Docket: 2011-2415(IT)I

BETWEEN:

ALLEN D. GALLANT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 22, 2012 at Vancouver, British Columbia

By: The Honourable Justice J.M. Woods

Appearances:

Agent for the Appellant:	Basil Jessome
Counsel for the Respondent:	Jonathan Wittig

JUDGMENT

The appeal with respect to assessments made under the *Income Tax Act* for the 2006 and 2007 taxation years is dismissed.

Signed at Toronto, Ontario this 11th day of April 2012.

"J. M. Woods"

Woods J.

Citation: 2012 TCC 119
Date: 20120411
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BETWEEN:

ALLEN D. GALLANT,

Appellant,

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REASONS FOR JUDGMENT

Woods J.

[1] At the end of 2005, Allen Gallant had tuition, education and textbook amounts under the *Income Tax Act* that were available to be carried forward to future taxation years. The amount of the carry forward was $32,479. The question to be determined is how this amount should be applied to the 2006 and 2007 taxation years.

[2] The appellant submits that he should be entitled to apply $25,780.47 in 2006 and $6,698.53 in 2007. The respondent submits that the appellant must apply $29,521.31 in 2006 and $2,957.69 in 2007.

[3] The issue has no effect on the tax payable for the 2006 taxation year since there is no tax payable for that year under either scenario. The issue only affects tax payable for the 2007 taxation year.

[4] The relevant legislative provision is section 118.61 of the *Act*, which is reproduced below as it was in effect for 2007.

118.61(1) Unused tuition, textbook and eduction tax credits. In this section, an individual's unused tuition, textbook and education tax credits at the end of a taxation year is the amount determined by the formula

$$A + (B - C) - (D + E)$$

where

A is the amount determined under this subsection in respect of the individual at the end of the preceding taxation year;

B is the total of all amounts each of which may be deducted under section 118.5 or 118.6 in computing the individual's tax payable under this Part for the year;

C is the lesser of the value of B and the amount that would be the individual's tax payable under this Part for the year if no amount were deductible under this Division (other than an amount deductible under this section and any of sections 118**,** 118.01, 118.02, 118.03, 118.3 and 118.7);

D is the amount that the individual may deduct under subsection (2) for the year; and

E is the tuition, textbook and education tax credits transferred for the year by the individual to the individual's spouse, common-law partner, parent or grandparent.

(2) Deduction of carryforward. For the purpose of computing an individual's tax payable under this Part for a taxation year, there may be deducted the lesser of

(*a*) the amount determined under subsection (1) in respect of the individual at the end of the preceding taxation year, and

(*b*) the amount that would be the individual's tax payable under this Part for the year if no amount were deductible under this Division (other than an amount deductible under this section and any of sections 118**,** 118.01, 118.02, 118.03, 118.3 and 118.7).

(3) Unused tuition and education tax credits at the end of 2000. [Repealed, 2007, c. 2, s. 24(3).]

(4) Change of appropriate percentage. For the purpose of determining the amount that may be deducted under subsection (2) or 118.6(2.1) in computing an individual's tax payable for a taxation year, in circumstances where the appropriate percentage for the taxation year is different from the appropriate percentage for the preceding taxation year, the individual's unused tuition,

> textbook and education tax credits at the end of the preceding taxation year is deemed to be the amount determined by the formula
>
> A/B × C
>
> where
>
> A is the appropriate percentage for the current taxation year;
>
> B is the appropriate percentage for the preceding taxation year; and
>
> C is the amount that would be the individual's unused tuition, textbook and education tax credits at the end of the preceding taxation year if this section were read without reference to this subsection.

[5] The interpretation of the above provisions is not in dispute in this appeal. The representative of the appellant, who prepared the income tax returns, acknowledges that the assessments are in accordance with these provisions.

[6] The appellant's concern is not with the legislation but with a form (Schedule 11) that is required to be used by taxpayers to calculate the deduction and is to be appended to the income tax return.

[7] The problem is that Schedule 11 provides a greater deduction to the appellant than the deduction provided by the legislation.

[8] The appellant calculated the deduction in accordance with the form. The calculation was initially accepted, but it was subsequently rejected when the appellant requested an amendment to the income tax return in 2009. A reassessment was issued so that the deduction conformed to the legislation.

[9] The appellant submits that it is inappropriate for the Canada Revenue Agency (CRA) to reassess on a different basis that the CRA's own forms.

[10] The problem with Schedule 11 is that it provides a greater deduction where a taxpayer's marginal tax rate is above the minimum. The problem is described below in an extract from a letter to the appellant from the appeals officer.

> The Schedule 11 calculates the amount to be applied on the assumption that the tuition credits and the tax payable are calculated at the same tax rate. It does not take into account that a greater amount may be required where the tuition carryforward is applied to a tax year in which the taxpayer is subject to tax on a portion of his

> income at a higher rate. Your client required $29520.00 of the tuition carryforward to reduce his 2006 federal tax payable to nil.

Analysis

[11] I would first comment that I agree with the appellant that it is unfair for the CRA to require a taxpayer to calculate a deduction in accordance with a form, and then to reassess on a different basis. Taxpayers should be able to rely on forms that are required to be included with income tax returns. No suggestion was given that taxpayers were warned about the problem with Schedule 11.

[12] The circumstances are exacerbated in this case because the CRA did not pick up on the problem until fortuitously the taxpayer requested a change to the income tax return. Accordingly, most taxpayers may have been assessed in accordance with the form.

[13] It is not enough, however, that a taxpayer has been unfairly dealt with by the CRA. Normally, this is not grounds for relief in this Court.

[14] In this case, the representative of the appellant suggests that the equitable grounds of estoppel should be applied on the basis that there has been a misrepresentation of fact.

[15] It is clear that estoppel cannot bind the Crown in respect of the law: *Goldstein v The Queen*, 96 DTC 1029 (TCC). However, principles of estoppel can be applied in respect of misrepresentations of fact: *Rogers v The Queen*, 98 DTC 1365 (TCC).

[16] The argument in support of the application of estoppel in this case is that the CRA wrongly represented to the appellant that it would administer section 118.61 in accordance with the form. As far as I am aware, the form has never been changed.

[17] The difficulty that I have with giving relief is the overriding principle that estoppel cannot be invoked to preclude the exercise of a statutory duty. The principle was described by Chevalier D.J. in *Ludmer v The Queen*, 95 DTC 5311 (FCA), at p. 5314:

> In *Canada v. Lidder*, [1992] 2 F.C. 621, Marceau, J.A. wrote (at 625):
>
> > The doctrine of estoppel cannot be invoked to preclude the exercise of a statutory duty -- here, the duty of the officer to deal with the application as it was presented -- or to confer a statutorily defined status on a person who clearly

> does not fall within the statutory definition. Indeed, common sense would dictate that one cannot fail to apply the law due to the misstatement, the negligence or the simple misrepresentation of a government worker.
>
> It was suggested in the course of the argument that, if the doctrine of estoppel could not apply, maybe the related doctrine of 'reasonable or legitimate expectation' could. The suggestion was to no avail because this doctrine suffers from the same limitation that restricts the doctrine of estoppel. *A public authority may be bound by its undertakings as to the procedure it will follow, but in no case can it place itself in conflict with its duty and forego the requirements of the law.* As was repeated by Sopinka, J. recently in writing the judgment of the Supreme Court in *Reference Re Canada Assistance Plan (B.C.)*, 2 S.C.R. 525, at pages 557-558:
>
> > There is no support in Canadian or English cases for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make representations or to be consulted. It does not fetter the decision following the representations or consultation.

[18] It is not open to this Court to revisit this principle. I would also note that the statutory duty to assess in accordance with the legislation was recently confirmed by the Federal Court of Appeal in *CIBC World Markets Inc. v The Queen*, 2012 FCA 3. At paragraph 22, Stratas J. stated:

> **22** This Court is bound by its decision in *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 (C.A.). In that decision, Jackett C.J., writing for the unanimous Court, stated (at page 602) that "the Minister has a statutory duty to assess the amount of tax payable on the [facts] as he finds them in accordance with the law as he understands it." In his view, "it follows that he cannot assess for some amount designed to implement a compromise settlement." The Minister is obligated to assess "on the facts in accordance with the law and not to implement a compromise settlement." See also *Cohen v. The Queen*, [1980] C.T.C. 318 (F.C.A.).

[19] I must dismiss the appeal, but it is with considerable regret that I do so. In light of the unfair situation in which the appellant is now placed, I would urge the respondent to refer the matter to the appropriate department for consideration of discretionary relief.

[20] Finally, I would note that the appeal with respect to the 2006 taxation year would be dismissed in any event because the assessment is a nil assessment: *The Queen v Interior Savings Credit Union*, 2007 FCA 151, 2007 DTC 5342.

Signed at Toronto, Ontario this 11th day of April 2012.

"J. M. Woods"

Woods J.

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APPEARANCES:

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