Docket: 2009-1013(IT)I

BETWEEN:

GUY-NOËL CHAUMONT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 2009, at Québec, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Anne-Marie Boutin

JUDGMENT

The appeal from the reassessment under the *Income Tax Act* (the Act) is allowed. Consequently, the reassessment for the 2004 taxation year is set aside; however, the reassessment for the 2005 taxation year is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this second day of October, 2009.

"Alain Tardif"

Tardif J.

Translation certified true
On this 10th day of November 2009
Monica Chamberlain, Reviser

Citation: 2009 TCC 493
Date: 20091002
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BETWEEN:

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REASONS FOR JUDGMENT

Tardif J.

[1] This appeal pertains to the 2004 and 2005 taxation years. It raises three questions, which the respondent has stated as follows:

> (a) For the 2004 taxation year, the Minister had the authority to reassess beyond the normal reassessment period.
>
> (b) For the 2004 and 2005 taxation years, the Minister was justified in adding the amounts of $1,259 and $2,188, respectively, as interest income.
>
> (c) For the 2004 and 2005 taxation years, the Minister was justified in granting the appellant the respective amounts of $21.30 and $57.34 as foreign tax credits.

[2] The appellant was the only person to testify. He referred to a detailed memorandum, which is in keeping with the contents of, but also expands upon, his Notice of Appeal, which is worded as follows:

[TRANSLATION]

Dear Sirs:
This is further to my objection for the 2004 and 2005 taxation years, which, in my opinion, does not conform to the Protocol signed on November 30, 1996, in Ottawa, between France and Canada. The Protocol reads as follows:

Article 24

Non-discrimination

(1) Individuals who are nationals of a Contracting State shall not be subject in the other Contracting State to any taxation or any requirement connected therewith, **which is other or more burdensome** than the taxation and connected requirements to which individuals who are nationals of that other State **in the same circumstances are or may be subjected, notably with respect to the residence.** This provision shall apply to individuals **whether or not** they are residents of one of the Contracting States.

Thus, the Protocol referred to above applies only to taxpayers of the two contracting states who are in the same situation. The other categories are not covered and cannot under any circumstances be used as comparators to establish a common tax burden. We are therefore dealing with an agreement of reciprocity that works in both directions, not just in one direction.

What is my situation?

Answer:

I was born in France and reside permanently in Canada.
I am a dual citizen and pay my taxes to Canada.
Part of my investment interest income is in France.

Thus the comparator for my situation is:

A taxpayer born in Canada who resides permanently in France.
Who has dual citizenship and pays his taxes to France.
Part of whose investment interest is in Canada.

> Question:
>
> Will a Canadian/French taxpayer have a heavier or different tax burden on his Canadian source income based on the pretext that the Canadian tax burden is heavier than the tax burden imposed by France?
>
> The answer is no: he will pay $85.59 for 2004 and $230.93 for 2005, and I made those payments on August 7, 2008.
>
> Moreover, can the French income portion be added to the Canadian income portion in order to reduce everything to the Canadian tax burden as a "common denominator", thereby increasing the tax liability, without contravening the intent and the letter of Article 24 of the Protocol of November 30, 1996, which clearly dictates that the most advantageous outcome applies?
>
> And can Guy-N. Chaumont, Canadian, be distinguished from Guy-N. Chaumont, Canadian, without there being any discrimination?
>
> I respectfully ask the Tax Court of Canada to answer my questions under the Informal Procedure.
>
> Guy-Noël Chaumont

[3] The amounts set out in the Notice of Appeal are not in dispute. The appellant, an engineer by training, gave a proper account of the chronology of his file and he referred several times to article 24, on non-discrimination, which reads as follows:

> (1) Individuals who are nationals of a Contracting State shall not be subject in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which individuals who are nationals of that other State in the same circumstances are or may be subjected, notably with respect to the residence. This provision shall apply to individuals whether or not they are residents of one of the Contracting States.

[4] He asserted and repeated that, under this article of the Convention between Canada and France, given income from one signatory of the Convention must be given the same tax treatment as given income from the other Contracting State. He asserted that the income earned in France, and which gave rise to the two reassessments, is exempt from taxation in France, and should therefore also be exempt in Canada. In other words, interest income that is not assessed in France should not have been assessed in Canada either.

[5] The first matter to decide is whether the Minister could make a reassessment that no longer falls within the normal reassessment period.

[6] In this regard, paragraph 152(4)(*a*) of the *Income Tax Act* (the Act), permits or confers such authority, provided that it can be concluded, on the evidence, that the person concerned misrepresented the facts by wilful default, or, at the very least, by neglect or carelessness, upon filing his income tax return for a taxation year that falls outside the statutory period.

[7] I feel it is important to state at the outset that the burden of proof is substantially less demanding than the burden required by the Act to justify the imposition of a penalty.

[8] However, it is a real burden of proof, not a mere formality in which it is simply shown that the tax return does not comply with the provisions of the Act; otherwise, paragraph 152(4)(*a*) would have no justification, because, in such an instance, mere evidence that a tax return does not meet all the provisions to which it was subject, would enable the Minister to go back in time without restrictions.

[9] Parliament has expressly set up a barrier, an obstacle, that requires the Minister to provide specific proof in matters that go back farther than the statutory period.

[10] Although the seriousness is not comparable to that required for the imposition of a penalty, it must be an error, a wilful default, a sort of wilful blindness, a sort of indifference, or even a somewhat reckless lack of care or prudence.

[11] In the case at bar, the Minister sought to highlight the appellant's experience, knowledge, and education with a view to establishing evidence of an error or wilful default. However, the evidence has shown and established exactly the opposite. An engineer by training, concerned about meeting his obligations, he drew on his knowledge and skills to argue the merits of his allegations, not to avoid or evade his tax obligations. In fact, he initiated several efforts in this regard, and obtained information which, in his opinion, validates his interpretation.

[12] Based on the fact that Canada and France have signed an agreement that provided for non-discrimination, he assumed that if one country accepted that certain income earned on its territory was exempt from taxation, then the other signatory country, in which the income earner resided, must exempt such income as well. Hence, the appellant concluded that the reassessments were unfounded, and he demanded that they be vacated.

[13] Being a citizen of both Canada and France, the appellant submits that this is an unusual situation that justifies such tax treatment.

[14] In order to validate his allegations, the appellant also noted that there is certain specific income that both countries did not tax reciprocally, namely, government pensions.

[15] Although the appellant's submissions were unusual and even surprising, they were neither far-fetched nor unreasonable enough for it to be concluded that he made a wilful default or mistake with the intent to escape from his Canadian tax obligations.

[16] Firstly, he expressed his objection, and secondly, he took initiatives to show that his allegations had merit, while taking into consideration the fact that certain income, specifically, pension income paid to a citizen who lives in a country other than the one that pays the pension, is not taxed.

[17] The cross-examination has demonstrated that the appellant had no specific knowledge of taxation; in fact, he asserted that he relied on the services of a business in this regard. He also said that he had provided all the information and documents regarding his interest income from France.

[18] To conclude that the appellant's conduct was a wilful default or that it constituted a sufficient error to permit the Minister to assess beyond the normal period, would affect any taxpayer's right to contest the merits of an assessment, and would cause the limitation period imposed by Parliament to be essentially theoretical.

[19] It is certainly wise and prudent to pay the amount set out in an assessment first, and object to the assessment afterwards. However, I do not believe that it is possible, in the case at bar, to conclude that the appellant's approach amounts to a mistake or wilful default.

[20] The amounts in issue are small. A wilful default requires a certain indifference or carelessness that is admittedly less marked than what would be required for a penalty, but it seems to me essential that the evidence genuinely support a complaint that such indifference or carelessness has been shown.

[21] In order for the Minister to be able to make a reassessment for a period beyond the statutory one, the evidence would also have to show that the default was capricious or stubborn.

[22] The case at bar did not involve stubbornness or capriciousness; rather, it involved a legitimate question and a principled concern that had a modicum of foundation. Moreover, the appellant did not simply express his objection. He took serious initiatives to approach serious entities in order to assert his position with respect to small amounts.

[23] The evidence does not show that the appellant made a wilful error or default; consequently, the appeal for that taxation year is allowed, and the reassessment for that year is vacated.

[24] As for the 2005 tax year, the assessment is confirmed: first of all, the contents of Article 24, entitled "non-discrimination" does not apply; and, secondly, the relevant statutory provisions, namely sections 2, 3, 4, 9, 12, 18, 20, 126 and 152 and subsection 248(1), clearly and unequivocally state that the disputed interest income was indeed taxable, subject to certain credits, which, in fact, the appellant was granted.

[25] Since the appellant's contentions are based on the *Convention Between the Government of Canada and the Government of the French Republic* (as amended by the Protocols of January 16, 1987 and November 30, 1995) I believe it would be helpful to cite the following excerpt therefrom:

> Article 11
> Interest
>
> 1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
>
> 2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest.

[26] This provision is very clear, and completely validates the reassessment.

Signed at Ottawa, Canada, this 2nd day of October 2009.

"Alain Tardif"

Tardif J.

Translation certified true
On this 10th day of November 2009
Monica Chamberlain, Reviser

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APPEARANCES:

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Counsel for the respondent:	Anne-Marie Boutin

COUNSEL OF RECORD:

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