the qualified dependant, an individual who is one of the two parents of the qualified dependant who
>
> (*a*) are not at that time cohabitating spouses or common-law partners of each other,
>
> (*b*) reside with the qualified dependant on an equal or near equal basis, and
>
> (*c*) primarily fulfil the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant, as determined in consideration of prescribed factors.

[18] With respect to the GSTC regime described in section 122.5 of the Act, I will only add that the person who is eligible for the GSTC is generally, by virtue of paragraph 122.5(6)(*b*), the person who is the eligible individual in respect of the child for the purposes of the CCTB. There are exceptions that I need not mention here.

[19] It is clear from the definition noted above, that the Appellant and her ex-spouse ceased to be "cohabitating spouses" since they had been living separate and apart for a period of at least 90 days from the date of separation on March 27, 2012.

[20] CRA was informed of the separation and, since no one testified on their behalf, I can only speculate that CRA concluded the Appellant was the "eligible individual" in respect of her two children, both falling within the definition of "qualified dependant" since i) they resided with her and ii) she was the parent who primarily fulfilled the responsibility for their care and upbringing – relying on the presumption set out in paragraph 122.6 eligible individual (*f*) that:

> (*f*) where the qualified dependant resides with the dependant's female parent, the parent who primarily fulfills the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent.

[21] As indicated above, CRA was not informed until November 2013 that the two children in fact resided with both parents on a shared-custody basis in which case the presumption described above would not apply and both the Appellant and her ex-spouse would qualify as eligible individuals since, looking at the definition of "shared-custody parent", they were one of two parents of the children who i) were not cohabiting spouses ii) resided with the children on an equal or near equal basis and iii) primarily fulfilled the responsibility for the care and upbringing of the children when they resided with them.

[22] Subsection 122.61(1) of the Act sets out a formula for the calculation of the CCTB but subsection 122.61(2) specifies that where an eligible individual is a shared-custody parent, the CCTB is to be shared between both parents taking into consideration each parent's adjusted income for the year.

[23] Having concluded that the Appellant and her ex-spouse were shared-custody parents, CRA issued the notices of redetermination which are the subject of this appeal, adjusting the CCTB and GSTC retroactively to the date of separation and seeking to recover the overpayments.

IV. Can the Minister request a reimbursement of the overpayments?

[24] While subsection 152(1) of the Act provides that the Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, as well as interest and penalties, if any, subsection 160.1(1) deals with a situation where an amount has been refunded in excess of the amount to which a taxpayer was entitled. It provides as follows:

> **160.1(1) Where excess refunded** — Where at any time the Minister determines that an amount has been refunded to a taxpayer for a taxation year in excess of the amount to which the taxpayer was entitled as a refund under this Act, the following rules apply:
>
> (*a*) the excess shall be deemed to be an amount that became payable by the taxpayer on the day on which the amount was refunded; and
>
> (*b*) the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess (other than any portion thereof that can reasonably be considered to arise as a consequence of the operation of section 122.5 or 122.61) from the day it became payable to the date of payment.
>
> . . .
>
> **160.1(3) Assessment** — The Minister may at any time assess a taxpayer in respect of any amount payable by the taxpayer because of subsection (1) or (1.1) or for which the taxpayer is liable because of subsection (2.1) or (2.2), and the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, in respect of an assessment made under this section, as though it were made under section 152 in respect of taxes payable under this Part, except that no interest is payable on an amount assessed in respect of an excess referred to in subsection (1) that can reasonably be considered to arise as a consequence of the operation of section 122.5 or 122.61.

[25] It is clear from the above, that when the Minister issued the notices of redetermination in question, she was relying on subsection 152(1) and notably subsection 160.1(1), the combined effect of which was considered in *Surikov v. R.*, 2008 TCC 161, (at paragraph 6):

> These provisions have the following effect:
>
> > (i) Paragraph 152(1)(b) requires the Minister to make a determination of the GSTC entitlement of the taxpayer;
> >
> > (ii) Subsection 152(1.2) makes the provisions of Divisions I and J of Part I, of the Act that relate to assessments, reassessments, objections, confirmations and appeals to this Court applicable to both determinations and redeterminations of GSTC entitlement made under paragraph 152(1)(b) and determinations and redeterminations of CCTB entitlement;
> >
> > (iii) Subsection 160.1(1) has the effect of making a taxpayer liable to repay any amount that the Minister has determined to be an overpayment of a refund, including an overpayment of GSTC or CCTB;
> >
> > (iv) Subsection 160.1(3) authorizes the Minister to assess the taxpayer for any such overpayment, and it makes the provisions of Division I of Part I relating to objections to assessments applicable to any such assessment;
> >
> > [My emphasis.]

[26] On the basis of the above, I conclude that the Minister was entitled to reassess the Appellant for the CCTB and GSTC overpayments.

V. Is the Minister estopped from claiming a reimbursement?

[27] The jurisdiction given to this Court by Parliament is to hear and determine disputes as to the correctness of assessments under the Act: *Surikov*, *supra*.

[28] Since it is not a court of equity, the Tax Court's jurisdiction does not include equitable considerations such as whether there is an issue of fairness to the Appellant. The Court's jurisdiction is found in its enabling legislation and it can only "determine whether an assessment is good or bad" *Smith v. MNR*, (1989) 1 C.T.C. 2413, 89 D.T.C. 299 (T.C.C.).

[29] Moreover, I do not accept that the Appellant was somehow entitled to rely on information allegedly provided by CRA officials over the telephone. As indicated in *Pappas v. Canada*, 2006, TCC 692 (at paragraph 13):

> 13. . . . the law is clear that (the Appellant) could not rely on the doctrine of estoppel to hold CRA to its incorrect advice. It is for this Court to determine the correctness of the assessment based on the law and the facts before me: it is not telephone advice of CRA officials that is determinative.

VI. Conclusion

[30] While the Minister has admitted that the overpayments made to the Appellant were the result of an administrative error, in fairness to CRA, it should be recognized that they were only informed of her shared-custody status in November 2013.

[31] One more piece of the puzzle is missing. The father did not testify at the hearing and, apart from his signature on the type-written note of January 18, 2015, no evidence was adduced as to what information, if any, he provided to CRA.

[32] This leads me to conclude that there was an arrangement that the father would not be required to make support payments as long as the Appellant continued to receive the CCTB and related benefits. Had that not been the case, it is more than likely that the father, as a "shared-custody parent", would have filed an application for his share of the CCTB. Had he done so, CRA would have dealt with the shared-custody situation at a much earlier date.

[33] In the end, I agree with the Minister that CRA's so-called error is simply not relevant and that subsection 160.1(1) of the Act is clearly intended to address a situation where an amount has been refunded in excess of the amount to which the taxpayer was entitled. While I appreciate that this might create a financial hardship and seem unfair from the Appellant's perspective, I find that her situation is no different than that of many ordinary Canadians who diligently file their income tax return prior to April 30th and receive a refund, only to be reassessed at a later date when it comes to CRA's attention that the initial assessment was based on incorrect or incomplete information.

[34] For all the foregoing, this appeal is dismissed without costs.

Signed at Ottawa, Canada, this 27th day of May 2016.

"Guy Smith"

Smith J.

CITATION:	2016 TCC 132
COURT FILE NO.:	2015-3124(IT)I
STYLE OF CAUSE:	JANICE L. CRETE v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 9, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Guy R. Smith
DATE OF JUDGMENT:	May 27, 2016

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Mélanie Sauriol

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada