2 of 2 DOCUMENTS

BETWEEN: JOSEPH HESTER, Appellant, and HER MAJESTY THE QUEEN, Respondent; AND BETWEEN: MILDRED BONDY, Appellant, and HER MAJESTY THE QUEEN, Respondent.

Dockets: 2007-1428(IT)I; 2007-2500(IT)I

TAX COURT OF CANADA

2010 TCC 647; 2010 Can. Tax Ct. LEXIS 929

December 20, 2010

[*1]

Appeal heard on common evidence with *Mildred Bondy* (2007-2500(IT)I) on November 2, 3, 4, 2010 at Toronto, Ontario

Appeal heard on common evidence with *Joseph Hester* (2007-1428(IT)I) on November 2, 3, 4, 2010 at Toronto, Ontario

COUNSEL:

Appearances:

Counsel for the Appellant: Jaimie Lickers

Kanata Penn-Maracle (student-at-law)

Counsel for the Respondent: Craig Maw

Annie Paré

JUDGES:

The Honourable Justice Judith Woods

OPINION:

JUDGMENT

The appeal with respect to assessments made under the *Income Tax Act* for the 1995, 1998, 1999, 2000, 2001, 2002 and 2003 taxation years is dismissed.

Each party shall bear their own costs.

JUDGMENT

The appeal with respect to assessments made under the *Income Tax Act* for the 1999 and 2000 taxation years is dismissed.

Each party shall bear their own costs.

REASONS FOR JUDGMENT

Woods J.

[1] The appellants, Joseph Hester and Mildred Bondy, are status Indians who during the relevant periods worked at Anishnawbe Health Toronto (AHT), a community health centre located in Toronto. The appellants were not employees of AHT, but were employed by Roger Obonsawin, who carries on a placement business under the name Native Leasing Services [*2] (NLS). The principal office of NLS was located on the Six Nations reserve near Brantford, Ontario. The issue is whether the employment income received by the appellants from NLS is exempt from federal income tax as being personal property situated on a reserve.

[2] The central legislative provision is paragraph 87(1)(b) of the *Indian Act*, which at the relevant time read:

> **87(1)** Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,
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> (*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (*b*) the personal property of an Indian or a band situated on a reserve.
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> (Emphasis added.)

[3] In respect of Mr. Hester's appeal, the relevant taxation years are 1995, 1998, 1999, 2000, 2001, 2002 and 2003. As for Ms. Bondy's appeal, the relevant taxation years are 1999 and 2000. The appeals were heard together on partial common evidence.

Background

[4] A useful background to these appeals is found in a decision of Lax J. of the Ontario Superior Court of Justice in an action commenced by Mr. Hester against the respondent [*3] and several government officials: *Hester v. The Queen et al*, [2008] 3 CTC 44. Parts of this decision are reproduced below:

> Response of CRA and NLS to s.87 Jurisprudence
>
> > [6] The exemption from income tax for aboriginal persons that is available under section 87 of the *Indian Act* has been the subject of evolving jurisprudence. Between 1983 and 1993, CRA interpreted section 87 as exempting from tax the income of employees working for on-reserve employers, even where such work was performed off the reserve in accordance with the law set out in *Nowegijick v. The Queen, [1983] 1 S.C.R. 29.* All of NLS's employees were exempt under this application of the law.
> >
> > [7] Hester asserts that CRA changed this policy in 1993. The defendants say that this was in response to the decision of the Supreme Court of Canada in *Williams v. Canada, [1992] 1 S.C.R. 877*, which formulated a "connecting factors" test to determine the *situs* of intangible personal property for the purposes of section 87. This represented a significant change from *Nowegijick* and required an analysis of the purpose of the

exemption under s. 87, the [*4] type of property and the nature of the taxation of that property, with reference to the individual personal circumstances of each Indian person.

[8] In 1993, CRA announced that it intended to change the manner in which it administered s. 87 in order to correspond to the test enunciated by the Supreme Court. To that end, on December 15, 1993, it released draft administrative guidelines for comment. Obonsawin and a number of other NLS workers made submissions to CRA, but these submissions were not adopted as in the opinion of CRA, they were not responsive to the newly formulated 'connecting factors' test.

[9] In June 1994, CRA issued the *Indian Act Exemption for Employment Income Guidelines* (the "administrative guidelines") effective for the 1995 taxation year. This provoked protest by members of the aboriginal community, including employees of NLS, and in December, they occupied CRA's Tax Services Office in Toronto demanding further consultations and changes to the administrative guidelines. This eventually resulted in an agreement in or about January 1995 whereby the protestors agreed to vacate CRA's premises; CRA agreed to hear further representations from Obonsawin on the [*5] application of the administrative guidelines to NLS workers; and both would take all available steps to expedite consideration by the courts of challenges to the guidelines (the "Test Case Agreement").

Test Cases

[10] The purpose of the test cases was to establish an orderly determination of the application of aboriginal tax immunity rights and present a range of factual situations applicable to NLS workers in order for the court to adjudicate the application of section 87 to NLS and similar organizations. Eventually, four test cases ("Shilling", "Horn", "Clark" and "Williams") made their way to the Federal Court.

Shilling Test Case

[11] Following a series of procedural motions, on November 23, 1998, Justice Reed of the Federal Court (Trial Division), stated a question of law for determination by the court in the Shilling action, namely whether Shilling was entitled by operation of section 87 of the *Indian Act* to exemption from income tax with respect to the salary paid to her by NLS during specified years. The matter proceeded on an agreed statement of facts and, in the first instance, the court determined the question in favour of Shilling. On June 4, 2001, [*6] the Federal Court of Appeal reversed the decision of Justice Sharlow of the Trial Division. Leave to appeal to the Supreme Court of Canada was refused on March 14, 2002.

[12] Shilling sought to continue on to trial in the Federal Court. On November 18, 2003, Justice Simpson granted the Crown's motion for summary judgment and dismissed the Shilling action. The Federal Court of Appeal dismissed Shilling's appeal from this decision and Shilling's subsequent application for leave to extend the time for seeking leave to appeal was dismissed by the Supreme Court of Canada on October 6, 2005.

Horn, Clarke and Williams Test Cases

[13] Although it was originally contemplated that the outcome of the Shilling test case would resolve most of the claims of NLS workers, NLS decided that the remaining three test cases needed to be litigated. To that end, the Crown sought and obtained timetables

> from the Federal Court (Trial Division) in order to bring these cases to completion. The Clarke test case was eventually settled on the consent of the parties. The Horn and Williams cases proceeded to trial on October 16, 2006. On October 16, 2007, Justice Phelan released his decision in the remaining [*7] test cases concluding that neither Horn nor Williams was entitled to exemption from tax pursuant to section 87 of the *Indian Act*. He dismissed the plaintiffs' claims for discrimination under section 15 of the *Charter*. Consequently, all three of the test cases have resulted in the tax exemption claims being denied, subject to appeals by Horn and Williams.
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> [...]

Income Tax Appeals of Hester and other NLS Workers

> [23] Beginning in February 2006 and on the understanding that NLS workers intended to be governed by the outcome of the test cases, CRA sent letters to NLS workers asking that they advise which of the four test cases was reflective of their individual situations. The NLS workers returned a form letter declining to identify which of the four factual situations applied to them. Believing that NLS workers no longer wished to be bound by the outcome of the test cases but instead wished to exercise their individual rights under the *Income Tax Act*, CRA then issued Notices of Confirmation confirming the income tax assessments. Hester and approximately 1200 other NLS workers served Notices of Appeal from their assessments. The scope of some of the appeals is broad [*8] asserting rights under section 81(1)(a) of the *Income Tax Act*, section 87 of the *Indian Act*, sections 25 and 35 of the *Charter* as well as an exemption from income tax on the basis of aboriginal or treaty rights. Subsequently, other NLS workers filed Amended Notices of Appeal and are only proceeding on the basis of section 87 of the *Indian Act*. The Chief Justice of the Tax Court is case managing all of these appeals, which are moving forward.

[5] The current status described by Justice Lax remains the status quo except that the *Horn* and *Williams* appeals have been exhausted and several other appeals by NLS workers have been heard by this Court. To my knowledge, none of the appeals that have been decided by this Court to date have been successful.

Issues

[6] The appellants raise two issues.

[7] First, they submit that the legal principle that the courts have been applying in these types of cases is incorrect. They submit that the correct test for the situs of employment income is the location of the employer. Based on this test, it is submitted, the appellants' employment income qualifies for exemption because the employer, NLS, is located on a reserve.

[*9] [8] Second, the appellants submit that the exemption applies even if the legal principle that has been adopted by the courts, the connecting factors analysis, is applied to their circumstances.

Is location of the employer the proper approach?

[9] The appellants submit that in interpreting the phrase "situated on a reserve" in subsection 87(1) of the *Indian Act*, employment income is situate where the employer is located. Since NLS is principally located on the Six Nations reserve, the appellants' employment income qualifies for the exemption, it is suggested.

[10] This approach is at odds with a significant body of jurisprudence in this Court and the Federal Court of Appeal which has consistently applied a connecting factors analysis in considering whether employment income is situated on a

reserve.

[11] The appellants acknowledge that their argument goes against the grain of many judicial decisions, but they submit that the courts have erred in applying the connecting factors analysis to employment income.

[12] The appropriate test, it is submitted, is the one acknowledged by the Supreme Court of Canada in *Nowegijick v. The Queen, [1983] 1 SCR 29,* [*10] 83 DTC 5041. That test essentially looks to the location of the employer. As for the connecting factors analysis which was later adopted by the Supreme Court of Canada in *Williams v. The Queen, [1992] 1 SCR 877,* 92 DTC 6320, the appellants submit this test was intended to have limited application and does not apply to employment income.

[13] These submissions have no merit, in my respectful view.

[14] I would first comment that the approval of the location of the employer test in *Nowegijick* was *obiter* and was only given a passing comment in the decision. The reasons of Dickson J. make it clear that this was not the issue in the case:

> [...] The Crown conceded in argument, correctly in my view, that the situs of the salary which Mr. Nowegijick received was sited on the reserve because it was there that the residence or place of the debtor, the Gull Bay Development corporation, was to be found and it was there the wages were payable.
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> [...]
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> [...] In R. v. The National Indian Brotherhood (1978), 78 DTC 6488 the question was as to situs, an issue which does not arise in the present case.
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> (pp. 5043, 5044)

[15] In any event, it is clear from the [*11] subsequent *Williams* decision that the connecting factors test should be applied to employment income. I would refer in particular to the comments of Gonthier J. below:

> 37 The approach which best reflects these concerns is one which analyzes the matter in terms of categories of property and types of taxation. For instance, connecting factors may have different relevance with regard to unemployment insurance benefits than in respect of employment income, or pension benefits. The first step is to identify the various connecting factors which are potentially relevant. These factors should then be analyzed to determine what weight they should be given in identifying the location of the property, in light of three considerations: (1) the purpose of the exemption under the *Indian Act*; (2) the type of property in question; and (3) the nature of the taxation of that property. The question with regard to each connecting factor is therefore what weight should be given that factor in answering the question whether to tax that form of property in that manner would amount to the erosion of the entitlement of the Indian *qua* Indian on a reserve. (Emphasis added.)

[16] Third, [*12] in my respectful view, the argument that the appellants put forward has effectively been dealt with in *Horn et al v. The Queen, 2008 FCA 352,* 2008 DTC 6743. The comments of Evans J.A. below are relevant:

> [4] However, the Court expressly stated (at para. 18) that the "contextual form of analysis" was appropriate for, *inter alia*, cases involving a taxation transaction "where the location is objectively difficult to determine". It quoted (at para. 17) the observation of the court below that *God's Lake* was "not concerned with where a transaction is located for the purposes of taxation." The Court also referred with approval to the adoption of the connecting factors approach in *Williams v. Canada, [1992] 1 S.C.R. 877,* the origin of this Court's jurisprudence on the location of employment income as personal property for the purpose of section 87, even though *Williams* concerned employment insurance payments.

> [5] In our view, the words quoted above from *God's Lake* make it clear that the Supreme Court has not issued an invitation to this Court to revisit its well settled law. The Supreme Court has so far refused [*13] leave to appeal from the section 87 cases decided by this Court applying the connecting factors analysis to determine the location of employment income for tax purposes. Short of Parliamentary intervention, only the Supreme Court of Canada may review the soundness of the analytical framework developed and consistently applied on the issue by this Court.

[17] For these reasons, I do not agree that courts have inappropriately applied the connecting factors analysis to determine whether employment income is situated on a reserve for purposes of the tax exemption.

Application of connecting factors analysis

[18] The appellants' second argument is that their employment income qualifies for exemption even if a connecting factors analysis is applied.

[19] This approach requires a consideration of the relevant facts and circumstances.

[20] As for Mr. Hester, he is a status Indian and a member of The Crees of the Waskaganish First Nation, located in Quebec. He has never lived on a reserve but maintains cultural ties to reserves. Mr. Hester has held a number of senior positions at AHT. He became the Acting Executive Director in 1997 and the Executive Director in 1998, a position which [*14] he continues to hold.

[21] Mr. Hester is responsible for all aspects of AHT, which is a community health centre based in Toronto whose mandate is to serve mainly aboriginal persons residing in the Greater Toronto Area.

[22] Mr. Hester's duties are performed principally in Toronto. AHT has mutually beneficial relationships with several reserves and Mr. Hester sometimes visits these reserves as part of his mandate. I am not satisfied from the evidence that such visits were a frequent part of his duties at AHT.

[23] In addition to duties performed for AHT, Mr. Hester was designated by NLS as their liaison at AHT. In this capacity, he reviewed evaluation forms for NLS employees at AHT. There is insufficient evidence to establish that any portion of Mr. Hester's employment income is properly allocable to these services.

[24] As for Ms. Bondy, she is also a status Indian who has lived in Toronto for many years. She is a member of the Wikwemikong First Nation on Manitoulin Island and maintains familial and cultural ties there.

[25] Ms. Bondy was placed by NLS at AHT as a secretary/assistant in 1997 and she carried out general administrative work there until early in 2000 when she left [*15] for other employment. Her AHT duties were carried out in Toronto.

[26] As for facts concerning NLS and Mr. Obonsawin, the parties submitted an agreed statement of facts. Most of the relevant facts have been reviewed in other cases, notably in *Horn*, and it is not necessary for me to review them again here.

[27] Based on the evidence before me, the facts in these appeals do not warrant a different outcome than that reached in *Shilling* and *Horn*.

[28] The appellants worked at the same community health centre that Ms. Shilling worked. Like the appellants, her duties were primarily performed in Toronto although she did visit reserves as part of her duties.

[29] I would note in particular the following comments of the Federal Court of Appeal in *Shilling*:

> [62] In this case, only the location of the employer's head office connects the respondent's employment income to a reserve, and there is no evidence to justify giving this factor the significant weight that the

> learned Trial Judge attached to it. On the other hand, the location and nature of the employment, which have been held to be generally the most important factors in a connecting factors analysis in employment [*16] income cases, as well as the respondent's place of residence, indicate that Ms. Shilling's employment income was situated off-reserve.
>
> [63] The factors connecting the employment income with an off-reserve location outweigh those connecting it with a reserve. Therefore, Ms. Shilling's employment income for 1995 and 1996 is not situated on a reserve and is not exempt from taxation under paragraph 87(1)(b) of the *Indian Act*.

[30] The *Horn* decision is also relevant because it filled in some evidentiary gaps regarding NLS that were missing in *Shilling*. Based on the larger evidentiary record concerning NLS, *Horn* concludes that the relationship with NLS is not a strong connecting factor. Reproduced below is a brief excerpt from the trial court decision in *Horn by Phelan J. (2007 FC 1052*, 2007 DTC 5589).

> [96] The benefits of NLS to the Six Nations Reserve are not overwhelming but are real. The majority of the administrative staff were members of the Six Nations, some of whom lived on the reserve. NLS paid rent to the reserve as well. However, these expenditures for rent and salary/benefit were modest amounts globally (approximately $ 240,000) [*17] and only a small percentage of NLS's gross income (approximately 2%).
>
> [97] Therefore, while NLS's location is on the Six Nations Reserve, these other circumstances indicate that this factor is not particularly weighty. It is of almost little weight to Horn as she is not a member of the Six Nations nor does her band at Kahnawake receive any direct benefits from NLS's location on the Six Nations Reserve.

[31] In light of the background to these appeals, it is important that the Courts provide certainty on this issue. In order to deviate from the conclusions reached in *Shilling* and *Horn*, there should be material facts that warrant a new look. Such facts do not present themselves in these two appeals.

[32] The appeals will be dismissed. Each party shall bear their own costs.

Signed at Toronto, Ontario this 20th day of December 2010.

"J. M. Woods"
Woods J.