

SUPREME COURT OF NOVA SCOTIA

Citation: *Ocean Nutrition Canada Ltd. v. Nova Scotia*, 2011 NSSC 493

Date: 20111201

Docket: Hfx No. 354692

Registry: Halifax

Between:

Ocean Nutrition Canada Limited

Appellant

v.

Her Majesty the Queen in right of Nova Scotia

Respondent

Judge: The Honourable Justice M. Heather Robertson

Heard: December 1, 2011, in Halifax, Nova Scotia

Decision: December 1, 2011 (**Orally**)

**Written Release
of Decision:** January 13, 2012

Counsel: Bruce Russell, Q.C. and Daniel Wallace, for the appellant
Stan McDonald, for the respondent

Robertson J.: (Orally)

[1] The appellant seeks to appeal an issue arising from an assessment under the *Income Tax Act (Nova Scotia)*, (“*ITA-NS*”).

[2] The respondent opposes the motion on the grounds that the Supreme Court of Nova Scotia lacks jurisdiction to hear the appeal. Further the respondent says the appellant is only entitled to appeal if it falls under one of the two listed circumstances in s. 64(2)(b).

[3] It strikes me as wrong that the respondent is able to say nil assessment and therefore you have no right of appeal and no jurisdiction to deal with the matter, even where there is significant financial cost associated with it. But had you been liable to pay as little as \$10 tax then this right of appeal would exist.

[4] And it strikes me as wrong that because the respondent says the statute did not otherwise deal with this situation, you have no recourse.

[5] I am going to make the determination that the *ITA-NS* ss. 64(1) and 64(2)(b)(ii) when read along with s. 41(2) does allow this Court to seize jurisdiction because there was an assessment. I agree that it is a nil assessment, but there was an assessment made. This is to say, I am using the plain wording of the *Act*, that an appeal may be taken of an assessment in respect of any question relating to the determination of the amount of tax payable. And, it would seem to me that how the province treated the tax credit goes to the heart of the tax payable. And, it seems to me there ought to be a right to appeal and the applicant should not be cut off from that access. This Court has broad jurisdiction in its interpretation of these sections of the *Act*. So, the right of appeal in this circumstance comes from s. 64(2), the appeal of an assessment question relating to the determination of an amount of tax payable.

[6] I also think the judicial review process does not provide an alternate appropriate recourse for the treatment of the research and development tax credits by the province, for the reasons counsel have both articulated. If this appeal is allowed it will be in effect a trial *de novo* where evidence can be called. That would not happen in a judicial review process. It would be much more restrictive and there would be issues of differences in the *Federal Court Rules* etcetera. So,

the application of the law in a judicial review process would be different than in a trial *de novo* process pursuant to s. 64(2).

[7] I can say I am adopting the law as articulated in Mr. Russell's brief and distinguishing the *Interior Savings Credit Union (Canada v. Interior Savings Credit Union, 2007 FCA 151)* to allow this appeal. So there we are. The bottom line is I think the appellant has a statutory right of appeal pursuant to *ITA-NS* s. 64(1). You can hang your hat on that Mr. Russell. *ITA-NS* s. 64(2)(b)(ii) also helps you and you are in.

[8] (Submissions heard re Costs) \$1000 – these things are not easily put together and are a great deal more costly than the amounts provided by in the tariff. So you will have your costs in the amount of \$1000.

Justice M. Heather Robertson