Docket: 2011-3257(IT)I

BETWEEN:

FARHAT ULLAH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 11, 2013, May 1, 2013 and October 8, 2013
at Montreal, Quebec

Before: The Honourable Justice B. Paris

Appearances:

Agent for the Appellant:	Esmat Ullah
Counsel for the Respondent:	Amelia Fink

JUDGMENT

The appeal from the reassessments under the *Income Tax Act* for the 2006, 2007, 2008 and 2009 taxation years is allowed, with costs, and the matter is referred back to the Minister of National Revenue for reassessment on the basis that the appellant is entitled to a credit for a wholly dependent person under paragraph (*b*) of the description of B in subsection 118(1) of the *Income Tax Act* for the 2006, 2007, 2008 and 2009 taxation years.

Signed at Vancouver, British Columbia, this 5th day of December 2013.

"B.Paris"

Paris J.

Citation: 2013TCC387
Date: 20131205
Docket: 2011-3257(IT)I

BETWEEN:

FARHAT ULLAH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] The appellant is appealing reassessments of her 2006, 2007, 2008 and 2009 taxation years by which the Minister of National Revenue (the "Minister") denied her a wholly dependent person credit under paragraph (*b*) of the description of B in subsection 118(1) of the *Income Tax Act* (the *Act*) for each year.

[2] As a preliminary matter, the respondent seeks to quash the appeal as it relates to the 2006 taxation year. The respondent states that reassessment for 2006 was made by the Minister outside the normal reassessment period under subsection 152(4.2) of the *Act*. Therefore, the respondent says that the appellant is prevented by subsection 165(1.2) from objecting to the reassessment. If this were the case, the appellant would have no right of appeal to this Court from the reassessment because according to subsection 169(1) of the *Act* an appeal may only be filed after a Notice of Objection has been served under section 165.

[3] Unfortunately, there is no evidence before me concerning the date that the Minister originally assessed the appellant for her 2006 taxation year, and therefore no

evidence that the reassessment which is under appeal in these proceedings was made pursuant to subsection 152(4.2). In order to have the appeal quashed as requested, the Minister would be required to produce evidence concerning the original assessment date. Typically, this is produced by the respondent in an affidavit sworn by an officer of the Canada Revenue Agency (CRA), as provided for in section 244 of the *Act*. In the absence of such evidence, the respondent's position that the appeal for the 2006 taxation year is invalid cannot be sustained.

[4] The remaining issue in this appeal is whether the appellant is entitled to the wholly dependent person credit for her 2006 to 2009 taxation years.

[5] Under paragraph (*b*) of the description of B in subsection 118(1), a taxpayer may claim a credit in calculating tax payable where the taxpayer has supported a related person who was entirely dependent on the taxpayer (or on the taxpayer and another person) for support and who lived with the taxpayer. The relevant portions of subsection 118(1) read:

> **118.** (1) For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted an amount determined by the formula
>
> A × B
>
> where
> *A*
> is the appropriate percentage for the year, and
> *B*
> is the total of,
>
> . . .
>
> (*b*) in the case of an individual who does not claim a deduction for the year because of paragraph 118(1)(*a*) and who, at any time in the year,
>
> (i) is
>
> (A) a person who is unmarried and who does not live in a common-law partnership, or
>
> (B) a person who is married or in a common-law partnership, who neither supported nor lived with their spouse or common law-partner and who is not supported by that spouse or common-law partner, and

> (ii) whether alone or jointly with one or more other persons, maintains a self-contained domestic establishment (in which the individual lives) and actually supports in that establishment a person who, at that time, is
>
> (A) except in the case of a child of the individual, resident in Canada,
>
> (B) wholly dependent for support on the individual, or the individual and the other person or persons, as the case may be,
>
> (C) related to the individual, and
>
> (D) except in the case of a parent or grandparent of the individual, either under 18 years of age or so dependent by reason of mental or physical infirmity,
>
> an amount equal to the total of
>
> . . .

[6] Subsection 118(4) provides certain rules which limit the credits available under subsection 118(1), including the wholly dependent person credit. Paragraph 118(4)(*a*.1) provides that no amount may be deducted as a wholly dependent person credit by an individual for a person in respect of whom a spousal tax credit has been deducted by another individual under paragraph (a) of the clause B in subsection 118(1). Paragraph 118(4)(*a*.1) reads:

> (4) For the purposes of subsection 118(1), the following rules apply:
>
> (*a.1*) no amount may be deducted under subsection (1) because of paragraph (*b*) of the description of B in subsection (1) by an individual for a taxation year for a person in respect of whom an amount is deducted because of paragraph (*a*) of that description by another individual for the year if, throughout the year, the person and that other individual are married to each other or in a common-law partnership with each other and are not living separate and apart because of a breakdown of their marriage or the common-law partnership, as the case may be;

[7] In this case, the appellant seeks to deduct a wholly dependent person credit in respect of her mother, with whom she lived (along with her father) and whom she supported in the years in question. The respondent maintains that the appellant is not entitled to the credit because her father deducted a spousal credit in respect of her mother for the same years.

[8] The appellant's father gave evidence that while he did claim the spousal credit in respect of his spouse when he filed his tax returns for the years in issue, he attempted in February 2011 to have the Minister adjust his returns for those years to delete his claim for the spousal credit in order to permit the appellant to claim the wholly dependent person credit. The appellant's father is disabled and had little income in those years, and the deletion of his claim for the spousal credit would not have resulted in any tax payable by him. However, since the appellant's father had declared bankruptcy in August 2010, the Minister refused to accept his request for the adjustment because the request had not been made by the trustee-in-bankruptcy.

[9] Shortly afterwards, the appellant's father asked the trustee in bankruptcy to make the request. According to the Minister, the trustee in bankruptcy never made a request for the adjustment, and therefore the appellant's father's returns continued to show that he had claimed the spousal credit for the years in issue. However, the trustee in bankruptcy testified that she did send a request for the adjustment to the CRA, along with a request to adjust the appellant's father's claim for the disability amount. She produced a copy of the request, and I accept that it was received by the CRA, because the adjustment to the disability amount that was requested by the trustee was in fact made.

[10] The respondent maintains that even if the adjustment request was made by the trustee, it is too late now to make the adjustments to the appellant's father's returns because those returns are statute-barred. Counsel argued that, while the Minister has the power under subsection 152(4.2) of the *Act* to reassess a taxpayer with the taxpayer's consent after the statute barred date, this can only be done if the reassessment would result in a refund or reduction in an amount payable under Part I of the *Act* for that taxpayer. The respondent says that since the adjustment of the spousal credit would not result in a refund or reduction in amount payable by the appellant's father, the Minister cannot reassess him under subsection 152(4.2). That provision reads as follows:

> (4.2) … for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer … in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,
>
> > (*a*) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; …

[11] I see a number of difficulties with the respondent's position.

[12] First, according to paragraph 118(4)(*a*.1), no wholly dependent person credit may be deducted in the computation of a person's tax payable if another person has deducted a spousal credit in respect of the same individual, in computing tax payable. In my view, where a person claims a spousal credit on his or her tax return, but that claim does not in fact reduce or affect tax payable in any way, it cannot be said that there has been any deduction of an amount in computing tax payable. The credit would have to have an impact on tax otherwise payable in order to say the credit has been deducted in computing tax.

[13] Therefore, since no deduction of the spousal credit was allowed to the appellant's father in computing his tax payable under Part I of the *Act* for the years in issue, there is no bar to the appellant deducting wholly dependent person credits for those years. No reassessment of the appellant's father's 2006 to 2009 taxation years is required.

[14] Furthermore, there is also authority for the proposition that the Minister may make adjustments to a taxpayer's returns after the normal reassessment period even if those adjustments do not result in a reduction to an amount payable under Part I of the *Act*. In *Clibetre Exploration Ltd. v The Queen*, 2003 FCA 16, the taxpayer had reported non-capital losses on its tax returns for its 1980 to 1995 taxation years. In 1996 it had income in excess of its available non-capital loss carry forward amounts from previous years. It sought to recharacterize the expenses that created the non-capital losses in the earlier years as Canadian exploration expenses (CEE) in order to reduce its 1996 income to nil. The Minister refused the taxpayer's request on the basis that the previous years had become statute barred and therefore that he was prohibited from reassessing the taxpayer for those years to recharacterize the expenses as CEE. The Federal Court of Appeal rejected the Minister's position, saying at paragraph 6:

> We are all of the view that the Minister's interpretation of subsection 152(4) is wrong, and the Tax Court Judge erred in accepting it. If in fact Clibetre reported non-capital losses for every year from 1980 to 1995, there is no need for the Minister to reassess Clibetre for those years in order to characterize as Canadian exploration expenses the amounts that gave rise to the non-capital losses initially claimed for those years. That is because the taxable income and thus the tax payable for each of those years would be nil whether the expenses for the year are claimed as deductions in computing a non-capital loss, or treated as Canadian exploration expenses. We conclude that there is no statutory bar to the requested recharacterization.

[15] Although it is not necessary for me to decide the point given, my decision that no deduction was taken by the appellant's father, I would also have held in this case that it would not be necessary for the Minister to reassess the appellant's father in order to delete the spousal credit claim, since it had no effect on his tax payable. As in *Clibetre*, his tax payable would have been nil whether the spousal credit was claimed or not.

[16] Finally, I also note that at the time the trustee in bankruptcy made the request to the CRA to delete the spousal credit claim by the appellant's father, the normal reassessment period for his 2008 and 2009 taxation years had not yet expired. According to Exhibits R-3 and R-4 those years were initially assessed on March 23, 2009 and April 29, 2010 respectively. Therefore, even if the Minister had been required to reassess to delete the spousal credit claim, the request for the 2008 and 2009 tax years would have been made in time.

[17] For all these reasons, the appeal is allowed and the matter is referred back to the Minister for reassessment on the basis that the appellant is entitled to a credit for a wholly dependent person under paragraph (*b*) of the description of B in subsection 118(1) of the *Act* for her 2006, 2007, 2008 and 2009 taxation years.

[18] I also award the appellant costs, fixed in the amount of $250.

Signed at Vancouver, British Columbia, this 5th day of December 2013.

"B.Paris"

Paris J.

CITATION:	2013TCC387
COURT FILE NO.:	2011-3257(IT)I
STYLE OF CAUSE:	FARHAT ULLAH AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	January 11, 2013, May 1, 2013 and October 8, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	December 5, 2013

APPEARANCES:

Agent for the Appellant:	Esmat Ullah
Counsel for the Respondent:	Amelia Fink

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	N/A
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada