When a Credit is NOT Claimed or Claimable in Law - Ullah

When is a tax credit not claimed or claimable, in law, by a taxpayer?

Ullah v The Queen, 2013 TCC 387

This decision of Paris J is eminently sensible and reflects the principle that in taxation a thing claimed/purported to have been done must actually have been done for there to be a tax consequence. This principle underlies both the sham and ineffective transaction doctrines.

At issue was whether Ms Ullah was entitled to claim the wholly dependent person credit under paragraph (b) of the description of B in subsection 118(1) of the *Income Tax Act*. The issue arose because the CRA denied the credit to the appellant on the basis that her father had claimed the spousal credit for his wife, being the dependent-mother of the taxpayer. The appellant's father, whose income was so low as to not result in tax liability with or without the deduction of the spousal credit, had indicated on his return a deduction for the spousal credit.

The credit available under subsection 118(1) is determined by a formula, while subsection 118(4) provide rules that limits the credits available under 118(1) (including the wholly dependent person credit). Paragraph 118(4)(a.1) provides one such limitation, being that a deduction of the wholly dependent person credit is not available where another individual has deducted the spousal credit in respect to the wholly dependent person (and the persona and the other individual are married or common-law, and are not living separate and apart because of a breakdown of the conjugal relationship).

In effect this means that where a person's spouse and another person both provide support for the person, only the person spouse may claim the spousal credit (the other person cannot claim that the person was wholly dependent on the other person). However, where the other person wholly supports the person, then a credit may be claimed by either the person's spouse or the person wholly supporting the person, with priority of the claim going to the spouse. Although both credits are purported to exist so as to defray the cost of supporting another person, the manner the credits interact result in a potential defeat of the policy. There is a disincentive for a third party to wholly support a dependent person if there is no guarantee that the tax credit will be available to the person providing support because the credit could be 'poached' by a non-supporting spouse.

Paris J resolved the issue by holding, at paragraph 12, that:

> [...] 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. [emphasis original]

Therefore, since there was no deduction of the credit by the father for the years at issue, there is no bar to the appellant claiming the credit.

The Court also responded to the Crown's argument (though not necessary for the outcome of the case) that the MNR may NOT make an adjustment to a return at the request of the taxpayer outside the normal reassessment period UNLESS the adjustment results in a reduction or tax payable or a refund of tax. Paris J referred to the decision in *Clibetre Exploration Ltd. v The Queen*, 2003 FCA 16, as authority that the minister may make adjustments to returns after the normal reassessment period even if those adjustments do not result in a reduction of an amount payable under Part I of the ITA. The Federal Court of Appeal rejected the Minister's position,in that case by 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.

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