

Docket: 2018-4136(IT)I

BETWEEN:

YOUSSEF ISMAIL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 3, 2019 at Ottawa, Ontario

Before: The Honourable Justice K.A. Siobhan Monaghan

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Raphaelle St. Pierre, Articling Student

JUDGMENT

In accordance with the attached reasons for judgment:

The appeal from a reassessment made under the *Income Tax Act* in respect of the Appellant's 2013 taxation year is dismissed. Each party shall bear their own costs.

Signed at Ottawa, Canada, this 31st day of July 2019.

“K.A. Siobhan Monaghan”

Monaghan J.

Citation: 2019 TCC 159

Date: 20190731

Docket: 2018-4136(IT)I

BETWEEN:

YOUSSEF ISMAIL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Monaghan J.

I. INTRODUCTION

[1] Yousef Ismail is an Egyptian who came to Canada in 2007 as an international student under a joint initiative between Egypt and Canada. Dr. Ismail explained that Egypt relies on foreign institutions in Canada, Europe and the United States to assist with training of Egyptian students, to add to their knowledge and to advance education in Egypt. Prior to coming to Canada, Dr. Ismail completed a Bachelor of Agricultural Science (Alexandria University, 1999) and a Masters of Agricultural Science (2004). In 2005, he registered in a PhD program at Cairo University and completed some of the course work towards that PhD before Egypt selected him to come to Canada. Dr. Ismail registered with the Université de Montreal (“UM”) as a PhD student in 2008 and remained a student in that program until 2012 when he received his PhD from UM.

[2] On completion of his Canadian PhD, Dr. Ismail sought a position with Atomic Energy of Canada Limited (“AECL”) to conduct post-doctoral research. His PhD supervisor at UM assisted him in applying for this position. AECL offered Dr. Ismail a post-doctoral fellowship in August 2012 and he commenced it in January 2013.

[3] Dr. Ismail learned from colleagues at AECL that they had not been taxed on fellowship amounts they received from AECL. This prompted Dr. Ismail to file a T1 adjustment to amend his 2013 income tax return to claim the scholarship exemption in respect of his fellowship. Understandably, the Canada Revenue Agency would not share the information relating to his colleagues with Dr. Ismail. However, Dr. Ismail states his colleagues were engaged in the same program, during the same period and doing the same type of work and yet they were treated as if the entire amount of the fellowship received was eligible for the scholarship exemption.

[4] The Minister accepted that \$500 of the total received by Dr. Ismail qualified as a scholarship exemption and issued a reassessment to Dr. Ismail reducing his income in 2013 by \$500. Dr. Ismail believes the entire fellowship qualifies and so he instituted this appeal under the *Income Tax Act* (“the Act”).

II. ONUS

[5] The assumptions of fact upon which the reassessment was made, as detailed in the Respondent’s Reply to the Notice of Appeal, are for the most part uncontroversial because Dr. Ismail agrees with most of them. In particular, Dr. Ismail agrees that he was a post-doctoral student doing research at AECL, that AECL paid him a fellowship, that Dr. Ismail was not enrolled at an educational program at AECL, and that AECL did not charge Dr. Ismail tuition fees. Even if those facts are true, that is not sufficient to uphold the reassessment because Dr. Ismail claims the relevant educational program is his PhD program in Egypt.

[6] The only assumptions of fact in the Reply that are disputed by Dr. Ismail are the assumptions that at no time in 2013 did he conduct research at AECL in a program leading to a degree and that no part of the post-doctoral fellowship was paid in respect of educational studies conducted at AECL. While Dr. Ismail agrees that AECL did not provide the educational program, he claims the research he conducted at AECL was educational study related to his PhD program in Egypt and that the fellowship amount was paid in connection with that program. Given Dr. Ismail’s position, the consequence of the manner in which the assumptions of

fact were drafted is that the onus to establish many of the facts necessary to uphold the reassessment lies with the Respondent.

III. ISSUE

[7] A taxpayer must include in income the difference between the amount of all scholarships, fellowships and bursaries received in the year and the amount of the taxpayer's scholarship exemption. The parties agree that Dr. Ismail was a post-doctoral fellow conducting research at AECL during 2013 and that he received a post-doctoral fellowship from AECL in the amount of \$56,100.26. While the Minister has treated \$500¹ of that amount as Dr. Ismail's scholarship exemption pursuant to paragraph 56(3)(c), Dr. Ismail's position is that the entire amount meets the conditions to qualify as a scholarship exemption under paragraph 56(3)(a).

[8] That provision states that a taxpayer's scholarship exemption for a taxation year includes a scholarship, fellowship or bursary received in connection with the taxpayer's enrolment in an educational program in respect of which the taxpayer is entitled to what is typically referred to as the education tax credit for the taxation year, or for the preceding or following taxation year.²

[9] Entitlement to the education tax credit requires the individual be a student enrolled:

- in a **qualifying educational program** as a full-time student at a **designated educational institution** or
- at a **designated educational institution** in a **specified educational program** that provides that each student in the program spend not less than 12 hours in the month on courses in the program.

Each of the terms in bold face is defined for these purposes in the Act.

¹ This is the basic exemption.

² The Act refers to an amount that may be deducted under subsection 118.6(2) in computing the taxpayer's tax payable for the taxation year, preceding taxation year or following taxation year. Because this amount is typically referred to as the education tax credit, that is how I will refer to it in these reasons.

[10] Entitlement to the education tax credit is also dependent on proof in the form of a certificate filed with the Minister and issued by the designated educational institution. The need for a certificate was not addressed in the assumptions of fact in the Respondent's Reply to the Notice of Appeal. Accordingly, the onus to establish that this condition is not met rests with the Respondent. Because this question was not addressed at the hearing or in the Reply, I have proceeded on the basis that the certificate condition is not at issue.

[11] The issue to be addressed in this appeal is whether Dr. Ismail received the fellowship amount from AECL in connection with his enrolment in an educational program in respect of which he may deduct an education tax credit in 2012, 2013 or 2014. The Respondent does not dispute that the amount Dr. Ismail received from AECL qualifies as a fellowship, but puts the other conditions in issue. Therefore, the particular questions to be addressed are:

1. Was Dr. Ismail enrolled at a designated educational institution in 2013?³
2. If yes, was Dr. Ismail either
 - a. a student enrolled in a qualifying educational program as a full-time student at that designated educational institution; or
 - b. a student enrolled in a specified educational program that provides that each student in the program spend not less than 12 hours in the month on courses in the program?
3. If yes, was the amount received as a fellowship received in connection with his enrolment in that educational program?

[12] As I have mentioned, the onus to establish many of the relevant facts rests with the Respondent, rather than Dr. Ismail. Because the Respondent did not call any witnesses, the Respondent must rely on evidence provided by Dr. Ismail, the only witness at the trial. I found Dr. Ismail to be a forthright, honest and credible witness.

IV. ANALYSIS OF ISSUES

³ While enrolment in 2012 or 2014 also could be relevant, those years were not addressed at the hearing. The focus was on 2013. Dr. Ismail stated he was enrolled in the same PhD program in each of those years, but that does not affect the outcome. There was no evidence he was enrolled at any other institution in 2012 or 2014. His registration at UM finished in 2011.

1. Was Dr. Ismail enrolled at a designated educational institution in 2013?

[13] Designated educational institution is defined in subsection 118.6(1) of the Act. Paragraph (a) of that definition applies only to educational institutions in Canada and paragraph (c) applies only to educational institutions in the United States when certain conditions are satisfied.

[14] The Respondent asserts that AECL is not a university or other degree granting institution. Dr. Ismail agrees. His enrolment in the PhD program at UM ended in 2011.⁴ Accordingly, Dr. Ismail agrees that he was not enrolled at a Canadian or United States institution in 2013.

[15] However, a university outside Canada at which the individual was enrolled in a course, of not less than three consecutive week's duration, leading to a degree is a designated educational institution.⁵ Dr. Ismail asserts that in his case the relevant institution is in Egypt. Thus, to fall within this part of the definition, three conditions must be satisfied:

- i. The relevant institution in Egypt must be a university;
- ii. Dr. Ismail must be enrolled at that institution in a course of at least three consecutive weeks; and
- iii. That course must lead to a degree.

(i) Is the institution in Egypt a university?

[16] Dr. Ismail registered for the PhD program at Cairo University in 2005 and testified he remained registered as a PhD student in Egypt throughout 2013. The status of Cairo University as a university was not challenged. Cairo University appears on the List of Designated Educational Institutions published by the Canada Revenue Agency. Accordingly, I accept that Cairo University is a university.

[17] Evidence also was given in respect of The Desert Research Center, another institution in Egypt with which Dr. Ismail was affiliated. Dr. Ismail testified that The Desert Research Center is an institution dedicated to studies and research in

⁴ See Exhibits A-2 and A-4.

⁵ See paragraph (b) of the definition of designated educational institution in subsection 118.6(1).

the desert in Egypt and is regulated as a university. He was conducting research there before he came to Canada.

[18] Dr. Ismail explained that every year he must seek permission from Egypt to remain in Canada. He has done this every year since completing his PhD at UM. Dr. Ismail entered two documents (the “Decrees”) as evidence which reflect permission granted to him to remain in Canada for the period September 2013 to September 2014, and for the period ending September 23, 2015.⁶ The Decrees record a decision of the President of The Desert Research Center to allow Dr. Ismail to remain in Canada. In support of his position that The Desert Research Center is also an educational institution, he notes that the Decrees state the President of the Center permitted him to stay in Canada after reviewing the law regarding the regulation of universities.

[19] The relationship between Cairo University and The Desert Research Center was not addressed expressly at the hearing. Counsel for the Respondent did not ask any Dr. Ismail any questions regarding the relationship, if any, between the two institutions. However, because I accept Dr. Ismail’s testimony that he remained enrolled in the PhD program at Cairo University in 2013, I do not need to decide whether The Desert Research Center itself also is a university.

(ii) Is enrolment in the PhD program enrolment in a course of at least three consecutive weeks?

[20] When counsel for the Respondent asked Dr. Ismail whether his PhD was on pause while he pursued his post-doctoral work here in Canada, Dr. Ismail said it was not. He explained that the research he is doing here in Canada is considered educational and will be applied towards his PhD in Egypt, that at all relevant times he remained enrolled in the PhD program in Egypt and that his permission from Egypt to remain in Canada in 2013 was premised on this research at AECL.⁷ I accept that evidence.

[21] The definition of designated educational institution refers to enrolment in a course, rather than enrolment in a program. While Dr. Ismail testified that he remained enrolled in the PhD program, whether he was enrolled in any particular course in 2013 is not known.

⁶ Exhibit A-6.

⁷ Dr. Ismail married in 2013 and indicated his marriage may have been a factor as well.

[22] The education tax credit provisions distinguish between a program and a course. For example, the definitions of qualifying educational program and specified educational program each refer to hours of work on *courses in the program*, suggesting that there is a distinction, i.e. that the program is a combination of courses and work, while a course is one of several separate components of a program. I also note that the “enrolment in a course” requirement applies only to institutions outside Canada that are not U.S. institutions that meet the conditions of paragraph (c) of the definition of designated educational institution.

[23] Previous cases that have considered the consecutive week requirement, typically in the context of the tuition tax credit provisions of the Act, have almost universally focused on the individual courses and not the overall program.⁸ In my view, given the context in which the word “course” is used, I agree with the conclusion in these cases that course refers to a component of a program, rather than the program itself.

[24] However, the Respondent’s Reply assumed Dr. Ismail was not a student enrolled in an educational program at AECL. When Dr. Ismail said that he was relying on the Egyptian university being a designated educational institution, Respondent’s counsel did not ask him whether he was enrolled in a course in Egypt in 2013. Her questions were focused on continuing enrolment in the PhD program in Egypt and whether his PhD in Egypt was on pause. I have accepted his testimony that he was enrolled in the PhD program in 2013.

[25] In my view, given the assumptions of fact, the onus to establish that Dr. Ismail was not enrolled in a course of at least three consecutive weeks duration was on the Respondent. The Respondent did not elicit any information about whether Dr. Ismail was enrolled in a course. Accordingly, the Respondent did not meet the onus and, for purposes of this appeal, Dr. Ismail is to be considered as having established that he was enrolled in a course of at least three consecutive weeks duration.

(iii) Does the course lead to a degree?

⁸ See, for example, *Ali v The Queen* 2004 TCC 726 (Inf.); *Ferre v. The Queen* 2010 TCC 593 (Inf.); *Faint v The Queen* 2011 TCC 26 (Inf.); and *Rose v. The Queen* 2012 TCC 166 (appeal discontinued) (Inf.). But, *contra*, see *Siddell v. The Queen* 2011 TCC 250 (Inf.).

[26] When counsel for the Respondent asked Dr. Ismail whether he received a degree on completing his post-doctoral fellowship at AECL, he replied not yet, explaining that he has not yet completed the necessary work for his PhD in Egypt. He said that while there is no degree called a post-doctoral degree, he intends to pursue his PhD in Egypt. As well, he testified he would be certified as a scientist, a designation he said was comparable to a degree.

[27] The definition of designated educational institution requires only that Dr. Ismail be enrolled in a course that leads to a degree. It does not require that he obtain a degree at the end of his course. I accept his testimony that, at all relevant times, Dr. Ismail remained registered in the PhD program in Egypt, his research program at AECL would be credited towards that PhD, and that he intended to pursue that PhD, such that his research at AECL was part of a program leading to a degree.

[28] Thus, for purposes of this appeal, Dr. Ismail is to be considered to have been enrolled at a designated educational institution in 2013.

2a. Was Dr. Ismail a student enrolled in a qualifying educational program as a full-time student at that designated educational institution?

[29] Qualifying educational program is defined⁹ as a program of not less than three consecutive weeks duration that provides that each student taking the program spend not less than ten hours per week on courses or work in the program and that is a program at a post-secondary school level that does not consist primarily of research (unless the program leads to a diploma from a college or a college d'enseignement general et professionnel ("CEGEP"), or a bachelor, masters, doctoral or equivalent degree), subject to certain exceptions not relevant here.¹⁰

[30] There is no dispute that a PhD program is a post-secondary level program. The duration of the program was not addressed at trial but the onus to establish it was not at least three weeks' duration rested with the Respondent.

⁹ See subsection 118.6(1) of the Act.

¹⁰ Programs in respect of which the student receives an allowance, benefit, grant or reimbursement for expenses in respect of the program other than certain specified benefits, including as or on account of a scholarship, fellowship or bursary, of a prize for achievement in a field of endeavour ordinarily carried on by the student.

[31] The definition of qualifying educational program distinguishes between course work and other work in the program. Secondly, the definition expressly recognizes that work that consists primarily of research qualifies provided the program leads to a college or CEGEP diploma or a bachelor, masters or doctorate or equivalent degree.

[32] Counsel for the Respondent appeared to be suggesting that the definition of qualifying educational program requires that Dr. Ismail be granted a degree at the end of his post-doctoral fellowship. At least twice she asked Dr. Ismail if he received a degree at the end of his fellowship. While the definition of qualifying educational program requires that the program lead to a college diploma or a degree, receipt of a diploma or degree is not a requirement. Moreover, the definition permits the program to consist primarily of research provided that it leads to a degree. Dr. Ismail submits that the PhD program in Egypt qualifies because the research at AECL will be credited towards and thus lead to a PhD in Egypt. I agree that it is sufficient that the research lead to a degree, regardless of whether the degree is awarded.

[33] Where the education tax credit is to be claimed in respect of a qualifying educational program, the individual must be enrolled as a full-time student at the qualifying educational institution in a program that provides that each student taking the program spend not less than ten hours per week on courses or work in the program. The definition of qualifying educational program recognizes that a program may consist primarily of research, clearly suggesting that full-time research in a program is sufficient to qualify an individual for full-time student status in that program. Prior cases have suggested that whether a student is to be considered a full-time student is largely left to the requirements for that status at the relevant institution.¹¹

[34] The Respondent's Reply did not include any assumptions of fact concerning Dr. Ismail's status as a full-time student or the time commitment requirements of the program.

[35] No questions were asked about these aspects of the PhD program in Egypt. As the Respondent bore the onus to establish these facts, but there was no evidence regarding Dr. Ismail's status as a full-time student¹² or the work (in this case,

¹¹ *Ferre, supra.*

¹² I want to address some additional evidence that arose because of the two Decrees Dr. Ismail submitted in evidence. The Decrees Dr. Ismail provided, suggesting perhaps he was not a student

research) requirements of the Egyptian PhD program, for purposes of this appeal, Dr. Ismail is to be considered a student enrolled in a qualifying educational program as a full-time student at a designated educational institution.

2b. Was Dr. Ismail a student enrolled in a specified educational program that provides that each student in the program spend not less than 12 hours in the month on courses in the program?

[36] A specified educational program is defined as a program that would be a qualifying educational program, if the definition of qualifying educational program were read without reference to the words “that provides that each student taking the program spend not less than 10 hours per week on courses or work in the program”. In other words, the only difference between a qualifying educational program and a specified educational program is the time required to be spent on courses or work in the program.

[37] However, where an individual seeks to rely on the program being a specified educational program, the program must provide that the student spend not less than 12 hours in the month on courses in the program.

[38] Although it is not necessary to consider this question, given the conclusion on question 2a, the onus to establish the program does not require Dr. Ismail to spend at least 12 hours in the month on courses in the program rested with the Respondent. As noted above, time requirements were not addressed and accordingly, for purposes of this appeal, Dr. Ismail is also to be considered a student enrolled in a specified educational program that provides that each student in the program spend not less than 12 hours in the month on courses in the program.

3. Was the fellowship received in connection with Dr. Ismail’s PhD program in Egypt?

but an employee, were copies of originals which had been translated from their original language (Arabic) by TranslationPal. The Decrees refer to renewal of his permission to stay in Canada “without salary”. Dr. Ismail said that although the word salary is used, it is not a salary as we would understand it in Canada. Rather, it is a scholarship or bursary. As he explained it, all graduate students in Egypt receive funds which he described as “symbolic salary.” He explained that, as is the case in Canada, where graduate students obtain bursaries and scholarships, Egypt provides funds to encourage study at a post-graduate level. He explained that the term used to describe these funds in Arabic is not very easily translated into English but that it is not a salary as we understand salary in Canada. I accept his evidence in this regard.

[39] The Act provides that a scholarship, fellowship or bursary is not considered to be received in connection with the taxpayer's enrolment in an educational program except to the extent that the scholarship, fellowship or bursary is intended to support the taxpayer's enrolment in the program having regard to all the circumstances and conditions that apply in respect of the scholarship, fellowship or bursary, the duration of the educational program, and the period for which the support is intended to be provided.¹³

[40] The Respondent in its Reply assumed that no part of the fellowship was paid in respect of educational studies conducted at AECL. Notwithstanding that Dr. Ismail's research (educational studies) were conducted at AECL, if Dr. Ismail's appeal is to succeed, the fellowship amount must be received in connection with his PhD in Egypt as that is the only qualifying educational program for which he possibly could claim an education tax credit in 2013. Therefore, the fellowship must be intended to support his enrolment in the PhD in Egypt having regard to all the circumstances and conditions that apply in respect of the fellowship, the duration of the educational program, and the period for which the support is intended to be provided.

[41] While the statutory language does not specify from whose perspective the intention is to be assessed (i.e., the recipient or the payer of the fellowship), in my view, because AECL is paying the fellowship, its intention is most important. Moreover, intention is not the same as motivation. Motivation is what stimulates or prompts actions while intention is the purpose in acting.¹⁴ While subjective intention is relevant, it is not sufficient; intention must be assessed objectively, particularly where intention is to be assessed having regard to all the circumstances and conditions. In other words, there must be objective manifestations of the relevant intention.¹⁵

[42] Following completion of his PhD at UM, Dr. Ismail applied for a post-doctoral position at AECL. The application was made with the assistance of his PhD supervisor at UM. Dr. Ismail testified that at the outset Egypt had nothing to do with it, although he had to seek permission from Egypt to stay in Canada. While his research at AECL may assist Dr. Ismail with respect to his PhD in Egypt,

¹³ Subsection 56(3.1).

¹⁴ See *Backman v. R.* 2001 SCC 10.

¹⁵ See *Stewart v. The Queen* [2002] 2 SCR 645, and *Symes v. The Queen* 94 DTC 6001 (SCC).

having regard to the circumstances and the terms of the fellowship, in my view, it cannot be said that the fellowship from AECL was received in connection with the PhD program in Egypt.

[43] AECL offered Dr. Ismail a post-doctoral position by letter dated August 13, 2012. He accepted the offer but commenced the fellowship in January 2013, after obtaining relevant security clearances, completing required paperwork and returning to Egypt to report on his PhD work in Canada, to advance his proposal to continue with post-doctoral research in Canada, and to convince the relevant institutions in Egypt that his post-doctoral work in Canada would advance his education and continue his studies.

[44] AECL's written offer states the assignment will be for two years, with the option to renew for a third year.¹⁶ The offer refers to Dr. Ismail pursuing research and states he will work under the direction and supervision of AECL. The offer does not mention any connection to Dr. Ismail's studies in Egypt and Dr. Ismail testified that the position was sought without Egypt's involvement. Although the offer refers to a number of conditions, it does not state that the fellowship is dependent on Dr. Ismail being enrolled in any educational program. The offer acknowledges that Dr. Ismail may, as part of the post doctorate experience, be required to publish work, and states AECL will make reasonable efforts to assist Dr. Ismail in doing that. However, the offer is also clear that AECL has all rights to any intellectual property, materials and information produced, developed or acquired by Dr. Ismail in the performance of his duties at AECL, and that AECL's rights will prevail over any obligations Dr. Ismail may have to publish work. There is nothing in the offer that suggests AECL intended to support his enrolment in, or otherwise ties the fellowship to, his PhD program in Egypt. While Egypt was supportive of Dr. Ismail continuing his research in Canada, he did not suggest that AECL was interested in his ongoing enrolment in a PhD program in Egypt.

[45] Looking at the fellowship from Dr. Ismail's perspective I am also not satisfied there is a sufficient connection. While I accept that Dr. Ismail's research and experience with AECL may benefit him in pursuing, and ultimately being awarded, his PhD in Egypt, that does not establish that the fellowship is intended to support his enrolment in that program as that phrase is to be interpreted for this purpose. The fellowship is not conditioned on him remaining enrolled in the PhD

¹⁶ Dr. Ismail remains employed at AECL although his current status there is not relevant to the appeal.

program. The term of the fellowship bears no relationship to the duration of his PhD program. He was enrolled in the PhD program for 7 years before he commenced the fellowship and remained enrolled in it following completion of the fellowship. The fellowship was for a two year term.¹⁷

[46] In my view, it is not sufficient that Dr. Ismail may have been motivated to apply for the fellowship to further his knowledge and help him meet the requirements of his PhD in Egypt.

[47] Accordingly, based on the evidence, I have determined that the fellowship was not paid by AECL to Dr. Ismail in connection with his PhD program in Egypt, as required by the Act, and as a result, Dr. Ismail's appeal is dismissed.

V. CONCLUSION

[48] Dr. Ismail seems a capable, dedicated researcher and he appeared to me to be a forthright and intelligent individual. I have no doubt that he is frustrated that he sees himself as being treated differently than his colleagues at AECL in the same post-doctoral program. While I am very sympathetic to that frustration, unfortunately I am unable to decide his case otherwise than in accordance with the law. As a result, I must dismiss the appeal from the reassessment made under the *Income Tax Act* in respect of the Appellant's 2013 taxation year. Each party shall bear their own costs.

Signed at Ottawa, Canada, this 31st day of July 2019.

“K.A. Siobhan Monaghan”

Monaghan J.

¹⁷ Although the AECL offer provided for a potential one year renewal, the fellowship was not renewed. See Exhibit A-6. However, Dr. Ismail remains employed at AECL, now Canadian Nuclear Laboratories.

CITATION: 2019 TCC 159

COURT FILE NO.: 2018-4136(IT)I

STYLE OF CAUSE: YOUSSEF ISMAIL v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 3, 2019

REASONS FOR JUDGMENT BY: The Honourable Justice K.A. Siobhan
Monaghan

DATE OF JUDGMENT: July 31, 2019

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Raphaelle St. Pierre, Articling Student

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

Firm: n/a

For the Respondent:

Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada