Docket: 2010-3552(IT)I

BETWEEN:

BRENDA THARLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 12, 2011, at Calgary, Alberta

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Adam Gotfried

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* with respect to the 2002 and 2003 taxation years are dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 27th day of June 2011.

"L.M. Little"

Little J.

Citation: 2011 TCC 325
Date: June 27, 2011
Docket: 2010-3552(IT)I

BETWEEN:

BRENDA THARLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] In 2007, the Canada Revenue Agency (the "CRA") carried out a net worth assessment on the Appellant for her 2002 and 2003 taxation years.

[2] The assessments issued for the 2002 and 2003 taxation years included Canada Pension Plan ("CPP") premiums payable on self-employment income.

[3] The Appellant paid the CPP premiums ($3,346.40 for 2002 and $3,284.06 for 2003) and the Appellant then filed tax returns for the 2002 and 2003 taxation years.

[4] Based on the information provided to him, the Minister of National Revenue (the "Minister") reassessed the Appellant on May 4, 2009, for her 2002 and 2003 taxation years.

[5] In the reassessment, the Minister reduced the amount of CPP premiums payable by the Appellant for those years. However, the Minister did not issue a refund of the overpayment to the Appellant.

[6] On December 8, 2009, the Appellant filed Notices of Objection to the Reassessments.

[7] The Minister confirmed the Reassessments on August 19, 2010.

[8] The Appellant filed Notices of Appeal with the Tax Court.

B. ISSUE

[9] The issue in these appeals is: When does the four-year limitation period on mandatory refunds of CPP overpayments (on self-employed income) commence? Is it the year in which the payments are made or the year in which contributions are owed?

C. ANALYSIS AND DECISION

[10] During the hearing, Counsel for the Respondent consented to the Appellant being reassessed for the 2002 taxation year, reducing the CPP contributions at issue to zero. This means that this Court must review the 2003 taxation year.

[11] The Appellant argued that the four-year limitation period contained in subsection 38(4) of the *Canada Pension Plan* (the "*Plan*") does not start until the contributions owing for a year are paid. Since the payments were made on June 18, 2007, the Appellant argued that the limitation period had not yet expired when the refund was requested and, therefore, the refund is payable. The Appellant maintained that saying the period begins immediately after the year in which the premiums were due is unjust. She noted that this interpretation would mean that an overpayment for a year outside the limitation period would not be refundable.

[12] Counsel for the Respondent argued that subsection 38(4) of the *Plan* prescribes a four-year time limit within which a taxpayer may demand a refund of overpayments to the CPP. He said that the time limit begins to run at the end of the taxation year for which the premiums were due. Therefore, Counsel for the Respondent maintained that the Appellant is too late to ask for a refund.

[13] 'Year' is defined in the *Plan* as "means calendar year." Subsection 38(4) of the *Plan* defines when overpayments to the CPP for self-employment income can be refunded:

> 38 (4) Where a person has paid, on account of the contribution required to be made by him for a year in respect of his self-employed earnings, an amount in excess of the contribution, the Minister
>
> (*a*) may refund that part of the amount so paid in excess of the contribution on sending the notice of assessment of the contribution, without any application having been made for the refund; and
>
> (*b*) shall make a refund after sending the notice of assessment, if application is made in writing by the contributor not later than four years — or, in the case of a contributor who is notified after the coming into force of this paragraph of a decision under subsection 60(7), 81(2), 82(11) or 83(11) in respect of a disability pension, ten years — after the end of the year.

[14] The *Plan* provides that to be in a position to compel the Minister to refund an excess contribution on self-employment income in respect of a particular "year", an application must be filed within four years of "the end of the year." According to the *Plan*, 'year' simply means calendar year. The problem in this provision is, which year was Parliament referring to when it stated "the end of the year"? Was it the calendar year in which the premiums were payable or the year in which the overpayment was made? The issue thus becomes a question of statutory interpretation.

[15] Subsection 38(4) of the *Plan* begins with the words "where a person has paid, on account of the contribution required to be made by him for a year…". It is clear that the section is referring to a contribution made for a particular calendar year, and not in that year. The confusion arises further on in paragraph 38(4)(*b*) where it ends with "…after the end of the year".

[16] If the reference to "year" in paragraph 38(4)(*b*) refers to the calendar year in which payments are owed, then there are two consequences that arise. One, it provides that the Minister can only be forced to make a rebate for a limited period of time. This interpretation provides certainty and finality for potential rebates.

[17] However, this can also lead to the problem that the Appellant has placed before this Court. Should the Minister reassess and make an error once the four year limitation period has expired, the Minister can keep any overpayment resulting from that reassessment without having to refund it.

[18] The injustice or unfairness arising from paragraph 38(4)(*b*) can be remedied by paragraph 38(4)(*a*) which gives the Minister discretion to refund an overpayment without a request by the taxpayer at the time of assessment. There is no time limit on

this discretion. Therefore, the time limit in (*b*) is reasonable given that a refund could still be given under (*a*), and the absurdity claimed by the Appellant is preventable. In this situation, the Minister chose not to exercise that discretion. We do not know why the Minister did not exercise the discretion found in (*a*). It is possible that the Minister did not apply paragraph (*a*) because the Appellant did not file income tax returns until forced to do so by a net-worth assessment issued by the Minister several years later.

[19] However, I suggest that the Minister should not be allowed to keep overpayments of contributions to which he is not otherwise entitled. To conclude that the Minister should keep excess contributions caused by his own net-worth assessment is acceptable because the Appellant did not file returns on time is like trying to turn two wrongs into a right. I suggest that the assessment system should not work in that manner.

[20] I maintain that retaining the excess contributions is not justified as a punitive measure either. The Minister has plenty of options if he should choose to punish a party for not making contributions, but keeping excess payments made in good faith by the Appellant should not be one of them.

[21] In my opinion, the Appellant's appeal fails, since the wording of the section is clear enough that it does not produce absurd and unintended consequences. I have concluded that the four-year limit to demand a refund for excess CPP contributions begins to run at the end of the calendar year for which those payments were owed. It therefore follows that the Appellant did not file a request for a refund within the time specified.

[22] During the trial, the Appellant said that she has other outstanding tax debts owing to the Minister and a lien has been placed against her property by the CRA as a result of those tax debts. I suggest that the Appellant might write to the Minister, asking for the excess contributions for 2003 to be applied against those other tax debts. This process would not require the Minister to give a refund but, rather, simply shuffle funds between the accounts. The letter to the Minister should state that the Minister received "excess contributions" which should not have been made and the refund of those "excess contributions" is blocked by the four-year time limit contained in the *Plan*.

[23] I suggest that this approach would remedy an unfair result, since the Appellant only became aware of the "excess contributions" to which she was entitled on May 4, 2009, i.e., some two years after the deadline for applying for a refund.

[24] As noted, the Minister maintains that the Appellant should have applied for a refund in 2007, i.e., two years before she realized that she was entitled to a refund. This is an unfair result because she was not aware of the excess contributions until 2009.

[25] Under a situation such as this where a taxpayer is unable to apply for a refund because she was not aware that she was entitled to a refund until two years after the deadline had expired, it may be appropriate for the Minister to apply the provisions of section 23 of the *Financial Administration Act*, R.S.C. 1985, c. F-11, (the "*Act*"). Section 23 of the *Act*, reads as follows:

> **23.** (1) In this section,
> …
>
> Remission of taxes and penalties
> (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.
>
> Remission of other debts
> (2.1) The Governor in Council may, on the recommendation of the Treasury Board, remit any other debt, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the other debt is unreasonable or unjust or that it is otherwise in the public interest to remit the other debt.
> …

[26] I suggest that the Appellant request that the Minister apply the provisions of the *Financial Administration Act* to correct the unfairness in this situation.

[27] The appeal is dismissed, without costs.

Signed at Vancouver, British Columbia, this 27th day of June 2011.

"L.M. Little"

Little J.

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APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Adam Gotfried

COUNSEL OF RECORD:

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