

Docket: 2008-3563(IT)I

BETWEEN:

DAVID GREENE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 11, 2010, at Hamilton, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Rita Araujo

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is dismissed.

Signed at Ottawa, Canada, this 16th day of April 2010.

"Lucie Lamarre"

Lamarre J.

Citation: 2010 TCC 162
Date: 20100416
Docket: 2008-3563(IT)I

BETWEEN:

DAVID GREENE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal against a reassessment made by the Minister of National Revenue (**Minister**) under the *Income Tax Act (ITA)* with respect to the appellant's 2005 taxation year.

[2] In computing his income for that year, the appellant included a severance pay amount of \$11,409.38.

[3] The appellant, who had been working for the Canada Revenue Agency (**CRA**) for 22 years, left his employment in May 2005. His employer, the CRA, gave him, upon his departure, a gross severance pay amount of \$29,261.73. The appellant transferred \$15,000 of his severance pay amount into a registered retirement savings plan (**RRSP**). In computing his income for 2005, the appellant included a net severance pay amount of \$11,409.38, that is, the gross severance pay amount less the \$15,000 transferred into the RRSP and the income tax deducted at source in the amount of \$2,852.35.

[4] The appellant also claimed the aforementioned amount of \$15,000 as an RRSP deduction in the computation of his income.

[5] In reassessing, the Minister included in income the gross severance pay amount of \$29,261.73, and allowed an RRSP deduction of \$15,000 (being the portion

transferred to the RRSP in 2005) plus RRSP premiums of \$3,000 as yet undeducted on January 1, 2005.

[6] The appellant objects to that reassessment and argues that he could validly report the net severance pay amount as he did and still claim an RRSP deduction of \$15,000. The appellant has in fact deducted twice the amount of \$15,000 transferred to his RRSP in 2005.

[7] Clearly, the severance pay amount is a retiring allowance as defined in subsection 248(1) of the ITA:

"**retiring allowance**" means an amount (other than a superannuation or pension benefit, an amount received as a consequence of the death of an employee or a benefit described in subparagraph 6(1)(a)(iv)) received

(a) on or after retirement of a taxpayer from an office or employment in recognition of the taxpayer's long service, or

(b) in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal,

by the taxpayer or, after the taxpayer's death, by a dependant or a relation of the taxpayer or by the legal representative of the taxpayer.

[8] The amount received was paid upon the appellant's retirement in recognition of his long service.

[9] A retiring allowance must be included in income pursuant to subparagraph 56(1)(a)(ii) of the ITA, which reads as follows:

56(1) **Amounts to be included in income for year** – Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,

(a) **Pension benefits, unemployment insurance benefits, etc.** – any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,

...

(ii) a retiring allowance, other than an amount received out of or under an employee benefit plan, a retirement compensation arrangement or a salary deferral arrangement,

...

[10] RRSP premiums paid by the appellant with money transferred from his retiring allowance are deductible in the computation of his income, pursuant to subparagraphs 60(i) and (j.1) and subsection 146(5) of the ITA, which read as follows:

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:

...

(i) Premium or payment under RRSP or RRIF – any amount that is deductible under section 146 or 146.3 or subsection 147.3(13.1) in computing the income of the taxpayer for the year;

...

(j.1) Transfer of retiring allowances [to RRSP] – such part of the total of all amounts each of which is an amount paid to the taxpayer by an employer, or under a retirement compensation arrangement to which the employer has contributed, as a retiring allowance and included in computing the taxpayer's income for the year by virtue of subparagraph 56(1)(a)(ii) or paragraph 56(1)(x) as

(i) is designated by the taxpayer in the taxpayer's return of income under this Part for the year,

(ii) does not exceed the amount, if any, by which the total of

(A) \$2,000 multiplied by the number of years before 1996 during which the employee or former employee in respect of whom the payment was made (in this paragraph referred to as the "retiree") was employed by the employer or a person related to the employer, and

(B) \$1,500 multiplied by the number by which the number of years before 1989 described in clause (A) exceeds the number that can reasonably be

regarded as the equivalent number of years before 1989 in respect of which employer contributions under either a pension plan or a deferred profit sharing plan of the employer or a person related to the employer had vested in the retiree at the time of the payment

exceeds the total of

(C) all amounts deducted under this paragraph in respect of amounts paid before the year in respect of the retiree

(I) by the employer or a person related to the employer, or

(II) under a retirement compensation arrangement to which the employer or a person related to the employer has contributed,

(C.1) all other amounts deducted under this paragraph for the year in respect of amounts paid in the year in respect of the retiree

(I) by a person related to the employer, or

(II) under a retirement compensation arrangement to which a person related to the employer has contributed, and

(D) all amounts deducted under paragraph (t) in computing the retiree's income for the year in respect of a retirement compensation arrangement to which the employer or a person related to the employer has contributed, and

(iii) 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 in respect of the amount so designated

(A) as a contribution to or under a registered pension plan, other than the portion thereof deductible under paragraph (j) or 8(1)(m) in computing the taxpayer's income for the year, or

(B) as a premium (within the meaning assigned by section 146) under a registered retirement savings plan under which the taxpayer is the annuitant (within the meaning assigned by section 146), other than the portion thereof that has been designated for the purposes of paragraph (j) or (l),

to the extent that it was not deducted in computing the taxpayer's income for a preceding taxation year

and for the purposes of this paragraph, "person related to the employer" includes

- (iv) any person whose business was acquired or continued by the employer, and
- (v) a previous employer or the retiree whose service therewith is recognized in determining the retiree's pension benefits;

...

146(5) Amount of RRSP premiums deductible – There may be deducted in computing a taxpayer's income for a taxation year such amount as the taxpayer claims not exceeding the lesser of

- (a) the amount, if any, by which the total of all amounts each of which is a premium paid by the taxpayer after 1990 and on or before the day that is 60 days after the end of the year under a registered retirement savings plan under which the taxpayer was the annuitant at the time the premium was paid, other than the portion, if any, of the premium
 - (i) that was deducted in computing the taxpayer's income for a preceding taxation year,
 - (ii) that was designated for any taxation year for the purposes of paragraph 60(j), (j.1) or (l),
 - (iii) in respect of which the taxpayer received a payment that was deducted under subsection (8.2) in computing the taxpayer's income for a preceding taxation year,

- (iv) that was deductible under subsection (6.1) in computing the taxpayer's income for any taxation year, or
- (iv.1) that would be considered to be withdrawn by the taxpayer as an eligible amount (as defined in subsection 146.01(1) or 146.02(1)) less than 90 days after it was paid, if earnings in respect of a registered retirement savings plan were considered to be withdrawn before premiums paid under that plan and premiums were considered to be withdrawn in the order in which they were paid

exceeds

- (v) the amount, if any, by which
 - (A) the total of all amounts deducted under subsection 147.3(13.1) in computing the taxpayer's income for the year or a preceding taxation year

exceeds

- (B) the total of all amounts, in respect of transfers occurring before 1991 from registered pension plans, deemed by paragraph 147.3(10)(b) or (c) to be a premium paid by the taxpayer to a registered retirement savings plan, and

(b) the taxpayer's RRSP deduction limit for the year.

[11] The respondent is right in arguing that the amount reassessed was the amount that should have been reported pursuant to subparagraph 56(1)(a)(ii), paragraphs 60(i) and (j.1) and subsections 146(5) and 248(1) of the ITA. The appellant was not entitled to deduct the amount of \$15,000 twice in the computation of his income for the 2005 taxation year.

[12] The appellant's final argument is that the notice of confirmation of the assessment indicated that:

The \$29,261 you received from The Government of Canada, was a "benefit" as defined in subsection 146(16). Therefore, it has been included in your income according to subsection 146(8) and paragraph 56(1)(n).

[13] Subsection 146(8), is the provision that includes in income amounts withdrawn from an RRSP that are not excluded withdrawals. Subsection 146(16) deals with transfers of funds between RRSPs. Paragraph 56(1)(n) includes in income amounts received on account of a scholarship, fellowship or bursary, or a prize for achievement in a "field of endeavour ordinarily carried on" by the taxpayer.

[14] The provisions relied upon by the Minister in the notice of confirmation are clearly the wrong ones.

[15] However, in the Reply to the Notice of Appeal, the respondent relied on the appropriate provisions of the ITA, which I have reproduced above.

[16] Therefore, although the provisions relied upon in confirming the assessment were not the right ones, the amount reassessed was correct under the provisions relied upon in the Reply to the Notice of Appeal. Pursuant to subsection 152(9) of the ITA, the respondent was entitled to base her argument on the provisions relied upon in her Reply. That subsection reads as follows:

152(9) Alternative basis for assessment - The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act

- (a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and
- (b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

[17] The Reply was filed on January 23, 2009. The appeal was heard on March 11, 2010. The facts of this case are not in dispute. The issue revolves around how to report income in the form of severance pay where a portion thereof was transferred to an RRSP. It is obvious that the amount reassessed by the Minister was properly reassessed pursuant to subparagraph 56(1)(a)(ii), paragraphs 60(i) and (j.1) and subsection 146(5) and 248(1) of the ITA. There was no other relevant evidence that the taxpayer could have adduced and that could have yielded a different result in law.

[18] This is not a case in which the respondent attempted to put forward for the first time in court a new basis for reassessing the appellant, as was done in *The Queen v. Continental Bank of Canada*, 98 DTC 6501 (SCC). It is rather a case in which I have to determine the validity of the assessment and not the correctness of the reasons

relied on by the Minister in confirming the assessment. An assessment may be valid even if the reasons relied on by the Minister are incorrect (see *Riendeau v. The Queen*, 91 DTC 5416 (FCA), referred to in *Les Entreprises Ludco Ltée et al. v. The Queen*, 94 DTC 6221 at 6223).

[19] An "alternative argument" in support of an assessment is not the same as an "alternative basis for an assessment". As Bowman A.C.J. said in *Loewen v. Canada*, [2003] T.C.J. No. 282 (QL) at paragraph 54:

54 These observations must of course be read in light of the subsequent comments by Bastarache J. in *Continental Bank* but they are useful in that they draw a distinction between, on the one hand, so fundamental an alteration in the basis of the assessment that, if accepted, would lead to a result that is tantamount to an entirely new assessment and, on the other hand, an assertion of a different legal result flowing from the same set of facts by alleging that those facts lead to an alternative legal relationship.

[20] In the present case, the respondent's argument does not lead to an entirely new assessment but is simply an assertion of a different legal result flowing from the same set of facts as a consequence of now relying on the appropriate provisions of the ITA.

[21] In other words, the Minister is not seeking to add to the appellant's income an amount that was not included in the reassessment made within the normal reassessment period. Rather, the Minister is seeking to support through reliance on the appropriate provisions of the ITA (see *Walsh v. The Queen*, 2007 FCA 222), exactly the same amount of tax liability, flowing from the same severance pay amount, as determined in the reassessment.

[22] The respondent is therefore not estopped from arguing that the Minister properly reassessed the appellant on the basis of the relevant provisions of the ITA.

[23] For these reasons, I will dismiss the appeal.

Signed at Ottawa, Canada, this 16th day of April 2010.

"Lucie Lamarre"

Lamarre J.

CITATION: 2010 TCC 162
COURT FILE NO.: 2008-3563(IT)I
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PLACE OF HEARING: Hamilton, Ontario
DATE OF HEARING: March 11, 2010
REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT: April 16, 2010
APPEARANCES:

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