Docket: 2008-2988(IT)I

BETWEEN:

MICHAEL A. POPE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 10, 2009, at Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Sara Fairbridge

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2006 taxation year is dismissed, without costs.

Signed at Vancouver, British Columbia, this 2nd day of October 2009.

"L.M. Little"

Little J.

Citation: 2009 TCC 498
Date: 20091002
Docket: 2008-2988(IT)I

BETWEEN:

MICHAEL A. POPE,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Little J.

A. Facts

[1] The Appellant was born in Andover, England in 1933. He immigrated with his parents to Canada in 1947.

[2] The Appellant moved to Kenya in 1949 and returned to Canada in 1951.

[3] The Appellant worked at various jobs in Canada from 1951 onward.

[4] In 1979, the Appellant moved to Honolulu, Hawaii and married a United States citizen. While living in Honolulu, the Appellant obtained a Green Card from United States authorities. The Appellant said that he also lived in other areas in the United States while working for several boat-building companies.

[5] The Appellant testified that he returned to Canada briefly in October 2005 and drove from Vancouver through the United States to Mexico. The Appellant said that he had developed a health condition caused by working with chemicals in the boat-building industry. He said that he suffers from Chronic Obstructive

Pulmonary Disease (“COPD”) and he was forced to retire because of this health problem. The Appellant said that he wanted to find a place to retire. In December 2005, the Appellant rented an apartment in Mexico. The Appellant did not return to Canada until September 2009.

[6] The Appellant entered Mexico on a six-month Visitor’s Permit. In May 2006, the Appellant applied for and obtained a Residence Card from Mexican officials (Exhibit A-1).

[7] On August 8, 2006 the Appellant received a lump sum retroactive payment of Old Age Security (“OAS”) from the Government of Canada in the amount of $29,941.33.

[8] The Appellant stated that the lump sum OAS payment covered the period from February 1998 until August 5, 2006.

[9] The Canada Revenue Agency (the “CRA”) withheld 15 per cent of the lump sum payment or $4,491.20.

[10] The Appellant claims that he is entitled to a refund of the amount of $4,491.20 that was withheld from the OAS payment by Canadian tax authorities.

B. Issue

[11] The issue is whether the Minister of National Revenue (the “Minister”) was correct in withholding the amount of $4,491.20 from the OAS lump sum payment that was received by the Appellant.

C. Analysis and Decision

[12] Based upon the evidence presented in court, I have concluded that the Appellant was a resident of Mexico throughout the 2006 taxation year. I have also concluded on the evidence presented that the Appellant was not a resident of Canada and was not a resident of the United States in 2006.

[13] Pursuant to Part XIII of the Canadian *Income Tax Act* (the “*Act*”), a non-resident person is liable to pay a withholding tax of 25% on certain types of income from Canada. This tax generally applies to passive income sources including superannuation and pension benefits.

[14] If there is not an applicable tax treaty, paragraph 212(1)(h) of the *Act* provides that the Appellant is required to pay tax at the rate of 25% on the OAS payments.

[15] Counsel for the Respondent maintains that the Appellant was a resident of Mexico throughout 2006 and therefore the *Convention between the Government of Canada and the Government of the United Mexican States for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income* (the "Canada-Mexico Tax Convention") applies. Article 18 of the Canada-Mexico Tax Convention, at paragraph 2, provides as follows:

> 2. Pensions arising in a Contracting State and paid to a resident of the other Contracting State may also be taxed in the State in which they arise, and according to the law of that State. However, in the case of periodic pension payments, the tax so charged shall not exceed the lesser of
>
> (a) 15 percent of the gross amount of the payment, and
>
> (b) The rate determined by reference to the amount of tax that the recipient of the payment would otherwise be required to pay for the year on the total amount of the periodic pension payments received by that individual in the year, if that individual were a resident of the Contracting State in which the payment arises.

[16] The amount received by the Appellant under paragraph (b) is calculated under section 217 of the *Act* which allows a non-resident taxpayer to elect to have his tax liability determined under Part I rather than under Part XIII. In other words, section 217 allows for the non-resident taxpayer to calculate the amount of tax that he would be required to pay as if he were a resident of Canada. The election is made by filing a Canadian income tax return for the year. The Appellant filed a Canadian income tax return for the 2006 taxation year (Exhibit R-2).

[17] The election can be beneficial to a non-resident taxpayer since it allows for Part I deductions and credits to be taken into account in the computation of tax liability. No such deductions can be taken under Part XIII (subsections 118(1) and (2) and 214(1)). In the Appellant's case, the personal credit under subsection 118(1) and the age credit under subsection 118(2) are available to him with an election filed under section 217.

[18] Where an election is filed under section 217 and the calculation results in a lower tax liability than that which results under Part XIII without the election, the CRA will assess the lower amount.

[19] Subsection 217(1) defines "Canadian benefits" as the "… total of all [amounts] each of which is an amount paid or credited in the year and in respect of which tax under this Part [Part XIII] would, but for this section, be payable by the person because of any of paragraphs 212(1)(h)…". The OAS payment is an amount in respect of which tax would be payable under paragraph 212(1)(h) and therefore this payment would qualify as a "Canadian benefit".

[20] Paragraph 217(3)(b) of the *Act* stipulates how the non-resident's "taxable income earned in Canada" ("TIEC") for the year will be determined.

[21] Counsel for the Respondent said:

> In summary, paragraph 217(3)(b) deems the non-resident's TIEC to be the greater of the following two amounts:
>
> (a) his TIEC for the year as determined under Division D plus his "Canadian benefits" (subparagraph 217(3)(b)(i)); and
>
> (b) his world income for the year (subparagraph 217(3)(b)(ii)).
>
> (Written Submissions, at paragraph 18)

[22] Counsel for the Respondent continued:

> Subparagraph 217(3)(b)(i) provides that a non-resident's TIEC for the year is to be determined in accordance with Division D (the usual way in which a non-resident's income is determined under Part I). However, for the purposes of this subparagraph section 115 of Division D is modified so that the non-resident's Canadian benefits are included in his TIEC for the year (clause 217(3)(b)(i)(A)).
>
> (Written Submissions, at paragraph 19)

[23] Counsel for the Respondent said:

> The Appellant's TIEC under subparagraph 217(3)(b)(i) is the total of his Canadian benefits. In other words, …[it includes the] OAS payment. …
>
> (Written Submissions, at paragraph 20)

[24] The Appellant's tax liability with a section 217 election (i.e. the Appellant's tax liability calculated under Part I as though he were a resident of Canada) is higher than his Part XIII tax liability of 15 per cent of the gross amount of the payment. According to the Canada-Mexico Tax Convention, the Appellant is entitled to pay the lower amount. In this case, this would be the withholding tax of $4,491.20. In my opinion, the tax has been correctly withheld and assessed.

[25] The Appellant argues that it is unfair to tax the entire OAS payment received by him in 2006 because much of this amount is arrears relating to prior taxation years. However, subsection 212(1) imposes a tax on amounts when they are paid. There is no provision in subsection 212(1) for deeming amounts to have been received at other times.

[26] While a portion of the Appellant's OAS payment may have related to previous years, he was not a resident in Canada during those earlier years. Therefore, the option of having a portion of the payments relating to the previous years taxed as if the Appellant received them in those years does not apply in this case.

[27] In connection with the Appellant's argument that a portion of the OAS payment related to previous years, counsel for the Respondent referred to the decision of the Tax Court in *Heaman v. Canada (Minister of Human Resources Development)*, 2006 TCC 106, [2006] T.C.J. No. 67. In that case, Bell, J. said, at paragraph 8:

> [8] There is no legislation permitting the inclusion of income with reference to a prior period to be included in the income of that prior period. … The amount of $2,133.01 was clearly "received" in 2000 and is properly includable in that year.

[28] The Appellant also referred to "fairness" in his argument. I do not have the authority to accept an argument based upon fairness. I must interpret the words of the *Act* and the applicable Tax Convention.

[29] In my opinion the Minister was correct when he withheld the amount of $4,491.20 on the OAS payment. The appeal is dismissed, without costs.

Signed at Vancouver, British Columbia, this 2nd day of October 2009.

"L.M. Little"

Little J.

CITATION:	2009 TCC 498
COURT FILE NO.:	2008-2988(IT)I
STYLE OF CAUSE:	Michael A. Pope and Her Majesty The Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 10, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
DATE OF JUDGMENT:	October 2, 2009

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Sara Fairbridge

COUNSEL OF RECORD:

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