Docket: 2007-3942(IT)G

BETWEEN:

PAUL C.J. BAREL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 12, 2009, at London, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Pascal Tétrault

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2006 taxation year is dismissed.

Signed at Ottawa, Canada, this 19th day of March 2009.

"V.A. Miller"

V.A. Miller, J.

Citation: 2009TCC156
Date: 20090319
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BETWEEN:

PAUL C.J. BAREL,

Appellant,

and

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REASONS FOR JUDGMENT

V.A. Miller, J.

[1] This appeal is from the assessment of the appellant's 2006 taxation year. The issue as stated in the Notice of Appeal is whether this court will allow the appellant to make a contribution to a Registered Retirement Savings Plan (RRSP) for the year in issue.

[2] As explained below, this court does not have the jurisdiction to grant the remedy requested by the appellant.

[3] The parties submitted an Agreed Statement of Facts as follows:

> The parties to this appeal, for the purposes only of this appeal, agree to the following facts. The parties agree that each party is free to adduce in evidence additional facts not inconsistent with this Agreed Statement of Facts:
>
> 1. The Appellant was born on March 15, 1936 and in the year 2006, he was 70 years of age.

2. During the years 1998 to 2003, the Appellant worked for The Austin Company in the United States of America (the US). During that same period, the Appellant was only a resident of the US.

3. The Austin Company had set up the Austin Employees' Saving Plan which was designed as a long term savings plan to establish a financially secure retirement for its employees.

4. The Austin Employees' Saving Plan offered employees the option to contribute to an account qualifying under s. 401(k) of the US Internal Revenue Code (the 401(k) Plan). When employees made contributions to the 401(k) Plan, The Austin Company was also making contributions to the plan according to a predetermined formula.

5. The 401(k) Plan was not a retirement savings plan or a retirement income fund accepted by the Minister of National Revenue for a registration under the *Income Tax Act*.

6. Employees contributing to the 401(k) Plan would do so by deduction from their income and the amounts contributed by employees and the Austin Company would not be taxed in the year of contribution under the US tax law. US tax law provided for a tax deferral not only on the amounts contributed but also on the investment income generated by the 401(k) Plan.

7. During his employment at The Austin Company in the US, the Appellant and The Austin Company contributed to the Appellant's 401(k) Plan.

8. In February 2003, the Appellant retired working from The Austin Company and returned to Canada where he regained his Canadian resident status. At the end of the year 2005, the Appellant transmitted the required form for the withdrawals of funds from the 401(k) Plan to the plan's trustee, The Vanguard Group.

9. From February 2006 to July 2006, the Appellant received 6 monthly payments for the 401(k) Plan of US $500 less withholding made in respect of US taxes.

10. During the year 2006, The Vanguard Group advised the Appellant that the 401(k) Plan was being terminated and that the funds in the plan could not be transferred to a US Individual Retirement Account or a Canadian Registered Retirement Savings Plan (RRSP).

11. The Appellant decided to withdraw his funds from the 401(k) Plan and received on November 2, 2006 a lump sum of US $68,309, less withholding made in respect of the US taxes, which was deposited in the Appellant's bank account at the branch of the Bank of Montreal in London, Ontario.

> 12. On November 7, 2006, the funds received from the 401(k) Plan were transferred to BMO Nesbitt Burns and subsequently used to acquire stocks and bonds.
>
> 13. During March 2007, the Appellant was advised that the funds received from the 401(k) Plan could have been transferred to a RRSP if it had been done within two months of receiving the said funds. To this day, the funds received by the Appellant from the 401(k) Plan have not been invested in a RRSP or a Registered Retirement Income Fund.

[4] In addition to the Agreed Statement of Facts, it was the appellant's evidence that in 2003, TD-Waterhouse informed him that it was no longer possible to transfer funds from a 401(k) plan to a Registered Savings Plan (RSP). In mid-March 2007, he again spoke to his TD-Waterhouse contact who now informed him that transfers from United States (U.S.) retirement plans to Canadian RRSPs were still possible. He was advised by them that he should have transferred the funds to a RRSP within two months after the end of 2006, i.e. by March 1, 2007.

[5] When he filed his 2006 income tax return, the appellant included a letter in which he requested that the age limit for contribution to an RRSP be increased and the time limit for a rollover of the 401(k) funds to a RRSP be extended. In his letter he also stated:

> It would be a shame if the RSP principle would be defeated by a combination of a US bankruptcy, US laws and misinformation given by specialists on both sides of the US/Canada border. Without the bankruptcy my 401-K plan was perfectly fine and operating. If the March 21 information had been supplied early November, there would have been ample time to arrange the transfer.
>
> It was never my inten(t) to collapse the 401-K plan as a lump sum unit.

[6] The appellant was upset that no one at the Canada Revenue Agency "reacted" to or addressed his letter. He stated that the law is not fair and there should be someone who could adjust it to make it fair.

[7] At the hearing it was the respondent's position that the appellant was over the age limit to make contributions to a RRSP when he received the funds from his 401(k) plan and when the legislation changed, the appellant did not contribute the funds to a RRSP within 60 days after the end of the year.

[8] The evidence is clear that in 2006 the appellant was 70 years old and he could not contribute to a RRSP as the age limit was 69[1]. The relevant statutory provision is paragraph 146(2)(*b.4*) which reads:

> **146. (2) Acceptance of plan for registration [-- conditions]** -- The Minister shall not accept for registration for the purposes of this Act any retirement savings plan unless, in the Minister's opinion, it complies with the following conditions:
>
> […]
> (b.4) the plan does not provide for maturity after the end of the year in which the annuitant attains 69 years of age; (emphasis added)

[9] This paragraph was amended by S.C. 2007, c.29 (Bill C-52), so that the Minister could accept a retirement savings plan for registration up to the end of the year in which the annuitant attained 71 years. This amendment applied after 2006 and the appellant had to contribute the funds from his 401(k) plan within 60 days after the end of 2006 in accordance with subparagraph 60 (*j*)(iv) which reads:

> **60. Other deductions** -- There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable:
>
> […]
>
> (*j*) **transfer of superannuation benefits [to RRSP]** -- such part of the total of all amounts each of which is
>
> (i) a superannuation or pension benefit (other than any amount in respect of the benefit that is deducted in computing the taxable income of the taxpayer for a taxation year because of subparagraph 110(1)(*f*)(i) or a benefit that is part of a series of periodic payments) payable out of or under a pension plan that is not a registered pension plan, attributable to services rendered by the taxpayer or a spouse or common-law partner or former spouse or common-law partner of the taxpayer in a period throughout which that person was not resident in Canada, and included in computing the income of the taxpayer for the year because of subparagraph 56(1)(*a*)(i), or
>
> (ii) an eligible amount in respect of the taxpayer for the year under section 60.01, subsection 104(27) or (27.1) or paragraph 147(10.2)(*d*),
>
> as
>
> (iii) is designated by the taxpayer in the taxpayer's return of income under this Part for the year, and

> (iv) does not exceed the total of all amounts each of which is an amount paid by the taxpayer in the year or within 60 days after the end of the year
>
> (A) as a contribution to or under a registered pension plan for the taxpayer's benefit, other than the portion thereof deductible under paragraph 8(1)(m) in computing the taxpayer's income for the year, or
>
> (B) as a premium (within the meaning assigned by subsection 146(1)) under a registered retirement savings plan under which the taxpayer is the annuitant (within the meaning assigned by subsection 146(1)), other than the portion thereof designated for a taxation year for the purposes of paragraph (l),
>
> to the extent that the amount was not deducted in computing the taxpayer's income for a preceding taxation year; (emphasis added)

[10] Unfortunately, it was not until sometime in mid-March that the appellant learned that he could make the contribution. This was too late.

Jurisdiction of the Tax Court to grant the remedy

[11] The Tax Court of Canada derives its jurisdiction from statute. Its exclusive jurisdiction over income tax appeals stems from subsection 12(1) of the *Tax Court of Canada Act* which provides:

> **12.** (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under [inter alia] the *Income Tax Act* when references or appeals to the Court are provided for in those Acts.

[12] Subsection 12(1) limits this court's jurisdiction, given that it clearly specifies that the right to appeal must emerge from within the statutes themselves. Thus, in income tax appeals, one must look to the *Income Tax Act* (the "Act") to further define this court's jurisdiction. The relevant sections are 169 and 171 which read:

> **169. (1) Appeal** -- Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either
>
> (a) the Minister has confirmed the assessment or reassessed, or
>
> (b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

> but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.
>
> **171. (1) Disposal of appeal** -- The Tax Court of Canada may dispose of an appeal by
>
> (a) dismissing it; or
>
> (b) allowing it and
>
> (i) vacating the assessment,
>
> (ii) varying the assessment, or
> (iii) referring the assessment back to the Minister for reconsideration and reassessment.

[13] Although the TCC may dispose of an appeal by allowing it and varying the assessment, it must do so by determining whether the assessment is correct in law and in fact. In *Addison & Leyen Ltd. v. Canada*[2], Justice Sharlow stated the following:

> A taxpayer who is not satisfied with the Minister's disposition of a notice of objection has the right to appeal the assessment to the Tax Court of Canada, subject to certain time limits (section 169 of the *Income Tax Act*; an extension of time may be permitted under section 167). The Tax Court may dispose of an income tax appeal by dismissing the appeal or allowing it. If the appeal is allowed, the Tax Court may vacate or vary the assessment, or refer it back to the Minister for reconsideration and reassessment (section 171 of the *Income Tax Act*). The decision of the Tax Court of Canada may be appealed to the Federal Court of Canada pursuant to section 27 of the *Federal Courts Act*.
>
> In an income tax appeal, the Tax Court is required to determine whether, in relation to the issues stated in the notice of appeal and the Minister's reply, the assessment under appeal is correct in law and in fact. Because the primary tax liability of a person for a particular year is a function of the relevant events that occurred in that year, unreasonable delay or other improper conduct on the part of a tax official in the assessment or objection process cannot be relevant to the correct determination of that liability: see, for example, *Bolton v. R.* (1996), 200 N.R. 303, [1996] 3 C.T.C. 3, 96 D.T.C. 6413 (Fed. C.A.), *Ginsberg v. R.*, [1996] 3 F.C. 334 (Fed. C.A.) (application for leave to appeal dismissed, S.C.C. File No. 25520).[3] (emphasis added)

[14] In a situation like the present appeal, where the assessment was calculated in accordance with the provisions of the Act as they existed in 2006, then the assessment must be upheld and the appeal dismissed. This court does not have

jurisdiction to allow an appeal on equitable grounds or on grounds of fairness as requested by the appellant. As stated by Sobier, T.C.J. in *Sunil Lighting Products v. Canada*[4]

> The jurisprudence clearly affirms that the Tax Court of Canada is not a court of equity and its jurisdiction is based within its enabling statute ... In addition, the Court cannot grant declaratory relief given that such relief is beyond the jurisdiction of the Court ... In an income tax appeal, the Court's powers are spelled out in subsection 171(1) of the Income Tax Act. Consequently, these powers essentially entail the determination of whether the assessment was made in accordance with the provisions of the Income Tax Act…

[15] The appeal is dismissed.

Signed at Ottawa, Canada, this 19th day of March 2009.

"V.A. Miller"

V.A. Miller, J.

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[1] See *Labonte v. R.*, [2003] 3 C.T.C. 2525 (TCC)
[2] [2006] 3 C.T.C. 95 (FCA)
[3] *Ibid* at paragraphs 42 and 43
[4] [1993] T.C.J. No. 666

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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Pascal Tétrault

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