

BETWEEN:

LUBOV SURIKOV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on December 6, 2007, at Toronto, Ontario

By: The Honourable Justice E.A. Bowie

Appearances:

Agent for the Appellant: Alexandr Surikov
Counsel for the Respondent: Justin Kutyan

JUDGMENT

Having heard the appeals herein, it is hereby adjudged that:

- (i) the appeals from determinations and assessments of CCTB and NCBS are allowed and the determinations and assessments of CCTB and NCSB overpayments in the total amount of \$2,290.00, notices of which are dated October 20, 2006, are vacated;
- (ii) the appeals from the determination and assessment of ECB are allowed and the determination and assessment of the ECB overpayment in the amount of \$250.00, notice of which is dated October 27, 2006, are vacated;
- (iii) the appeals from the determination and assessment of GSTC for the 2003 taxation year are allowed, and the determination of the GSTC overpayment in the amount of \$283.00 for the 2003 taxation year, notice of which is dated

October 27, 2006, is referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that the appellant was separated and Michael Surikov was her qualified dependant in respect of the July 2004 and the October 2004 payments. The assessment resulting from that determination is vacated, without prejudice to the Minister's right to reassess, if necessary, as a result of that redetermination; and

- (iv) the appeals from the determinations and assessments of GSTC overpayments for the 2004 and 2005 taxation years are dismissed.

Signed at Ottawa, Canada, this 25th day of March, 2008.

“E.A. Bowie”

Bowie J.

Citation: 2008TCC161
Date: 20080325
Docket: 2007-1092(IT)I

BETWEEN:

LUBOV SURIKOV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] This appellant has been advised by the Minister of National Revenue that she is indebted to Her Majesty for overpayments of Canada Child Tax Benefit (CCTB), National Child Benefit Supplement (NCBS), Goods and Services Tax Credit (GSTC) and Energy Cost Benefit (ECB). By various notices sent to her she has been told that she must repay certain amounts. Her position is that no such overpayments were made to her, and she has come to this Court seeking relief to that effect. Her appeals to the Court were met by a preliminary objection brought by counsel for the respondent, who took the position that the Court has no jurisdiction to entertain appeals from any of these Notices.

[2] The notices sent by the Minister to the Appellant claiming repayment of these amounts were entered into evidence. The following table shows the amounts that the Minister claims were overpaid.

<u>Exhibit</u>	<u>Date</u>	<u>Benefit</u>	<u>Amount</u>	<u>Period of the overpayment</u>
A-3	October 20, 2006	CCTB	\$921.00	October 2005 to June 2006
		NCBS	786.79	October 2005 to June 2006
A-4	October 20, 2006	CCTB	313.74	October 2005 to June 2006
		NCBS	268.47	October 2005 to June 2006
A-5	October 6, 2006	GSTC	170.25	October 2005 to April 2006
A-6	October 6, 2006	GSTC	116.00	July 2006 to October 2006

A-8	October 27, 2006	GSTC	283.00	July 2004 to June 2005
A-7	October 27, 2006	ECB	250.00	None stated ¹

The total of the amounts that the Minister seeks to recover from the appellant, then is:

CCTB & NCBS	\$2,290.00
GSTC	569.25
ECB	<u>250.00</u>
Total	<u>\$3,109.25</u>

The CCTB and the NCBS are shown separately on Exhibits A-3 and A-4, but both are computed under section 122.61 of the *Income Tax Act* (the *Act*). For practical purposes, they are the same benefit and reference herein to the CCTB includes the NCBS. Exhibits A-3 and A-4 are styled CANADA CHILD TAX BENEFIT NOTICE. A-7 is simply headed ENERGY COST BENEFIT, and A-5, A-6 and A-8 are headed GOODS AND SERVICES TAX/HARMONIZED SALES TAX (GST/HST) CREDIT. A-4, A-5, A-6 and A-8 all contain the words “Your entitlement has been reviewed based on ...”. A-7 says “Your eligibility for the Energy Cost Benefit (ECB) has been reviewed.” Nowhere are the words “notice of determination” or “notice of assessment” used to describe any of these documents, but each contains the words “This amount owing was assessed under the *Income Tax Act*”. No particular provision of the *Act* is mentioned in any of them, however.

jurisdiction

[3] At the beginning of the hearing, counsel for the respondent sought to have me quash the appeals for lack of jurisdiction in this Court to entertain them. He relies on the decisions of the Federal Court of Appeal in *Boucher v. Canada*,² and *Neuhaus v. Canada*.³ Those cases stand for the proposition that a taxpayer whose dispute with the Minister is not as to the amount of an assessment for income tax but as to whether that assessment has been paid in part, by way of withholdings at source, cannot litigate that issue in this Court. The jurisdiction given to this Court by Parliament is to

¹ Entitlement to the ECB follows entitlement to the NCBS for the month of January 2006: see *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49, subsection 2(1).

² [2004] 2 C.T.C. 174.

³ [2003] 2 C.T.C. 177.

hear and determine disputes as to the correctness of assessments under the *Act*, but not whether those assessments have been satisfied. The correctness of that proposition is by no means in doubt, insofar as the context of those cases is concerned. They do not deal with determinations of entitlement to GSTC and CCTB, however.

[4] Counsel for the respondent also referred me to three decisions of this Court dealing with overpayments, actual or alleged, of CCTB. In *Cheung v Canada*,⁴ this Court was dealing with a situation similar to the present case. There had been a change in the custody of the child, with the result that the appellant was no longer entitled to receive the CCTB payments as the eligible individual. The payments after the date of that change were made to a bank account that was not hers, and it was her position that she had not received them, and therefore was not required to repay them. The judge dismissed the appeal, stating that the issue before him was “... strictly a collection matter ...”.⁵ He apparently was not referred to subsections 152(1.2), 160.1(1) and 160.1(3) of the *Act*, all of which have a bearing on the issue. There are at least four other cases⁶ in which this Court has dealt with alleged overpayments of CCTB, but in none of them is the jurisdictional issue discussed in any depth.

[5] The statutory scheme that governs the determination and redetermination of entitlement to payment of CCTB and GSTC is complex almost beyond belief. Certainly it would baffle any lay taxpayer. The entitlement to CCTB and its computation are governed by sections 122.6 to 122.64 of the *Act*. The entitlement to GSTC and its computation are governed by sections 122.5 and 122.51. For present purposes, it is sufficient to know that in both these provisions the benefit conferred by the legislation takes the form of a deemed payment, or in the case of the CCTB a deemed overpayment, of tax by the taxpayer, entitling her to a refund. The ECB is a one-time payment under the *Energy Costs Assistance Measures Act*⁷ (the *ECAM Act*). It is payable to an individual who is entitled to receive the NCBS under section 122.61 for the month of January 2006.

⁴ [2006] 3 C.T.C. 2086.

⁵ *Ibid* at para. 6.

⁶ *Moore v. Canada*, 2006 TCC 587; *Badia v. Canada*, 2007 TCC 570; *Hirtle v. The Queen*, [2003] 2 C.T.C. 3487; *Cleuziou v. Canada*, [1996] TCJ 93 (QL).

⁷ *Supra*, note 1.

[6] More germane to the immediate problem before me are paragraph 152(1)(b) and subsections 152(1.2), 160.1(1) and 160.1(3) of the *Act*, and section 4 of the *ECAM Act*.

Income Tax Act

152(1) **The Minister shall**, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and **determine**

...

(b) **the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.**

...

152(1.2) Paragraphs 56(1)(l) and 60(o), **this Division and Division J, as they relate to an assessment or a reassessment and to assessing or reassessing tax, apply, with such modifications as the circumstances require, to a determination or redetermination of an amount under this Division or an amount deemed under section 122.61 or 126.1 to be an overpayment on account of a taxpayer's liability under this Part, except that ...[the exceptions are not relevant]**

160.1(1) **Where at any time the Minister determines that an amount has been refunded to a taxpayer for a taxation year in excess of the amount to which the taxpayer was entitled as a refund under this Act, the following rules apply:**

(a) **the excess shall be deemed to be an amount that became payable by the taxpayer on the day on which the amount was refunded; and**

(b) **the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess (other than any portion thereof that can reasonably be considered to arise as a consequence of the operation of section 122.5 or 122.61) from the day it became payable to the date of payment.**

...

160.1(3) The Minister may at any time assess a taxpayer in respect of any amount payable by the taxpayer because of subsection 160.1(1) or 160.1(1.1) or for which the taxpayer is liable because of subsection 160.1(2.1) or 160.1(2.2), and this Division applies, with such modifications as the circumstances require, in respect of an assessment made under this section as though it were made under section 152.

Energy Costs Assistance Measures Act

4. **For the purposes of section 160.1 of the *Income Tax Act*, an amount paid to a person under section 2 or 3 is deemed to be an amount that has been refunded to the person as a consequence of the operation of section 122.61 of that *Act*.**

(emphasis added)

These provisions have the following effect:

- (i) Paragraph 152(1)(b) requires the Minister to make a determination of the GSTC entitlement of the taxpayer;
- (ii) Subsection 152(1.2) makes the provisions of Divisions I and J of Part I, of the *Act* that relate to assessments, reassessments, objections, confirmations and appeals to this Court applicable to both determinations and redeterminations of GSTC entitlement made under paragraph 152(1)(b) and determinations and redeterminations of CCTB entitlement;
- (iii) Subsection 160.1(1) has the effect of making a taxpayer liable to repay any amount that the Minister has determined to be an overpayment of a refund, including an overpayment of GSTC or CCTB;
- (iv) Subsection 160.1(3) authorizes the Minister to assess the taxpayer for any such overpayment, and it makes the provisions of Division I of Part I relating to objections to assessments applicable to any such assessment;
- (v) Section 4 of the *ECMA Act* has the same effect as 3 and 4 above in respect of an overpayment made under that *Act*.

Although subsection 160.1(3) does not specifically make the provisions of Division J, which include the right to appeal to this Court following confirmation of

an assessment that has been objected to, applicable to an assessment under that subsection, there can be no doubt that an appeal will lie under subsection 169(1). The wording of subsection 160.1(3) is not materially different from that of subsection 160(2),⁸ and it has never been doubted that a subsection 160(2) assessment may be appealed to this Court.

[7] It is clear from the wording of the various notices that I have referred to at paragraph 2 that the Minister has made both a determination, or redetermination, and an assessment under subsection 160.1(3) in respect of each of the amounts that he now seeks to recover. If there were any doubt about that, it is dispelled by the wording of the Minister's letter to the appellant dated February 12, 2007 and its enclosure styled NOTIFICATION OF CONFIRMATION BY THE MINISTER of the same date. They read as follows:

LUBOV SURIKOV
11 BOUSTEAD AVE
TORONTO ON M6R 1Y7

Dear Madam:

Re: Objection to the Canada Child Tax Benefit and the Goods and
Services Tax Credit for the 2003, 2004 & 2005 years

As a result of this review, we are confirming the notices of determination. The Minister's decision is stated in the attached Notice of Confirmation.

If you disagree with the decision, you can file an appeal with the Tax Court of Canada. We have attached information on how to proceed.

If you have any questions concerning this letter you may call Diane A. LeBlanc at (705) 671-4257.

Yours sincerely,

"Denis Chretien"
Team Leader
Appeals Division

⁸ 160(2) The Minister may at any time assess a taxpayer in respect of any amount payable because of this section and the provisions of this Division apply, with any modifications that the circumstances require, in respect of an assessment made under this section as though it had been made under section 152.

Enclosure

NOTIFICATION OF CONFIRMATION BY THE MINISTER

Your Notice of Objection to the Canada Child Tax Benefit and Goods & Services Tax Credit determinations for the 2003, 2004 and 2005 base years have been carefully reviewed under subsection 165(3) of the *Income Tax Act*.

The Minister of National Revenue has considered the reasons set out in your objection and all the relevant facts. It is hereby confirmed that the determinations have been made in accordance with the provisions of the *Income Tax Act* on the basis that:

You did not have a cohabiting spouse as defined under sections 122.5 of the *Income Tax Act* and you were not the “eligible individual” who was responsible for the care and upbringing of Michael as defined under sections 122.5 and 122.6 of the *Income Tax Act*. Your Goods and Services tax credit and your Canada Child tax benefit have been calculated according to subsections 122.5(3) and 122.61(1).

Dated at Sudbury this 12th day of February, 2007

TO: LUBOV SURIKOV
11 BOUSTEAD AVE
TORONTO ON M6R 1Y7

Minister of National Revenue

Per: “D.Chretien
Team Leader
Appeals Division
Sudbury Tax Services
Canada Revenue Agency

Although I do not have the notice of objection before me, it is clear from these documents that the appellant did serve one on the Minister. She has therefore satisfied the condition precedent to launching these appeals under section 169 of the *Act*, and her appeals are properly before the Court.

the redeterminations and assessments

[8] I turn now to consider whether the Minister correctly redetermined the appellant’s entitlements and correctly assessed her in respect of overpayments. This requires an examination of the facts.

[9] The appellant and Alexandr Surikov were married, and they had one child prior to their separation on September 16, 2002. From that date until May 11, 2005 their son lived only with the appellant, and she was his primary caregiver. From May 12, 2005 onward their son lived with Alexandr, and he was the primary caregiver. The payments to the appellant for CCTB were credited to her bank account by direct deposit, up to and including the payment made on August 19, 2005. The September 2005 payment, and all subsequent payments, were paid by direct deposit to Alexandr's bank account. These facts are agreed to in the pleadings, and so are not in dispute.

[10] The evidence was that when Alexandr assumed custody of their son in May 2005 she advised the officials of the Canada Revenue Agency (CRA), both by telephone and in writing, of that fact. The respondent's position is that CRA was first told of the change in the primary caregiver by a letter from the appellant dated July 31, 2006. The determinations and assessments against her are based upon the assumption that the payments deposited to Alexandr's account between October 2005 and June 2006 were in fact payments made to the appellant. Among the facts assumed by the Minister, according to subparagraphs 19(f) and (g) of the Reply to the Notice of Appeal, are these:

- (f) the appellant had access, either directly or indirectly, to the CCTB payments deposited into the bank account of Alexandr;
- (g) whether or not the CCTB was paid to, or received by, the appellant directly or indirectly, the money was paid for the benefit of Michael and Michael did so receive such a benefit;

The first of these assertions is simply not correct, on the basis of the evidence before me. The second is no doubt correct, but it is totally irrelevant. I accept completely the evidence that she had no access to Alexandr's bank account, and also the evidence that she notified CRA of the change of primary caregiver immediately after May 12, 2005. Subsection 122.62(4) of the *Act* requires this notice, but it need not be given in writing:

- (4) Where during a particular month a person ceases to be an eligible individual in respect of a particular qualified dependant (otherwise than because of the qualified dependant attaining the age of 18 years), **the person shall notify the Minister of that fact** before the end of the first month following the particular month. (emphasis added)

I am satisfied that the appellant complied with that requirement. Her evidence to that effect is consistent with the fact that CRA stopped the payments to her account and started the payments to Alexandr's account in September. The appellant also testified that when she telephoned CRA she was told that she would continue to receive the payments for three months, and that she should give these payments to Alexandr, which she did. Her evidence is corroborated by Alexandr, and I accept it entirely.

[11] The appellant did exactly what she was required to do upon the change of primary caregiver, and exactly what she was told to do by the CRA official to whom she spoke. She did not receive any payment after August 2005; she received the June, July and August payments only as agent for Alexandr, on the instructions given to her, and she paid those to him as she was told to do. She therefore received no overpayment of CCTB and the determinations and assessments of CCTB and NCBS in the total amount of \$2,290.00, notices of which are dated October 20, 2006, will be vacated.

[12] The payments for GSTC and for ECB were paid to the appellant by cheque. Alexandr testified that she gave the ECB payment of \$250.00 to him. As he was the individual entitled to the January 2006 CCTB payment, he was also entitled to receive the ECB payment. While the evidence is equivocal, it seems more probable than not that the appellant was acting as agent in respect of that payment in exactly the same way as for the three CCTB payments, and so the determination and assessment for ECB in the amount of \$250.00, notice of which is dated October 27, 2006 will also be vacated.

[13] The GSTC credit is applied for in conjunction with the return of income for the year, and is paid by cheque four times during the 12-month-period beginning in July of the following year. I do not have the appellant's returns of income before me, or the applications for the GSTC that she filed with them. Nor is there any cogent evidence as to the basis on which she made the claims. I must therefore take the Minister's assumptions as to those facts as being correct. On that basis the Minister's determinations and assessments for the 2004 and 2005 taxation years, the notices of which are Exhibits A-5 and A-6, both dated October 6, 2006, are correct. Subsections 160.1(1) and (3) permit the Minister to recover these overpayments by way of assessments. The appeals from the GSTC determinations and assessments for 2004 and 2005 will therefore be dismissed.

[14] The respondent concedes at paragraph 28 of the Reply to the Notice of Appeal that the appellant's GSTC entitlement for the 2003 taxation year should have been, but was not, determined on the basis that the appellant was separated, and that

Michael Surikov was her qualified dependant within the meaning of subsection 122.51 of the *Act* in respect of the July 2004 and the October 2004 payments, as he lived with her throughout that year. The appeal in respect of the GSTC determination and assessment for the 2003 taxation year will therefore be allowed and the determination will be referred back to the Minister for reconsideration and redetermination. The assessment will be quashed, but without prejudice to the Minister's right to reassess, if necessary, as a result of that redetermination.

Signed at Ottawa, Canada, this 25th day of March, 2008.

“E.A. Bowie”

Bowie J.

CITATION: 2008TCC161

COURT FILE NO.: 2007-1092(IT)I

STYLE OF CAUSE: LUBOV SURIKOV and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 6, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice E.A. Bowie

DATE OF JUDGMENT: March 25, 2008

APPEARANCES:

Agent for the Appellant: Alexandr Surikov
Counsel for the Respondent: Justin Kutyan

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm: N/A

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