Docket: 2008-2676(IT)I

BETWEEN:

ROBERT SHINDLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 24, 2009, at Toronto, Ontario
Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	Warren McCann
Counsel for the Respondent:	Michael Alder

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* ("*Act*") for the 2005 taxation year is allowed, with costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that in determining the foreign tax deduction available to the Appellant pursuant to subsection 126(1) of the *Act* the amount of foreign non-business-income tax paid by the Appellant to the government of a country other than Canada in 2005 should be increased by CAN$1,672 (US$1,380).

The filing fee of $100 is to be refunded to the Appellant.

Signed at Halifax, Nova Scotia, this 12th day of March 2009.

"Wyman W. Webb"

Webb J.

Citation: 2009TCC133
Date: 20090312
Docket: 2008-2676(IT)I

BETWEEN:

ROBERT SHINDLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether certain amounts that were withheld from the Appellant's pay and remitted to various states and cities in the United States should be included in determining the amount of foreign non-business-income tax paid by the Appellant in 2005 for the purposes of section 126 of the *Income Tax Act* (the "*Act*").

[2] In 2005, the Appellant worked as a sound engineer on the Hairspray musical tour in the United States. The tour started in Seattle and then moved to various cities throughout the United States. When he was working in states or cities that imposed an income tax, amounts were withheld from his paycheque and identified as either state income tax or local income tax (in addition to the amounts withheld for US federal income tax).

[3] The Appellant filed a US federal income tax return in 2005 as well as a return for the state of Wisconsin. The total amount that the Appellant claimed as foreign non-business-income tax paid in 2005 was US$16,959. Of that amount US$15,033, was the amount paid for U.S. federal income taxes and US$525 was the amount paid to the state of Wisconsin. These amounts have been accepted by the Respondent as foreign non-business-income tax paid by the Appellant. The balance of US$1,401 (CAN$1,697) was not accepted by the Respondent as foreign non-business-income tax paid. The amounts that comprise this balance were paid to a total of 11 different states and cities with the amount paid to a particular state or city ranging from a low of $20 paid to Kansas City and a high of $261 paid to the state of Ohio.

[4] When the Appellant filed his Wisconsin state tax return his tax liability to the state of Wisconsin was greater than the amount that had been withheld. His tax liability to the state of Wisconsin was US$525 and the amount that had been withheld was US$507.

[5] Paragraph 10 of the Reply sets out the assumptions made by the Minister in reassessing the Appellant. This paragraph provides as follows:

> 10. In determining the Appellant's tax liability for the 2005 taxation year the Minister assumed the following facts:
>
> a) the Appellant earned foreign non-business income in the United States ("U.S.") working as a sound engineer during the 2005 taxation year;
>
> b) in his return of income, the Appellant reported foreign tax paid in the amount of $20,548.07 and foreign non-business income in the amount of $93,317.61;
>
> c) the Appellant provided a U.S. Non-resident Alien Income Tax Return (Form 1040NR), showing a tax liability of $15,033.00 U.S. and a Non-resident & Part-year resident Wisconsin Income Tax Return (Form 1NRP), showing a tax liability of $525.00 U.S. to support his claim for foreign tax credits;
>
> d) the Minister allowed foreign tax credits based on the foreign taxes paid by the Appellant in the amount of $18,850.00 Canadian (($15,033.00 + $525) x $1.2116324 exchange rate);
>
> e) the Appellant failed to provide proof that the disallowed foreign taxes paid resulted in a settlement for his foreign tax liability;
>
> f) the Minister was unable to determine whether or not the amounts withheld on "Form W-2 Wage and Tax Statements" received by Appellant for

> working in the United States resulted in a settlement for foreign tax liability, or if the amount would result in a refund to the Appellant;

[6] The Respondent did not assume that the amounts that were remitted to the various states and cities in question were not income taxes. It is implicit in the assumptions that were made that the amounts remitted were income taxes. The assumption in paragraph e) is that "the Appellant failed to provide proof that the disallowed foreign taxes paid resulted in a settlement *[sic]* for his foreign tax liability".

[7] The assumption in paragraph f) is not a proper assumption as the Appellant should not have the onus of showing what the Minister was able or was unable to determine.

[8] It seems to me from my reading of paragraph e) that the Minister based the reassessment on an assumption that the disallowed foreign taxes paid did not result in a settlement of the Appellant's foreign tax liability. That is the fact that presumably was assumed. The reference to the failure of the Appellant to provide proof should not have been included. The issue should not be whether the Appellant failed to provide proof but whether the amounts paid were foreign non-business-income tax paid by the Appellant to a government of a country other than Canada.

[9] A settlement of the Appellant's foreign tax liability to a particular jurisdiction would only occur if the actual tax liability in that particular jurisdiction was equal to or less than the amount that was withheld and remitted to that jurisdiction. It is clear from the state tax return that was filed for Wisconsin that the amount withheld did not settle his tax liability, because his tax liability was greater than the amount that was withheld. If only amounts that resulted in a settlement of a foreign non-business-income tax liability were included in foreign non-business-income tax paid, then if the Appellant had not paid the balance payable of US$18 to the State of Wisconsin, he would not be entitled to include US$507 in foreign non-business-income tax paid to the State of Wisconsin as the US$507 that was paid did not result in a settlement of his foreign tax liability to the State of Wisconsin. It does not seem to me that this would be the correct result. The issue is not whether or not his foreign tax liability has been settled, but what amount has the Appellant paid as foreign non-business-income tax.

[10] Subsection 126(1) of the *Act* provides, in part, as follows:

> 126. (1) A taxpayer who was resident in Canada at any time in a taxation year may deduct from the tax for the year otherwise payable under this Part by the taxpayer an amount equal to
>
> > (a) such part of any non-business-income tax paid by the taxpayer for the year to the government of a country other than Canada … as the taxpayer may claim,

[11] The definition of "non-business-income tax" in subsection 126(7) of the *Act* provides, in part, that:

> "non-business-income tax" paid by a taxpayer for a taxation year to the government of a country other than Canada means, subject to subsections (4.1) and (4.2), the portion of any income or profits tax paid by the taxpayer for the year to the government of that country…

[12] Subsection 126(6) of the *Act* provides that:

> (6) For the purposes of this section,
>
> > (a) the government of a country other than Canada includes the government of a state, province or other political subdivision of that country;

[13] The definition of "non-business-income tax" does not provide that the amount paid must result in a settlement of the tax liability. It only provides that the amount paid be income tax paid by a taxpayer to the government of a country other than Canada. Therefore, for the amount paid to the State of Wisconsin, if the Appellant would have only paid US$507 when his actual tax liability was US$525, the amount of US$507 would still be an amount of income tax paid by the Appellant to the State of Wisconsin and hence would still have been included in his foreign non-business-income tax paid even though the US$507 payment did not result in a settlement of his liability for income tax to the State of Wisconsin.

[14] If the amount that is withheld and remitted to any particular state or city is less than his tax liability to that state or city, then the amount withheld is a payment of tax even though it is not a settlement of his tax liability in that jurisdiction. If the amount that is withheld and remitted to any particular state or city is equal to his tax liability to that state or city, then the amount withheld is a payment of tax and would result in a settlement of his tax liability in that jurisdiction. If the amount withheld and remitted to a particular state or city exceeds the tax liability to that state or jurisdiction, then the excess amount is not a tax.

[15] In *Meyer v. The Queen*, 2004 TCC 199 the individual failed to claim a treaty exemption, but yet still sought to deduct the amount of taxes paid to the United States as a foreign tax credit. In that case Justice Hershfield made the following comments:

> 20 While I have some reservations in accepting the notion that the CCRA can determine if a foreign tax paid is a voluntary payment and therefore not a "tax", on the facts of this case, based on the authorities cited by the Respondent, I accept that the amount in dispute was not a "tax" paid to the foreign jurisdiction in question. That is not to say however that all voluntary payments are not a "tax". For example, that one might not claim discretionary deductions and voluntarily increase the tax in a foreign jurisdiction would not entitle the CCRA to deny a credit on that basis. Nor should the CCRA dictate any foreign filing position on a resident taxpayer. However, where the resident taxpayer has approached his foreign filing position without regard to providing the information necessary to determine the tax payable, such as not submitting required forms or return information to claim a Treaty entitlement, and has refused to correct the error or establish that it was not in error, the resultant overpayment can be regarded as an amount paid other than as a "tax".
>
> …
>
> 22 With that said, I wish to emphasize that it is always open to the taxpayer to bring evidence that the foreign tax paid was not gratuitously paid without basis under the laws of the foreign jurisdiction. That is a question this Court can determine but the onus is on the taxpayer. The Appellant chose to ignore that onus and simply wanted the CCRA to work it out with the U.S. Treasury or Internal Revenue Service and leave him out of it. This is not an acceptable position in my view. **That is, while the language of section 126 does not ultimately permit the CCRA to deny a credit because it has reason to believe that the foreign tax has been erroneously calculated under the laws of that foreign jurisdiction or is limited by provisions of the tax Treaty between that jurisdiction and Canada, nothing prevents it from taking that position and putting the onus on the taxpayer to show that such belief is not well-founded.** In any event Article XVIII, paragraph 2(a), expressly provides that the U.S. cannot charge a tax in excess of 15% in respect of pensions received from the U.S. by a Canadian resident. Article XXIX, paragraph 3, provides that this limitation applies to citizens of the U.S. **An excess amount paid then is not a "tax".**
>
> (emphasis added)

[16] While Justice Hershfield in the first part of paragraph 22 refers to the taxpayer having the onus, he confirms that this arises when the Respondent has taken the position that the amount paid by a taxpayer exceeds that person’s tax liability. In this case the Minister did not assume that the amounts withheld exceeded the tax liability of the Appellant in any of the relevant jurisdictions.

[17] In *del Valle* v. *Minister of National Revenue* [1986] 1 C.T.C. 2288, 86 DTC 1235, Justice Sarchuk made the following comments:

> 11 The Johnston case (supra), was considered in Hillsdale Shopping Centre Limited v. Minister of National Revenue, [1981] C.T.C. 322, 81 D.T.C. 5261 and at 328 (D.T.C. 5266) Urie, J. made the following comments:
>
> > If a taxpayer, after considering a reassessment made by the Minister, the Minister's reply to the taxpayer's objections, and the Minister's pleadings in the appeal, has not been made aware of the basis upon which he is sought to be taxed, the onus of proving the taxpayer's liability in a proceeding similar to this one would lie upon the Minister. This defect may be due to a number of reasons such as a lack of clarity on the part of the Minister in expounding the alleged basis of the taxability which could include an attempt by the Minister to attach liability on one of two or more alternative bases thus failing to make clear to the taxpayer the assumption upon which he relies.
>
> 12 I believe this is the approach which should be followed in the case at bar. In my view the respondent has failed to allege as a fact an ingredient essential to the validity of the reassessment. There is no onus on the appellant to disprove a phantom or non-existent fact or an assumption not made by the respondent.
>
> 13 While it was possible for the respondent to have alleged further and other facts the respondent did not choose to do so in this case but simply relied on the facts assumed at the time of the reassessments. I emphasize that if the respondent had alleged such further or other facts the onus would have been on him to establish them. (See *Minister of National Revenue* v. *Pillsbury Holdings Limited*, [1965] 1 Ex. C.R. 678, [1964] C.T.C. 294).
>
> 14 The facts relied upon do not support the reassessments. For these reasons the appeal is allowed and the matter is referred back to the respondent for reassessment on the basis that the sum of $5,100 was improperly added in computing the appellant's income in each of her 1980 and 1981 taxation years.

[18] In *Pollock v. The Queen*, [1994] 1 C.T.C. 3, 94 DTC 6050, Justice Hugessen, on behalf of the Federal Court of Appeal, made the following comments:

> It is, of course, the general rule that every party to litigation in this Court must plead the facts upon which he relies in such a way as to put his opponent fairly on notice of the case he has to meet. Where a party's pleadings are so inadequate as to disclose no case at all he runs the risk of having them struck out and of losing for that reason. That rule is quite irrelevant here. There is no question in the present case of the Minister's pleadings being inadequate or of the appellant not knowing clearly and beyond any possibility of doubt the basis upon which he was reassessed. That basis was and is that the appellant's dealings in shares of the companies in question constituted for him an adventure in the nature of trade so as to make the profits therefrom taxable as income.
>
> The special position of the assumptions made by the Minister in taxation litigation is another matter altogether. It is founded on the very nature of a self-reporting and self-assessing system in which the authorities are obliged to rely, as a rule, on the disclosures made to them by the taxpayer himself as to facts and matters which are peculiarly within his own knowledge. When assessing, the Minister may have to assume certain matters to be different from or additions to what the taxpayer has disclosed. While the Minister's assumptions, if any, are generally made in the pleadings, that is not always the case and we have seen, in this very record, an example of the taxpayer taking pains to demolish assumptions which the Minister had not pleaded. Where pleaded, however, assumptions have the effect of reversing the burden of proof and of casting on the taxpayer the onus of disproving that which the Minister has assumed. Unpleaded assumptions, of course, cannot have that effect and are therefore, in my view, of no consequence to us here.
>
> The burden cast on the taxpayer by assumptions made in the pleadings is by no means an unfair one: the taxpayer, as plaintiff, is contesting an assessment made in relation to his own affairs and he is the person in the best position to produce relevant evidence to show what the facts really were.
>
> Where, however, the Minister has pleaded no assumptions, or where some or all of the pleaded assumptions have been successfully rebutted, it remains open to the Minister, as defendant, to establish the correctness of his assessment if he can. In undertaking this task, the Minister bears the ordinary burden of any party to a lawsuit, namely to prove the facts which support his position unless those facts have already been put in evidence by his opponent. This is settled law.

[19] Justice Rothstein in *The Queen* v. *Anchor Pointe Energy Ltd.* 2003 DTC 5512 stated that:

> [23] The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet.

[20] In *Loewen* 2004 FCA 146, Justice Sharlow, on behalf of the Federal Court of Appeal, made the following comments:

> 11 The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown. This is well explained in Schultz v. R. (1995), [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (Fed. C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4 (S.C.C.)).

[21] Leave to appeal the decision of the Federal Court of Appeal in *Loewen* to the Supreme Court of Canada was refused (338 N.R. 195 (note)).

[22] In *Hickman Motors Ltd. v. Her Majesty the Queen*, [1997] S.C.J. No. 62, Justice L'Heureux-Dubé of the Supreme Court of Canada made the following comments in relation to an Appellant's onus of "demolishing" the Minister's assumptions:

> 92 It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco Ltd.* v. *Minister of National Revenue*, [1966] S.C.R. 95 (S.C.C.), and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance Co.* v. *Dalton Cartage Ltd.*, [1982] 1 S.C.R. 164 (S.C.C.); *Pallan* v. *Minister of National Revenue* (1989), 90 D.T.C. 1102 (T.C.C.) at p. 1106. The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd.* v. *Minister of National Revenue* (1959), 59 D.T.C. 1098 (Can. Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston* v. *Minister of National Revenue*, [1948] S.C.R. 486 (S.C.C.); *Kennedy* v. *Minister of National Revenue* (1973), 73 D.T.C. 5359 (Fed. C.A.), at p. 5361). **The initial burden is only to "demolish" the exact assumptions made by the Minister but no more**:*First Fund Genesis Corp.* v. *R.* (1990), 90 D.T.C. 6337 (Fed. T.D.), at p. 6340.
>
> (emphasis added)

[23] Therefore it is very important that the assumptions clearly and accurately state the facts assumed by the Minister as the initial burden on the Appellant "is only to "demolish" the exact assumptions made by the Minister and no more". In this case the only assumption related to the amount paid as foreign non-business-income tax was that the Appellant had failed to prove that the amounts that had been withheld and remitted had resulted in a settlement of the Appellant's tax liability to the various states and cities. However, this assumption does not set out the relevant facts that must be determined in order to decide whether the amounts withheld should be included in determining the amount of the foreign non-business-income tax paid by the Appellant in 2005.

[24] The issue is not whether the payments made by the Appellant to the various jurisdictions resulted in a settlement of his income tax liability to these various jurisdictions but rather whether the amounts that were paid by the Appellant were foreign non-business-income tax that he paid to the various states and cities. To the extent that the amounts withheld and remitted to a particular jurisdiction were less than or equal to income tax liability to that jurisdiction, then such payments would qualify as foreign non-business-income tax paid. To the extent that the amounts withheld and remitted to a particular jurisdiction exceeded his income tax liability to that jurisdiction, such excess amount would not qualify as foreign non-business-income tax paid. There were no assumptions made with respect to which jurisdictions had received more than the amount of his income tax liability to such jurisdiction or the amount of such excess payment or payments. Therefore the Respondent has the onus of proof in relation to these facts.

[25] The agent for the Appellant was the Appellant's accountant. No notice was provided to the Respondent that the agent would be testifying as an expert. Paragraph 7 of the *Tax Court of Canada Rules (Informal Procedure)* provides as follows:

> 7. (1) A party who intends to call an expert witness at the hearing of an appeal shall, not less than 10 days before the commencement of the hearing, file at the Registry and serve on the other parties a report, signed by the expert, setting out the expert's name, address and qualifications and the substance of the expert's testimony.
>
> (2) An expert witness may not testify, except with leave of the presiding judge, if subsection (1) has not been satisfied.

[26] Since the amount of foreign taxes in dispute is less than CAN$1,700, I granted leave for the accountant to testify as an expert witness. His credentials were not challenged by the counsel for the Respondent. The accountant is a Chartered Accountant. He had worked in Toronto at a major accounting firm dealing with

Canadian executives who worked in the United States. In 1989, he formed his own firm which specializes in clients who work in the entertainment and arts fields. He has extensive experience in filing federal US tax returns. He has filed returns in 30 different states in the United States. He has filed returns in every jurisdiction in question in this case, except Akron, Ohio.

[27] The accountant stated that the Appellant had filed the necessary forms related to the amounts to be withheld from his paycheques and that based on his experience, the amounts withheld would generally be close to or equal to the actual liability of the Appellant to the various states and cities. If a return would have been filed in each jurisdiction, for some jurisdictions there may be a small refund. For the other jurisdictions, the amount withheld would be less than or equal to the tax liability of the Appellant. Any shortfall would be small. There was no evidence to suggest that the Appellant would be entitled to a full refund of any amounts that had been withheld and remitted.

[28] I accept the evidence of the accountant that the amounts withheld and remitted would be approximately equal to the income tax liability of the Appellant to the various states and cities. However since the accountant did acknowledge that the Appellant would be entitled to a small refund in some of the jurisdictions, an amount should be deducted for this refund amount since, as noted above, the excess amount paid in a particular jurisdiction is not a tax.

[29] The only evidence of the amount by which the amount withheld may be different from the actual income tax liability to a city or state is the evidence related to the state of Wisconsin. In that case, the amount withheld was $507 while the actual liability was $525. Therefore the amount withheld represented 97% of his actual tax liability. Extrapolating this to the other jurisdictions and assuming that the amounts withheld were within the same percentage range of his tax liability, would mean that the amount by which the Appellant overpaid or underpaid his taxes would be 3%. Since the amount in dispute is CAN$1,697 (US$1,401) and since the Appellant would not be entitled to a refund in each jurisdiction, the amount claimed should be reduced by one-half of 3% of CAN$1,697 or CAN$25 (US$21).

[30] As a result the appeal is allowed, with costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that in determining the foreign tax deduction available to the Appellant pursuant to subsection 126(1) of the *Act* the amount of foreign non-business-income tax paid by the Appellant to the government of a country other than Canada in 2005 should be increased by CAN$1,672 (US$1,380).

Signed at Halifax, Nova Scotia, this 12th day of March 2009.

"Wyman W. Webb"

Webb J.

CITATION:	2009TCC133
COURT FILE NO.:	2008-2676(IT)I
STYLE OF CAUSE:	ROBERT SHINDLE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 24, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	March 12, 2009

APPEARANCES:

Agent for the Appellant:	Warren McCann
Counsel for the Respondent:	Michael Alder

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

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