Docket: 2008-2054(IT)I

BETWEEN:

DAVID JOHN COOPER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 1, 2009, at Vancouver, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the appellant: The appellant himself

Counsel for the respondent: Shannon Currie

ORDER

UPON motion made by the respondent for an order striking the appellant's notice of appeal for lack of the Court's jurisdiction under Rule 53 and Rule 58(1)(*b*) of the *Tax Court of Canada Rules (General Procedure)*;

AND UPON hearing submissions of the parties;

The respondent's motion is dismissed.

IT IS ORDERED THAT costs in the amount of $250 shall be payable to the appellant by the respondent.

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

"Patrick Boyle"

Boyle J.

Citation: 2009 TCC 236
Date: 20090430
Docket: 2008-2054(IT)I

BETWEEN:

DAVID JOHN COOPER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle J.

[1] The taxpayer is a non-resident of Canada who disposed of taxable Canadian property in 2006. It appears that section 116 was complied with and the taxpayer obtained a tax clearance certificate upon remittance of a portion of the sales proceeds to the Canada Revenue Agency ("CRA") to be held on account of his ultimate tax liability.

[2] The taxes payable as a result of the disposition were resolved prior to the notice of appeal being filed. The taxpayer's capital gains tax liability from the disposition, after accounting for a prior year's capital loss carry forward, is not in dispute. A portion of the sale price that was held in a financial institution and the taxpayer received interest in respect of that deposit. The Part XIII non-resident withholding tax owing on the interest paid to him by the Canadian financial institution was also resolved prior to the notice of appeal being filed.

[3] In his notice of appeal the taxpayer raises three issues relating to interest for which he seeks relief.

[4] Firstly, the taxpayer has asked the CRA, and is now asking this Court in his notice of appeal, that the difference between (i) the payment made on account of tax in order to obtain the release and (ii) the total net capital gains tax payable under

Part I of the *Income Tax Act* (the "*Act*") which the parties have agreed to, be paid to him. It is the taxpayer's position that the full refund has not yet been paid. This is perhaps complicated somewhat at the pleadings stage by the fact that apparently the CRA made an error at the outset and withheld his refund on the basis there was a previously unpaid balance. The Crown apparently now agrees there was not an unpaid balance. With respect to this relief claimed, the taxpayer is asking this Court to address the computation and payment of a refund of overpaid tax.

[5] The taxpayer's second and third requests for relief raise interest-related claims.

[6] The taxpayer's second claim for relief is with respect to his Part I refund. He disputes that the CRA properly calculated the interest owing to him on the credit balance in his account which they had held since the original payment on account of tax was made. According to the taxpayer, the interest credited on his refund balance owing to him reflected an annual rate of only approximately 1% whereas the prescribed rate at the time was 7%. The taxpayer asked the CRA, and in his notice of appeal is asking the Court, to pay the prescribed rate of interest on his refund.

[7] Thirdly, the taxpayer is disputing whether the interest for which he was assessed in his Part XIII non-resident withholding tax assessment was properly calculated. He states that the prescribed rate at the relevant time was 9% but that the interest assessed was almost double that rate. This is complicated somewhat by the fact that it appears the taxpayer made his calculations on the assumption his non-resident withholding tax was due on April 30 of the following year, being the normal filing due date, whereas Part XIII provides that the tax is to be remitted forthwith and the CRA's published administrative practice provides that it should be remitted by the 15th of the month following receipt. It is further complicated by the fact that the Crown says that the CRA's assumption pleaded on when the Part XIII tax was payable is itself incorrect as well. With respect to this third request for relief, the taxpayer is clearly asking this Court to review an amount of interest assessed by the CRA in a notice of assessment.

[8] At this point, it does not appear that there is a dispute regarding post-assessment interest, although I suspect that if this matter proceeds to trial, we may find that there is similar disagreement on interest computation methods.

I. <u>The motion</u>

[9] The respondent has brought a motion under Rule 53 and Rule 58(1)(*c*) asking this Court to strike the taxpayer's notice of appeal. The notice of motion uses the

necessary buzz words of scandalous, frivolous, vexatious and abuse of process, “plain and obvious that the appeal can not succeed as pleaded”, and “the appellant can not obtain the relief sought in the appeal on the basis of the allegations plead in the notice of appeal”. However, in short, it is the Crown’s position that this Court does not have jurisdiction to deal with the computation of refunds, the computation of interest on refunds, the payment of refunds or interest on the refunds, or, according to the notice of motion, the assessment of interest on amounts of tax assessed by the Minister.

II. The test for striking pleadings

[10] The applicable test is best described by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at paragraph 33:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". . . . Only if the action is certain to fail because it contains a radical defect . . . should the relevant portions of a plaintiff's statement of claim be struck out . . .

[11] Justice Lamarre of this Court in *Hardtke v. The Queen*, 2005 TCC 263, 2005 DTC 676 wrote at paragraph 11:

> [A] high standard must be met in order to strike out a pleading. Indeed, it must be plain and obvious, or beyond a reasonable doubt, that the pleading in question discloses no reasonable cause of action . . .

[12] It is clear that the Crown bears a heavy burden in a motion such as this. Looked at another way, the judges of this Court should be expected to deny Canadian taxpayers their day in court only in the clearest of cases.

[13] In this case, the Crown’s position is that the taxpayer’s claims for relief have no chance of being accorded by this Court because this Court does not have the jurisdiction to consider them. In this case, the issue is therefore a straightforward legal analysis of the jurisdiction of this Court as set out in the relevant provisions of the *Income Tax Act* and the *Tax Court of Canada Act*. There are no other allegations of scandal, frivolity, vexatiousness or abuse to an extent that would need be considered in the context of a motion to strike an action.

III. Jurisdiction of the Court in respect of the relief claimed in the notice of appeal

[14] Clearly, if a notice of appeal only asks for relief that this Court does not have jurisdiction to grant, this Court can be expected to make an order under either rule 58 or rule 53 striking the notice of appeal. It is therefore necessary to determine whether this Court has jurisdiction in respect of;

1) the computation and payment of refunds;
2) the computation and payment of interest on refunds payable under the *Act*; and,
3) the amount of interest assessed in an assessment issued by the CRA.

[15] Appeals under the *Act* are grounded in section 169 and section 171 of the *Act*. Subsection 169(1) provides that a taxpayer may appeal an "assessment" to the Tax Court if he has first served a notice of objection to that assessment under section 165. Subsection 165(1) provides that a taxpayer can object to an assessment under Part I by serving a written notice of objection.

[16] Subsection 152(1) of the *Act* provides that, following the filing of a return, the Minister shall examine the return and "assess the tax for the year, the interest and penalties, if any, payable . . ." (Emphasis added).

[17] It is clear from these provisions that an assessment under subsection 152(1) is subject to the right of objection, and every dispute remains open to appeal to the Tax Court of Canada. The assessment provided for in subsection 152(1) expressly provides for tax being assessed, penalties being assessed and interest being assessed. It could not be more clear that interest assessed in a notice of assessment under Part I can be the subject of appeal to this Court.

[18] In Mr. Cooper's case, there was interest assessed in the second assessment, being that for non-resident withholding tax. Non-resident withholding tax is assessed under Part XIII and not under Part I. However, subsection 227(7) provides that, with respect to assessments of non-resident withholding tax, the relevant Part I provisions relating to assessments, objections and appeals to this Court all apply with any modifications that the circumstances require.

[19] It is clear that the taxpayer's notice of appeal disputes the assessed amount of interest in the Part XIII assessment. This is interest assessed as payable by him, the

non-resident taxpayer. This Court has jurisdiction to hear such a claim. The respondent's motion cannot succeed.

[20] This same issue has already been clearly dealt with in the former Chief Justice Bowman's decision in *Wright et al. v. The Queen*, 2005 TCC 485, 2005 DTC 1211. In that decision, Bowman C.J. wrote, at paragraph 3:

> Interest, like tax and penalties, is a component of the assessment the Minister is entitled to make and the correctness of its computation or imposition is a matter that can be challenged in an appeal to the Tax Court of Canada from an assessment.

[21] To like effect are the comments of this Court's current Chief Justice Rip in *McFadyen v. The Queen*, 2008 TCC 441, 2008 DTC 4513 wherein he wrote, at paragraph 42:

> However, the [notice of appeal] alleges that the Minister has incorrectly calculated the interest on the tax liability. This part should not be struck. The notices for 2006 reassessments do indicate interest accrued on federal tax unpaid. As there are new amounts of interest calculated and assessed, the appellant should be permitted to challenge the Minister's computation of interest.

[22] To like effect are the former Chief Justice's comments in *Moledina v. The Queen*, 2007 TCC 354, 2007 DTC 1415 wherein he wrote, at paragraph 5:

> It is appropriate, however, that at this point I deal briefly with the matter of this Court's jurisdiction in respect of interest. It is sometimes said, inaccurately in my view, that we have no jurisdiction when a taxpayer objects to the imposition of interest on income taxes. This statement is too broad. If the issue in an appeal is whether the interest was properly calculated, or whether it was imposed in accordance with the provisions of the *Act*, patently the Tax Court has jurisdiction to hear such an appeal. Interest is a component of an assessment and the Tax Court's jurisdiction includes the power to hear and determine appeals from assessments under the various statutes mentioned in section 12 of the *Tax Court of Canada Act*. See *Union Gas Limited v. The Queen*, 90 DTC 6659.

IV. The Pleadings

[23] The taxpayer, who is self-represented, has filed a most clear, concise and informative one and a half-page notice of appeal supplemented by a half-page

detailed set of his calculations of the amounts of capital gains refund and interest thereon and withholding tax and interest payable thereon which he feels supports his position. The taxpayer's notice of appeal is among the finest I have seen filed by a self-represented taxpayer in an informal proceeding in this Court. It is a model of clarity.

[24] With respect to the taxpayer's dispute with respect to the Part XIII tax assessment his paragraph says:

> I next received a Notice of Assessment dated 12th July, 2007, claiming the sum of $184.12 non-resident withholding tax and $6.47 interest. The claim for non-resident tax was correct but the interest charge was not, because when the tax became due (on 30th April, 2007) there was a credit of some $20,000.00 in my account. I should also point out that the interest claimed equated to an annual rate of 17.57%, almost double the prescribed rate at that time of 9%.

[25] I can not but read this paragraph as raising two distinct complaints with respect to the interest assessed in the Part XIII assessment. The first relates to their having been a credit balance in his account. The second relates to the computation of interest on the tax assessed even if there had not been a credit in his tax account.

[26] The respondent has asked that the Court strike out the pleading in its entirety. The respondent has not asked that particular paragraphs be struck out. I therefore need not carry on to turn my mind to address the Court's jurisdiction or lack thereof as it relates to refunds of interest payable under the *Act* by the CRA to taxpayers on refunds due. Indeed, had the Crown asked for paragraphs dealing with refunds and interest on refunds to be struck from the pleading separately, I would not have been inclined to do that as the paragraphs relating to those aspects are an integral part of the context in which the dispute relating to the Part XIII tax arises. Indeed, if I understand both sides' information given in argument on the motion, it appears that the initial failure by the CRA to refund the excess payment on account of capital gains tax further related to tax assessed and collected on an Old Age Security dispute which subsequently had to be corrected in the taxpayer's favour.

[27] It is clear from the Crown's notice of motion as well as its outline of argument that they also read the notice of appeal paragraph relating to the Part XIII assessment as dealing with "the assessment of interest on amounts of tax assessed by the Minister". See Ground (a)(iii) of the notice of motion. (See also paragraphs 7(b), 29(b), and 30 of the respondent's written outline of argument.)

[28] I would like to note that the Crown filed a reply to the notice of appeal. That reply had been prepared by a CRA litigation Officer. The reply did not raise the matters raised by the Crown in its motion. No question of jurisdiction was raised whatsoever. However, I do not believe a lack of jurisdiction is a mere irregularity which could be subject to the fresh step rule.

V. Conclusion

[29] This motion was brought long after the Crown's reply was filed. It was initiated shortly before the trial to be heard at the opening of the time assigned for the trial. As the taxpayer pointed out, our Rules do not address motions in informal appeals; however that does not mean they can not be brought in appropriate circumstances. The questions raised by the respondent's motion could have been dealt with, on notice to the taxpayer, in the course of the trial. The result of the Crown's unsuccessful motion is that the trial has been delayed instead of resolved. The taxpayer will have to return later for his day in court.

[30] The respondent's motion is denied, a new trial date will be assigned, and costs are awarded in favour of the taxpayer in the amount of $250. I will be ordering that, in the circumstances, the hearing of this appeal will be heard by me on my next available sittings in Vancouver. As stated when hearing the motion, as a practical matter I will be expecting to hear evidence and argument from both parties on the proper method computation of interest under the *Act* and its quantification.

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

"Patrick Boyle"

Boyle J.

CITATION:	2009 TCC 236
COURT FILE NO.:	2008-2054(IT)I
STYLE OF CAUSE:	DAVID JOHN COOPER v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	April 1, 2009
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF ORDER:	April 30, 2009

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Shannon Currie

COUNSEL OF RECORD:

For the appellant:	
Name:	
Firm:	
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