Docket: 2006-1373(IT)G

BETWEEN:

JOSEPH MYS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 8, 2007, at Montreal, Quebec

Before: The Honourable Gerald J. Rip, Associate Chief Justice

Appearances:

Counsel for the Appellant:	Pierre Barsalou et Josée Pelletier
Counsel for the Respondent:	Nathalie Labbé

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2001, 2002 and 2003 taxation years are allowed with costs and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessments on the basis that the appellant is entitled to overseas employment tax credits in accordance with subsection 122.3(1) of the *Act.*

Signed at Ottawa, Canada, this 6th day of December 2007.

"Gerald J. Rip"

Rip A.C.J.

Citation: 2007TCC736
Date: 20071206
Docket: 2006-1373(IT)G

BETWEEN:

JOSEPH MYS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rip, A.C.J.

[1] Joseph Mys appeals his income tax assessments for 2001, 2002 and 2003 in which the Minister of National Revenue ("Minister") did not permit him to deduct from tax otherwise payable as an overseas employment tax credit in accordance with section 122.3 of the *Income Tax Act* ("*Act*").

[2] The relevant portions of section 122.3 read as follows:

> (1) Where an individual is resident in Canada in a taxation year and, throughout any period of more than 6 consecutive months that commenced before the end of the year and included any part of the year (in this subsection referred to as the "qualifying period")
>
> (*a*) was employed by a person who was a specified employer, other than for the performance of services under a prescribed international development assistance program of the

> (1) Lorsqu'un particulier réside au Canada au cours d'une année d'imposition et que, tout au long d'une période de plus de 6 mois consécutifs ayant commencé avant la fin de l'année et comprenant une fraction de l'année (appelée la « période admissible » au présent paragraphe) :
>
> *a*) d'une part, il a été employé par une personne qui était un employeur déterminé, dans un but autre que celui de fournir des services en vertu d'un programme, visé par règlement, d'aide au développement international du gouvernement du Canada;

Government of Canada, and

(*b*) performed all or substantially all the duties of the individual's employment outside Canada

(i) in connection with a contract under which the specified employer carried on business outside Canada with respect to

. . .

(B) any construction, installation, agricultural or engineering activity, or

. . .

there may be deducted, from the amount that would, but for this section, be the individual's tax payable under this Part for the year, . . .

b) d'autre part, il a exercé la totalité, ou presque, des fonctions de son emploi à l'étranger :

(i) dans le cadre d'un contrat en vertu duquel l'employeur déterminé exploitait une entreprise à l'étranger se rapportant à, selon le cas :

[...]

(B) un projet de construction ou d'installation, ou un projet agricole ou d'ingénierie,

[...]

peut être déduite du montant qui serait, sans le présent article, l'impôt à payer par le contribuable pour l'année en vertu de la présente partie [...]

[3] The parties agreed that Mr. Mys was resident in Canada during the "qualifying period" and during that period was employed by Noramtec Consultants Inc. ("Noramtec"), who was a specified employer,[1] other than for the performance of services under a prescribed international development assistance program of the Canadian government.

[4] During the relevant qualifying period Mr. Mys performed all or substantially all of his employment duties outside of Canada, more specifically at the Kvaerner Philadelphia Shipyard ("Kvaerner") in Philadelphia, Pennsylvania, U.S.A., in connection with a contract between Noramtec and Kvaerner. The appellant's employment duties during the qualifying period were engineering activities as provided in paragraph 122.3(1)(*b*) of the *Act* consisting of computer assisted design and layout of structural steel drawings plus coordination with vendors and construction personnel for the shipbuilding industry. At the time, Kvaerner was in

[1] Subsection 122.3(2) of the *Act* defines "specified employer" to mean, among other things, "a person resident in Canada".

the business of shipbuilding, engineering and construction services. All of these facts were agreed to by the appellant and respondent.

[5] The appellant submits that Noramtec carried on business outside of Canada, specifically the United States, with respect to engineering activity.

[6] Noramtec, according to its president Glenn Holland, provides teams of engineering personnel to clients who are undertaking engineering projects. Noramtec's business operates in three main areas: marine, oil and gas and aerospace. The Marine Division is managed by Terry Logue who works for Noramtec in Richmond, Virginia. The oil and gas and the aerospace divisions are headed by management located in Calgary and New York, respectively.

[7] Mr. Mys worked for Noramtec's marine branch which is primarily concerned with "anything that floats", according to Mr. Holland. Mr. Logue's responsibilities as manager were to assess each contract and determine Noramtec's ability to fulfill the contract. He authorizes all orders and he secures the personnel for the work, arranges visas and all things necessary for the contract to begin on time. During a contract, Noramtec's employees are in weekly contact with Mr. Logue. He visits the worksite at least once every three months to discuss any problems or issues. He is also in contact with the client, in the case at bar, Kvaerner. Mr. Logue is also in charge of hiring and firing. Persons with similar authority manage the other two divisions of Noramtec.

[8] Mr. Holland declared that Noramtec undertakes risk whenever it undertakes a contract. If there is poor workmanship by its employees, Noramtec risks not being paid. He recalled that some clients did refuse to pay invoices "of six figures".

[9] Under the contract with Kvaerner — and others, Mr. Holland added — Noramtec had to secure insurance coverage for the full replacement value of the work to be performed as well as comprehensive general liability insurance with a combined simple limit of $5,000,000. Noramtec warranted its work and was liable to either repair or replace any goods and services failing to conform to the requirements of the Purchase Order. The Purchase Order with Kvaerner was for three Tribon designers and set out the hours each designer was expected to work, the standard and premium hourly rates and travel expenses for the designers, among other things.

[10] The contracts by Noramtec were on a "cost plus" basis, the same, Mr. Holland stated, as what SNC Lavolin as well as Cadco Design, its main competitor, enter into.

[11] Noramtec employs about 300 to 350 personnel, about 25 per cent of whom work in the United States; the Virginia office is responsible for about 50 employees.

[12] All work is done "on site", at the contractor's facilities. It is, explained Mr. Holland, an engineering requirement that the designer be at a specific location. The client wants people on its premises.

[13] The Minister's assessments are based on his assumption that Noramtec is a placement agency that sends employees to work on different contracts to provide specific services both in Canada and other countries. Noramtec does not carry on the business of professional engineer and was not executing any part of Kvaerner's engineering contracts.

[14] Respondent's counsel referred Mr. Holland to letters dated January 5, 2000 and January 1, 2001 from Noramtec to Mr. Mys setting out the terms of employment of Mr. Mys. The letter dated in 2001 contains the following paragraph which the Crown believed was an essential element to the assessments:

> By signing this agreement, you agree not to contract your services directly to THE CLIENT, or to the CLIENT as an employee or representative of an agency other than Noramtec Consultants, Inc., until a period of six (6) months has elapsed from the time this assignment ceased to be in effect.
>
> [Emphasis added.]

[15] Mr. Holland denied that his company is a placement agency. He declared that Noramtec provides specialized engineering personnel to third parties. Clients "ask us to provide specific individuals", specifically Tribon designers[2] and the names of such individuals are set out in the Purchase Order with the client, in this case Kvaerner. In the Kvaerner contract Mr. Mys was responsible for the conversion of vessels to conform to North American standards. Noramtec was obliged to provide Tribon designers, of which Mr. Mys was one, for the project.

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[2] I understand that Tribon is an European computer design program for commercial marine vessels.

[16] Mr. Mys was described by Mr. Holland as a specialist who was hired to lead the team. When Mr. Mys found solutions to problems he would advise the project manager who would decide whether or not to accept the advice. Mr. Mys did not require any significant supervision, although he did have a supervisor. He would be in touch with Mr. Logue. The latter would provide him with support, if necessary, and be in contact with Kvaerner's supervisor at the site.

[17] Mr. Mys described himself as a ship designer. He was trained in Scotland as a shipbuilding technician. He is an associate member of the Royal Institution of Naval Architects. Mr. Mys immigrated to Canada in 1987 and has worked in Saint John, N.B.; Baltimore, MD; Ottawa, ON; Montreal, QC; Coquitlam, B.C.; Scotland, Ireland and Durban, South Africa and elsewhere in the United States.

[18] As a Tribon designer in Philadelphia, Mr. Mys worked on outfitting rudders and cellguides, a guidance system to bring containers onto vessels. In his view, if he "messed up", Noramtec was liable. Mr. Mys testified that he spoke to Mr. Logue at least once a week on matters as diverse as work problems in Philadelphia to personal matters.

[19] The appellant's position is that he clearly met the requirements of paragraph 122.3(1)(*b*) of the *Act* for the relevant period. In his view, he performed during that period all or substantially all the duties of his employment outside Canada in connection with contracts under which Noramtec carried on business outside Canada with respect to an engineering activity, namely the designing and building of vessels by the Philadelphia Kvaerner Shipyard. This is admitted by the parties in their Agreed Statement of Facts.

[20] The contracts, according to the appellant, are ones under which Noramtec carried on business in the U.S. with respect to an engineering activity. The appellant states that the meaning of "carried on business" for the purpose of the overseas employment tax credit has been interpreted by the courts by reference to the definition of "business" and its ordinary sense. The appellant referred to *Timmins v. R.*,[3] a decision of the Federal Court of Appeal, in which Noël J.A. stated that:

> The expressions "carry on business," "carrying on business" or "carried on business," while undefined must, when regard is had to the ordinary meaning of the words refer to the ongoing conduct or carriage of a business. It would seem to follow that where one "carries on" a business in the ordinary sense or by pursuing

[3] 99 DTC 5494, at para. 9.

> one or more of the included activities under ss. 248(1) over time, one is "carrying on business" under the Act.

[21] Noël J.A. explained, at paragraph 11, that even though subsection 122.3(1) does not impose a tax but extends a benefit, it cannot be seriously argued that on that account only, the word business should be construed differently. There is nothing in the language of subsection 122.3(1) which excludes from its application the defined meaning of the word "business".

[22] See also *Surprenant et al. v. The Queen*,[4] where at paragraph 36, 37 and 38 my former colleague Dussault J. adopted the reasons of Noël J.A. In *Surprenant*, MCI Canada, a resident corporation, and MCI SA France, a non-resident corporation, were both owned by a non-resident corporation. MCI Canada recruited information technology specialists. These specialists, including the appellant taxpayers, rendered services in France to MCI SA France's clients. They were paid by MCI Canada, although MCI Canada was reimbursed, in part, by MCI SA France. In assessing the taxpayers the Minister disallowed the overseas employment tax credits claimed. Dussault J. held that the Minister's argument that the taxpayers were not MCI Canada's employees was untenable. This is not the issue in this appeal; the parties agreed that Mr. Mys was an employee of Noramtec. Dussault J. found that MCI Canada was a specified employer within the meaning of subsection 122.3(2) of the *Act*. He also held that the contract with MCI Canada and MCI SA France was concerned with projects involving "engineering activity". By making its employees available to MCI SA France, MCI Canada was assisting MCI SA France to carry out the principles set out in *Timmins, supra.* MCI Canada, as a "specified employer", was "carrying on business outside Canada with respect to . . . any . . . engineering activity", within the meaning of clause 122.3(1)(*b*)(i)(B) of the *Act*.

[23] Subparagraph 122.3(1)(*b*)(i) refers to a taxpayer's duties of employment outside Canada where the taxpayer's specified employer carries on business outside Canada "with respect to" any engineering activity. In *Nowegijick v. The Queen*,[5] Dickson J. (as he then was) declared that:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

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4 2006 DTC 3286.

5 [1983] 1 S.C.R. 29, at p. 39.

[24] The Supreme Court of Canada has confirmed its interpretation of the words "in respect of" in *Markevich v. Canada*,[6] *Sarvanis v. Canada*,[7] and *Slattery (Trustee of) v. Slattery*.[8]

[25] There is no dispute that Kvaerner was in the business of shipbuilding, engineering and construction services and the appellant's employment duties were engineering activities as described in paragraph 122.3(1)(*b*) of the *Act.*

[26] As I stated in *Gabie v. R.*,[9] it does not matter that the appellant himself was or was not a professional engineer as long as his employer carried on business outside Canada with respect to an engineering activity outside Canada. The respondent's basis for the assessment is that Noramtec was only an agent and did not carry on any business as an engineer. It was not an engineering firm. The only obligation of Noramtec to Kvaerner, according to the Crown, was to provide employees of a certain skill. The purpose of section 122.3 is to help Canadian companies, more specifically specified employers, to carry on business outside Canada with respect to the qualifying activity such as engineering. The contract between Kvaerner and Noramtec is not for the design of a ship or anything relating to Noramtec performing engineering functions; it was only a contract for Noramtec to provide skilled employees. Indeed, in its letter of January 1, 2001 to Mr. Mys, Noramtec alludes to a possible agency other than itself.

[27] The Crown submits that Mr. Mys finds himself in a situation similar to that of Christian Fonta[10] who appealed from a dismissal of his claim for an overseas employment tax credit. Mr. Fonta had been paid by a Canadian employment agency for engineering services provided to Siemens Transportation Systems ("Siemens") at his California location. Mr. Fonta had argued that he was entitled to an overseas employment tax credit because he was being paid by the Canadian employment agency acting as a subcontractor in a provision of engineering services overseas. This Court held that the employment agency was not a subcontractor carrying on a qualifying activity. The trial judge was influenced by the fact that the evidence showed that the employment agency acted as a specialized personnel agency for Siemens. She found it questionable that such a business was carried on outside Canada. Moreover, it seemed certain in law that

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6 [2003] 1 S.C.R. 94.
7 [2002] 1 S.C.R. 28.
8 [1993] 3 S.C.R. 430.
9 98 DTC 2207, at para. 24.
10 *Fonta v. Canada*, [2001] T.C.J. No. 62 (QL).

such services were not services pertaining to subcontracting under an engineering contract. Mr. Fonta was therefore not eligible for the overseas employment tax credit.

[28] The facts in these appeals are quite different from those in *Fonta*. Mr. Mys was located in Philadelphia, he performed the services in Philadelphia for Noramtec under a contract that the latter had with Kvaerner. There is no suggestion that Noramtec acted as a specialized personnel agency for Kvaerner; Noramtec had other clients as well. Noramtec carried on business not only in Canada but also in the United States. It had a business location in the State of Virginia through Terry Logue, who solicited potential clients, concluded contracts on behalf of Noramtec's shipbuilding division and monitored the performance of those contracts. It also had another U.S. business location in New York. Mr. Mys was performing all of the duties of his employment with Noramtec outside Canada in connection with a contract Noramtec carried on business outside of Canada with respect to any engineering activity, all as required by subsection 122.3(1) of the *Act*.

[29] The appeals are allowed with costs.

Signed at Ottawa, Canada, this 6th day of December 2007.

"Gerald J. Rip"

Rip A.C.J.

CITATION:	2007TCC736
COURT FILE NO.:	2006-1373(IT)G
STYLE OF CAUSE:	JOSEPH MYS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Gerald J. Rip, Associate Chief Justice
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APPEARANCES:

Counsel for the Appellant:	Pierre Barsalou et Josée Pelletier
Counsel for the Respondent:	Nathalie Labbé

COUNSEL OF RECORD:

For the Appellant:

Name:	Josée Pelletier
Firm:	Barsalou Lawson

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