

Docket: 2017-2334(IT)I

BETWEEN:

HUI ZHANG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 25, 2017, at Vancouver, British Columbia

Before: The Honourable Justice David E. Graham

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Jamie Hansen

 Katherine Shelley
 Student-at-law

JUDGMENT

The appeal of the assessment of the Appellant's 2015 tax year is dismissed.

Signed at Ottawa, Canada, this 27th day of December 2017.

“David E. Graham”

Graham J.

Citation: 2017 TCC 258

Date: 20171227

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BETWEEN:

HUI ZHANG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] Hui Zhang is a dentist. From 2009 to 2012, Dr. Zhang accumulated significant tuition and education tax credits. She used some of those credits to reduce her 2013 tax payable. By the end of 2013, Dr. Zhang had \$52,040 in tuition and education tax credits available to be carried forward to her 2014 tax year. Dr. Zhang earned dividend income in 2014. When she filed her 2014 tax return, she claimed a dividend tax credit. She did not use any of her tuition and education tax credits that were available to be carried forward from 2013. Accordingly, she believed that she had \$52,040 in tuition and education tax credits that could be carried forward to 2015. When Dr. Zhang filed her 2015 tax return, she claimed those credits. The Minister of National Revenue denied her claim. The Minister took the position that Dr. Zhang had no credits available in 2015 as all of those credits had been applied by the Minister to Dr. Zhang's 2014 tax year. Dr. Zhang has appealed that decision.

[2] The sole issue in this appeal is whether a taxpayer's tuition and education tax credits available to be carried forward at the end of a tax year are reduced by the amount of any credits that the taxpayer could have claimed in the year but chose not to claim.

[3] Subsection 118.61(1) of the *Income Tax Act* sets out a formula by which an individual's unused tuition, textbook and education tax credits at the end of a tax year are determined. In 2013, subsection 118.61(1) read:

In this section, an individual's unused tuition, textbook and education tax credits at the end of a taxation year is the amount determined by the formula

$$A + (B - C) - (D + E)$$

where

- A is the amount determined under this subsection in respect of the individual at the end of the preceding taxation year;
- B is the total of all amounts each of which may be deducted under section 118.5 or 118.6 in computing the individual's tax payable under this Part for the year;
- C is the lesser of the value of B and the amount that would be the individual's tax payable under this Part for the year if no amount were deductible under this Division (other than an amount deductible under this section and any of sections 118 to 118.06, 118.3 and 118.7);
- D is the amount that the individual may deduct under subsection (2) for the year; and
- E is the tuition, textbook and education tax credits transferred for the year by the individual to the individual's spouse, common-law partner, parent or grandparent.

[Emphasis added.]

[4] The parties agree on how all elements in this formula should be calculated for Dr. Zhang's 2014 tax year, other than element "D". They agree that "A" is the \$52,040 that Dr. Zhang had available to carry forward from 2013 and that "B", "C" and "E" are all nil.¹ The Respondent submits that "D" is \$52,040 and thus that Dr. Zhang had nothing available to carry forward to her 2015 tax year. Dr. Zhang submits that "D" is nil and thus that she had the full \$52,040 available to carry forward.

[5] Element "D" refers to the amount that the taxpayer may deduct under subsection 118.61(2) for the year. Subsection 118.61(2) reads:

¹ "B" refers to amounts which the taxpayer can deduct under sections 118.5 or 118.6 for the year. Those sections deal with tuition, textbook and education amounts incurred in the year. Since Dr. Zhang did not attend school in 2014, the parties agree that "B" is nil. Since "C" is the lesser of "B" and another amount, this means that "C" must also be nil. The parties agree that "E" is not applicable to Dr. Zhang.

For the purpose of computing an individual's tax payable under this Part for a taxation year, there may be deducted the lesser of

(a) the amount determined under subsection (1) in respect of the individual at the end of the preceding taxation year, and

(b) the amount that would be the individual's tax payable under this Part for the year if no amount were deductible under this Division (other than an amount deductible under this section and any of sections 118 to 118.07, 118.3 and 118.7).

[Emphasis added.]

[6] The word “may” appears in both element “D” and subsection 118.61(2). The parties agree that in subsection 118.61(2), the word “may” should be read as permissive. In other words, the parties agree that a taxpayer has the choice of whether he or she wants to claim a credit under subsection 118.61(2) or not. This interpretation is consistent with the meaning of “may” in the *Interpretation Act*.²

[7] Where the parties disagree is on the meaning of the word “may” in element “D”. Element “D” requires a taxpayer’s unused tuition, textbook and education credits to be reduced by the amount that the taxpayer “may deduct under subsection (2) for the year”. The Respondent argues that, in element “D”, the words “may deduct” mean “is permitted to deduct”. Thus, the Respondent submits that, because Dr. Zhang was permitted to deduct an amount under subsection 118.61(2), her credits carried forward are reduced whether she actually deducted that amount or not. By contrast, Dr. Zhang takes the position that the words “may deduct” in element “D” acknowledge the fact that the taxpayer has a choice whether to deduct the amount or not and thus refer to the choice that the taxpayer has actually made. Since she did not choose to deduct any amount under subsection 118.61(2) in 2014, Dr. Zhang argues that the value of element “D” was nil.

[8] I will conduct a textual, contextual and purposive analysis of subsection 118.61(1).

Textual Analysis

[9] A textual analysis of subsection 118.61(1) supports the Respondent’s position that the words “may deduct” in element “D” mean “is permitted to

² R.S.C. 1985, c. I-21, s. 11.

deduct”. Element “D” refers to “the amount that the individual may deduct under subsection (2) for the year”. Without expressly stating it this way, Dr. Zhang is taking the position that “may deduct” means “deducted”. If a taxpayer has a choice whether or not to deduct an amount under subsection 118.61(2) in a year and makes the choice to deduct a certain amount, then the amount so chosen is “the amount that the individual deducted under subsection (2) for the year”. The problem with this position is that the presumption against tautology requires that every word in a statute be given meaning. The Respondent’s view gives meaning to the word “may”. If Parliament had intended Dr. Zhang’s interpretation, it could have simply changed the tense of the word “deduct” to “deducted”. The fact that Parliament chose to insert the word “may” suggests that Parliament was trying to convey a different meaning – the meaning argued for by the Respondent.

Contextual Analysis

[10] A contextual analysis of subsection 118.61(1) supports Dr. Zhang’s position that “may deduct” means the amount that the taxpayer actually chose to deduct.

[11] Looking at a different element of the calculation in subsection 118.61(1) reveals an inconsistency in its drafting. Where element “D” uses the phrase “that the individual may deduct under subsection (2)”, element “B” uses the phrase “which may be deducted under section 118.5 or 118.6”. Sections 118.5 and 118.6 in turn use the phrase “may be deducted”. Thus there is symmetry between those sections and element “B”. Sections 118.5 and 118.6 provide for a permissive deduction and, by using the same language, element “B” clearly refers to the amount that the taxpayer is permitted to deduct.³ The same is not true of subsection 118.61(2) and element “D”. Like sections 118.5 and 118.6, subsection 118.61(2) uses the phrase “may be deducted”. However, unlike element “B”, which uses the phrase “which may be deducted”, element “D” uses the phrase “that the individual may deduct”. I cannot see any reason why Parliament would have used different wording in element “D” unless it wanted to say something different. There is no apparent reason why the phrase already employed in element “B” could not have been used in element “D”. Based on the foregoing, the contextual analysis indicates that Parliament was trying to say something different in element “D”. The

³ It would actually be absurd to interpret element “B” as referring to the amount that the taxpayer had actually claimed under section 118.5. Doing so would effectively prevent a taxpayer from ever carrying any amount forward. A taxpayer would never claim more than he or she was permitted to claim under section 118.5. Thus any unclaimed amount would never become part of element “B” and would thus be left on the table.

only logical thing that Parliament could have been trying to say is the interpretation put forward by Dr. Zhang. Thus, the contextual analysis reveals an ambiguity in the textual analysis. There is a difference between what Parliament said and what the context suggests Parliament was trying to say.

[12] The Respondent relies on the ordering of credits provisions in section 118.92 to support her interpretation of element “D”. I do not find that section to be helpful. It is capable of supporting either position. Section 118.92 requires tuition and education tax credits to be claimed before dividend tax credits. The Respondent asserts that a taxpayer has the choice of what amount to deduct under subsection 118.61(2) but, if he or she fails to deduct an amount, he or she will be unable to carry it forward to the next year. Dr. Zhang agrees that a taxpayer has the choice of what amount to deduct under subsection 118.61(2) but argues that any unused amount will still be available the following year. Under both of these interpretations the taxpayer has the choice of what amount to deduct under subsection 118.61(2) in a given year. If a taxpayer has a choice whether to claim a credit or not, I do not see how a provision dictating the ordering of credits helps me to understand the effect of the taxpayer not claiming the credit. Section 118.92 applies to whatever amount the taxpayer chooses to deduct. It merely states that whatever tuition and education tax credit a taxpayer claims must be claimed before any dividend tax credit. I accept that, if the Respondent’s interpretation of element “D” is correct, then section 118.92 applies in Dr. Zhang’s case to force her to use her available tuition and education tax credits before her dividend tax credits. However, that fact does not help me understand whether the Respondent’s interpretation of element “D” is correct or not.

Purposive Analysis

[13] The purposive analysis supports the Respondent’s position. The Department of Finance Technical Note which accompanied the enactment of section 118.61 stated:

New section 118.61 provides for the carryforward of a student’s unused tuition and education tax credits. Subsection 118.61(1) provides for the calculation of a student’s unused tuition and education tax credits at the end of a taxation year that may be carried forward to future taxation years for use by the student. That amount is determined by, first, adding to the student’s unused tuition and education tax credits at the end of the previous year (where that year is after 1996) the portion of the student’s tuition and education credits for the current year that is not needed to eliminate the student’s tax payable for the current year. This total is then reduced by the amount of the tuition and education tax credits carryforward

that is deductible for the current year (which is, as set out in subsection 118.61(2), equal to the lesser of the previous year's carryforward and the tax that would be payable for the current year by the student if no tuition and education tax credits were allowed). Finally, this total is further reduced by the tuition and education tax credits transferred for the year by the student to the student's spouse, parent or grandparent.

[Emphasis added.]

[14] The phrase "amount of the tuition and education tax credits carryforward that is deductible for the current year" is used to describe element "D". Note that the word "deductible" is used rather than the word "deducted". "Deductible" refers to an amount that is capable of being deducted whereas "deducted" refers to an amount that was actually deducted. The choice by the Department of Finance to use the word "deductible" in the note strongly supports both the Respondent's position and the textual analysis.

[15] The accompanying Budget Plan also supports the Respondent's position. It states:⁴

. . . To permit all students to take full advantage of the tuition and education credits, the budget proposes to allow the student to carry forward these credits indefinitely until they have sufficient tax liability to make use of them.

[Emphasis added.]

[16] The underlined phrase above indicates that a student will be forced to use the credit once he or she has income against which the credit could be applied.

[17] In summary, a purposive analysis does not reveal any ambiguity in the textual analysis. Rather it supports the textual analysis.

Conclusion

[18] While the contextual analysis has revealed an ambiguity in the textual analysis, I am satisfied from the purposive analysis that the contextual problem is simply a result of poor drafting. I find that element "D" in subsection 118.61(1) should be read as if it said:

⁴ *Budget Plan: Including Supplementary Information and Notices of Ways and Means Motions*, at page 180.

D is the amount which may be deducted under subsection (2) for the year; and

Conclusion

[19] Based on all of the foregoing, the appeal is dismissed.

Signed at Ottawa, Canada, this 27th day of December 2017.

“David E. Graham”

Graham J.

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APPEARANCES:

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