

Docket: 2010-628(IT)I

BETWEEN:

PETER KOSTIUK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Respondent's Motion heard on November 29, 2010,
at Saskatoon, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant: D. Heather Funk
Counsel for the Respondent: Bryn Frape

ORDER

Upon the Appellant having filed a Notice of Appeal in respect of a Goods and Services Tax Credit Notice issued by the Minister of National Revenue advising that he was entitled to a Goods and Services Tax Credit in the 2006 year;

And the Respondent having brought a motion for an order dismissing the Appellant's Notice of Appeal on the basis that there can be no appeal from a 'nil' assessment;

And having read the materials filed including the Affidavit of Sandy Slight and the Affidavit of Peter Kostiuk, and having heard the submissions of counsel;

The Respondent's motion is granted, without costs, and the appeal of the 2006 taxation year is dismissed in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 6th day of December, 2010.

“G. A. Sheridan”

Sheridan J.

Citation: 2010TCC630

Date: 20101206

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BETWEEN:

PETER KOSTIUK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Sheridan, J.

[1] The Appellant, Peter Kostiuk, is a 94-year-old gentleman. By Goods and Services Tax Credit Notice issued by the Minister of National Revenue dated September 4, 2009 (the “GST Credit Notice”) he was advised that he was entitled to a Goods and Services Tax Credit in the 2006 year of \$90.50 for the specified months of July 2007, October 2007, January 2008 and April 2008. The basis for the Minister’s redetermination of Mr. Kostiuk’s entitlement to the GST Credit was that he was “separated” and had a family net income of \$24,124.

[2] Prior to the GST Credit Notice under appeal, the Minister had issued three other GST credit notices for the same period: one dated September 7, 2007 advising Mr. Kostiuk that he was not entitled to a GST Credit because his “spouse” had applied and there could be only one application per family; another dated November 30, 2007 advising that he was entitled to a GST Credit because he was “separated” and the family income level was within the amount allowed; and a third on November 28, 2008 advising, again, that he was not entitled to a GST Credit because his “spouse” had applied and there could be only one application per family.

[3] It was against this background that on October 1, 2009 Mr. Kostiuk objected to the Minister’s redetermination of September 4, 2009 on the basis that he was “married”, not “separated” as had been determined by the Minister. For reasons not

known to this Court, the Minister maintained his position that Mr. Kostiuk was “separated” and confirmed the redetermination in respect of the GST Credit Notice.

[4] It is from that confirmation that Mr. Kostiuk seeks to appeal. He does not dispute that no tax was assessed under the GST Credit Notice; what he takes issue with is the department’s determination of his marital status as “separated” when, in fact, he says he is and was at all relevant times “married”. Mr. Kostiuk’s concern is that should he, in future, file his returns as “married”, he runs the risk of being constantly reassessed or worse, assessed penalties for having filed a false return. His purpose in appealing is to avoid such difficulties by asking this Court to make a final determination of his marital status.

[5] The Respondent’s position is that no tax having been assessed under the GST Credit Notice, it is a ‘nil’ assessment and accordingly, no appeal lies from it.

[6] While the legislation itself makes no reference to that term, it has long been defined in the jurisprudence to identify an assessment which cannot be appealed: where no tax has been assessed, there is no “assessment” as that term is used in the legislation and hence, nothing to appeal. The rationale for this interpretation was explained by Noël, J.A. in the Federal Court of Appeal decision, *Interior Savings Credit Union v. Her Majesty the Queen*¹:

17 ... There are two reasons why a so-called nil assessment cannot be appealed. First, an appeal must be directed against an assessment and an assessment which assesses no tax is not an assessment (see *Okalta Oils Limited v. MNR*, 55 D.T.C. 1176 (SCC) at p. 1178: “Under these provisions, there is no assessment if there was not (*sic*) tax claimed”). Second, there is no right of appeal from a nil assessment since: “Any other objection but one related to an amount claimed [as taxes] was lacking the object giving rise to the right of appeal ...” (*Okalta Oils, supra*, at p. 1178).²

[7] As Mr. Kostiuk admits that no tax was payable under the GST Credit Notice, this Court is without authority to entertain an appeal from it. An additional obstacle for Mr. Kostiuk is that what he is effectively seeking in his appeal is a declaration of his marital status, a remedy which, in any event, is beyond the power of this Court to grant.

¹ 2007 FCA 151. (F.C.A.). Re the *Excise Tax Act*, see *Bruner v. R.*, [2003] F.C.J. No. 144. (F.C.A.).

² Above, at paragraph 17.

[8] For the reasons set out above, the Respondent's motion is granted, without costs, and the appeal is dismissed.

Signed at Ottawa, Canada, this 6th day of December, 2010.

“G. A. Sheridan”

Sheridan J.

CITATION: 2010TCC630

COURT FILE NO.: 2010-628(IT)I

STYLE OF CAUSE: PETER KOSTIUK AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: November 29, 2010

REASONS FOR ORDER BY: The Honourable Justice G. A. Sheridan

DATE OF ORDER: December 6, 2010

APPEARANCES:

Counsel for the Appellant: D. Heather Funk
Counsel for the Respondent: Bryn Frape

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