

Docket: 2010-41(IT)I

BETWEEN:

GIFFORD H. TOOLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on May 7, 2010 at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Rishma Bhimji Justin Kutyan

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**ORDER**

The Respondent's Motion to quash the Appellant's purported appeal under the *Income Tax Act* is denied but this appeal shall continue as an appeal under the *Canada Pension Plan* and not as an appeal under the *Income Tax Act* for the reasons as attached.

The Respondent shall have until July 19, 2010 to file a Reply.

Signed at Halifax, Nova Scotia, this 31<sup>st</sup> day of May, 2010.

“Wyman W. Webb”

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Webb, J.

Citation: 2010TCC270

Date: 20100531

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BETWEEN:

GIFFORD H. TOOLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**REASONS FOR ORDER**

Webb, J.

[1] The Appellant filed a Notice of Objection with the Canada Revenue Agency in January 2009. The Appellant used the form that indicated that he was filing an appeal under the *Income Tax Act* and the Canada Revenue Agency treated his appeal as an appeal under the *Income Tax Act* and a confirmation was issued by the Canada Revenue Agency on behalf of the Minister of National Revenue. However, the Appellant was appealing the determination that no contributions were payable by him under the *Canada Pension Plan* (“*CPP*”) for 1999, 2000 and 2001.

[2] The Respondent brought a Motion to quash the Appellant’s purported appeal under the *Income Tax Act*. The Appellant acknowledged at the hearing of the Motion that he was not disputing the amount of his liability for income taxes for any of these years. He was only disputing the determination that no contributions were payable by him under the *CPP* for 1999, 2000 and 2001.

[3] It seems obvious to me that this is a matter that should be determined in accordance with the provisions of the *Canada Pension Plan*.

[4] Section 26.1 of the *CPP* provides as follows:

26.1 (1) The Minister of Social Development, an employer, an employee or a person claiming to be an employer or an employee may request an officer of the Canada Revenue Agency authorized by the Minister of National Revenue to make a ruling on any of the following questions:

- (a) whether an employment is pensionable;
- (b) how long an employment lasts, including the dates on which it begins and ends;
- (c) what is the amount of any earnings from pensionable employment;
- (d) whether a contribution is payable;
- (e) what is the amount of a contribution that is payable; and
- (f) who is the employer of a person in pensionable employment.

[5] Whether a contribution is payable and the amount of a contribution that is payable are matters that can be the subject of a ruling.

[6] Section 27 of the *CPP* provides as follows:

27. An appeal to the Minister from a ruling may be made by the Minister of Social Development at any time, and by any other person concerned within 90 days after the person is notified of the ruling.

[7] Section 28 of the *CPP* provides as follows:

28. (1) A person affected by a decision on an appeal to the Minister under section 27 or 27.1, or the person's representative, may, within 90 days after the decision is communicated to the person, or within any longer time that the Tax Court of Canada on application made to it within 90 days after the expiration of those 90 days allows, appeal from the decision to that Court in accordance with the Tax Court of Canada Act and the applicable rules of court made thereunder.

[8] Subsection 30(5) of the *CPP* provides that:

(5) The amount of any contribution required by this Act to be made by a person for a year in respect of their self-employed earnings for the year is deemed to be zero where

- (a) the return of those earnings required by this section to be filed with the Minister is not filed with the Minister before the day that is four years after the day on or before which the return is required by subsection (1) to be filed; and

(b) the Minister does not assess the contribution before the end of those four years.

[9] As it appears that the Appellant did not file his tax returns for 1999, 2000 and 2001 until June 2007, it was apparently determined that no contributions were payable by the Appellant for these years as a result of the application of the provisions of Subsection 30(5) of the *CPP*. Counsel for the Respondent submitted that this distinguished this case. However the issue in this motion is not whether the Appellant will be successful but whether he should be permitted to continue his appeal and have his case heard with respect to the interpretation and application of subsection 30(5) of the *CPP* to the facts that may be established at the hearing.

[10] The position of the Respondent was also that there was an assessment, not a ruling. However it seems to me that a ruling had to be made by the Canada Revenue Agency that no contributions were payable by the Appellant for any of these years in order to issue an assessment that indicated a nil liability. The notice of assessment was simply the means by which the Appellant was notified of the determination that no contributions were payable by him for these years. The determination that no contributions were payable by him for 1999, 2000 and 2001 would be a ruling in relation to this matter and is the type of ruling referred to in section 26.1 of the *CPP*. Therefore the Appellant has a right of appeal from this ruling. The appeal from the ruling that no contribution was payable is made to the Minister referred to in section 27 of the *CPP*. Subsection 5(1) of the *CPP* provides that “Minister” for the purposes of Part I of the *CPP* means the Minister of National Revenue. Section 27 is in Part I of the *CPP*. Even though the form filed by the Appellant was treated by the Canada Revenue Agency as an objection under the *Income Tax Act*, since it was dealt with by the Canada Revenue Agency acting on behalf of the Minister of National Revenue, it seems to me that it can also be treated as an appeal under section 27 of the *CPP* because the Minister of National Revenue is also the Minister to whom an appeal is to be brought under section 27 of the *CPP*.

[11] Counsel for the Respondent also submitted that the assessment indicated a nil liability for contributions under the *CPP* for these years and referred to cases under the *Income Tax Act* which provide that the Appellant cannot appeal a nil assessment. As Justice Campbell noted in *Esesson Canada Inc. v. The Queen* 2009 TCC 336, [2009] 5 C.T.C. 2182, 2009 D.T.C. 1168:

5 The Federal Court of Appeal in *Interior Savings Credit Union v. R.*, 2007 D.T.C. 5342 (Eng.) (F.C.A.), definitively states that a “nil assessment” of a taxpayer identifies an assessment that cannot be appealed by that taxpayer. At paragraphs [17] and [18] of that decision, the Federal Court of Appeal sets out the two reasons why a notification to a taxpayer that no tax is payable cannot be appealed to the Tax Court of Canada:

[17] ...First, an appeal must be directed against an assessment and an assessment which assesses no tax is not an assessment (see *Okalta Oils Limited v. MNR*, 55 D.T.C. 1176 (SCC) at p. 1178: “Under these provisions, there is no assessment if there was not tax claimed”). Second, there is no right of appeal from a nil assessment since: “Any other objection but one related to an amount claimed [as taxes] was lacking the object giving rise to the right of appeal ...” (*Okalta Oils, supra*, at p. 1178).

[18] The two aspects of the rule are succinctly put by Lamarre Proulx, J. in *Faucher v. Canada*, 94 D.T.C. 1575, at p. 1579:

In conclusion, there is no right of appeal from an assessment of a nil amount, or from an assessment of which a reduction is not requested, ..

[12] However the appeal in this case is under the *CPP* not the *Income Tax Act*. Since a right of appeal is specifically granted under the *CPP* in relation to the question of whether a contribution is payable under the *CPP* and also with respect to the amount of any such contribution that is payable, it seems to me that this can be distinguished from the cases addressing the issue of whether a person has a right of appeal from a nil assessment under the *Income Tax Act*. It seems to me that a person will have a right of appeal under the *CPP* from a determination that no contribution is payable for certain years.

[13] As a result, I agree that this is not a proper appeal under the *Income Tax Act*. However, it seems to me that this is an appeal under the *CPP* from a decision of the Minister of National Revenue and it should continue as such. Therefore the Respondent’s Motion is denied but the matter is to continue as an appeal under the *CPP*.

[14] The Respondent shall have until July 19, 2010 to file a Reply.

Signed at Halifax, Nova Scotia, this 31<sup>st</sup> day of May, 2010.

“Wyman W. Webb”

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Webb, J.

CITATION: 2010TCC270  
COURT FILE NO.: 2010-41(IT)I  
STYLE OF CAUSE: GIFFORD H. TOOLE AND THE QUEEN  
PLACE OF HEARING: Toronto, Ontario  
DATE OF HEARING: May 7, 2010  
REASONS FOR ORDER BY: The Honourable Justice Wyman W. Webb  
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APPEARANCES:

For the Appellant: The Appellant himself  
Counsel for the Respondent: Rishma Bhimj  
Justin Kutyan

COUNSEL OF RECORD:

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