Docket: 2016-905(IT)I

BETWEEN:

TERENCE O. FREITAS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 3, 2017, at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Stephanie Hodge

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2008 taxation year is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of March 2017.

"Diane Campbell"

Campbell J.

Citation: 2017 TCC 46
Date: 20170323
Docket: 2016-905(IT)I

BETWEEN:

TERENCE O. FREITAS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] The Appellant is appealing a reassessment by the Minister of National Revenue (the "Minister") in respect to his 2008 taxation year.

[2] In filing his income tax return for that year, the Appellant reported net self-employed professional income of $161,303. Because he believed that these earnings were exempt from *Canada Pension Plan* contributions, he did not include contributions on his 2008 tax return.

[3] The Appellant retired as a partner from Deloitte & Touche LLP on May 31, 2007 at the age of 62 years pursuant to a partnership agreement he had with the firm. From June 1, 2007 onwards and specifically during the 2008 taxation year, he received a share of the partnership income. The statement of partnership income, Form T5013, from Deloitte & Touche LLP for the 2008 taxation year identified the Appellant as membership status code "1", being a specified member who is not a limited partner. The Appellant admits he received this amount from the firm pursuant to subsection 96(1.1) of the *Income Tax Act* (the "*ITA*"). He characterized this amount as a retiring allowance.

[4] The Appellant's return was initially assessed on September 11, 2009 to include *Canada Pension Plan* contributions payable of $4,098.60 together with corresponding non-refundable tax credits and deductions. At a meeting of retired partners in 2013, the firm advised the Appellant, along with other partners, that

they had been incorrectly assessed for these contributions. However, the time for objecting to the assessment under the *ITA* had already passed. As a result, the Appellant filed a T1 adjustment request on June 24, 2013 for a refund. Initially, the Appellant was advised that he could not seek an adjustment for the 2008 taxation year and that he might instead be eligible for taxpayer relief. That application was denied.

[5] On May 20, 2014, a Notice of Reassessment was issued that resulted in the deletion of the non-refundable tax credit and the deduction and denied the refund of excess contributions due to the limitation period set out in subsection 38(4) of the *Canada Pension Plan* (the *"CPP"*). The Appellant objected to this reassessment on August 14, 2014. This resulted in a variation of the reassessment on December 22, 2015 to reinstate the non-refundable tax credit and deduction in respect to the contributions payable under the *CPP*. It is from this reassessment that the Appellant has appealed and it is properly before this Court. The Appellant has asked this Court to order a refund of the amount he paid as *Canada Pension Plan* contributions.

[6] Therefore, the first issue that must be addressed is whether this Court has jurisdiction to grant the type of relief that the Appellant is requesting. In other words, can I order a refund of contributions paid under the *CPP*. The short answer is that I have no jurisdiction to order such a refund. Because this Court is a statutory court, the type of relief it can grant is determined pursuant to the relevant legislation. The Court's jurisdiction is set out in section 12 of the *Tax Court of Canada Act* together with subsections 169(1) and 171(1) of the *ITA*. These provisions allow this Court to either confirm the Minister's assessment or vary or vacate it and refer it back to the Minister. Determining the correctness of an assessment in respect to a taxpayer's tax liability is where this Court's jurisdiction ends. Consequently, the manner in which the Minister deals with refunds has been excluded by legislation from this Court's jurisdiction. This view has been confirmed in a number of cases (See *3735851 Canada Inc. v The Queen*; 2010 TCC 24, 2010 DTC 1048; *Strong v The Queen*, 2006 TCC 38, 2006 DTC 2197; *Paradis v The Queen*, 2004 TCC 676.

[7] The second issue, concerning the correctness of the underlying assessment, is properly before this Court for consideration.

[8] Basically, the Appellant's argument is that the net professional income which he reported on his 2008 tax return was earned pursuant to subsection 96(1.1)

of the *ITA* and consequently, it is exempt from *Canada Pension Plan* contributions.

[9] Subsection 96(1.1) states:

> **Allocation of share of income to retiring partner**
>
> **(1.1)** For the purposes of subsection 96(1) and sections 34.1, 34.2, 101, 103 and 249.1,
>
> **(a)** where the principal activity of a partnership is carrying on a business in Canada and its members have entered into an agreement to allocate a share of the income or loss of the partnership from any source or from sources in a particular place, as the case may be, to any taxpayer who at any time ceased to be a member of
>
> **(i)** the partnership, or
>
> **(ii)** a partnership that at any time has ceased to exist or would, but for subsection 98(1), have ceased to exist, and either
>
> **(A)** the members of that partnership, or
>
> **(B)** the members of another partnership in which, immediately after that time, any of the members referred to in clause 96(1.1)(a)(ii)(A) became members
>
> have agreed to make such an allocation
>
> or to the taxpayer's spouse, or common-law partner, estate or heirs or to any person referred to in subsection 96(1.3), the taxpayer, spouse, or common-law partner, estate, heirs or person, as the case may be, shall be deemed to be a member of the partnership; and
>
> **(b)** all amounts each of which is an amount equal to the share of the income or loss referred to in this subsection allocated to a taxpayer from a partnership in respect of a particular fiscal period of the partnership shall, notwithstanding any other provision of this Act, be included in computing the taxpayer's income for the taxation year in which that fiscal period of the partnership ends.

[10] This provision deals with the allocation of a share of income or loss paid to a retiring partner in respect to the activities of a partnership. It provides that, when a partnership allocates a share of its income to a retiring partner, that amount is to be

included in computing the partner's income for that year for the purposes of assessing net tax in that year. The Appellant reported his share of the partnership income as professional income. Subsection 96(1.1) makes no mention of *Canada Pension Plan* contributions in relation to such professional income allocation. However, sections 13 and 14 of the *CPP* reference a taxpayer's total self-employed earnings in the calculation of contributory earnings for the purposes of the *CPP*. Section 13 sets out several exceptions to the general rule that the amount of a taxpayer's contributory self-employed earnings in any year will be the amount of the taxpayer's self-employed earnings. Section 13 makes no reference to subsection 96(1.1) of the *ITA*. Section 14 deals with the calculation of the amount of the self-employed earnings of a taxpayer in any year for the purposes of section 13. Pursuant to section 14, the amount of self-employed earnings, which is used to calculate contributory earnings under section 13, is the amount of a taxpayer's income for a year from all businesses less any losses.

[11] The Appellant's professional income amount does not fall within any of the exceptions listed in section 13 of the *CPP*. Those exceptions relate to an individual being under the age of 18 years, or over the age of 70 years or 65 years and able to exempt oneself from contributions, or in receipt of a provincial pension plan due to disability. The Appellant was 62 in 2007 when he retired and turned 63 years old in the 2008 taxation year which is under appeal. His income, by his own admission, is business or professional income in respect to the 2008 taxation year under the *ITA*. Although the Appellant argued that this income should be characterized as a retiring allowance and therefore not subject to *Canada Pension Plan* contributions, the amount does not fall within the definition of retiring allowance set forth in subsection 248(1) of the *ITA*:

> **248(1)** In this Act,
>
> **…**
>
> ***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;

[12] Since this definition specifically references retirement from an office or employment, the Appellant's income cannot be a retiring allowance. He was a partner at Deloitte & Touche LLP earning business or partnership income. He retired in 2007 as a partner of that firm. His income was not from an office or employment as referenced in the definition of retiring allowance. After his retirement, he continued to receive a portion of the partnership income pursuant to his partnership agreement. Since this income falls into the category of business or professional income pursuant to subsection 96(1.1) of the *ITA*, the Minister was correct in including it in the calculation of his self-employed earnings for the purposes of sections 13 and 14 of the *CPP*.

[13] The Appellant relied on three documents to support his argument. The first document was the January 17, 1996 CRA View document titled 9527946, Retired Partner, Canada Pension Plan. The Appellant relied specifically on the following paragraph:

> Income allocated pursuant to subsection 96(1.1) of the Act is business income but for the purposes of the CPP provision is not considered to be from a business carried on by the retired partner and consequently such a partner is not required to contribute to CPP solely as result of receiving such income.

[14] Canada Revenue Agency ("CRA") advance rulings, such as this, are given in response to specific questions from a taxpayer. Without the background and the specific questions, there is no context provided in which CRA made this particular ruling. But apart from this problem, administrative documents produced or advice given by CRA do not bind this Court. There is an abundance of caselaw to support that conclusion. They are not determinative because the issue, being the validity of the assessment, is to be resolved in accordance with the law. [see *Main Rehabilitation Co. v The Queen*, 2004 FCA 403, 2004 DTC 6762; *Butler v The Queen*, 2016 FCA 65, 2016 DTC 5034; *Hahn v The Queen*, 2011 FCA 282, 2011 DTC 5166; *Brousseau Succession v The Queen*, 2012 TCC 390, 2013 DTC 1038; *Klassen v The Queen*, 2007 FCA 339, 2007 DTC 5612]. While such documents may be helpful to the Court, they will never be dispositive of the issue before the Court. In some instances, they will not assist the Court at all where the relevant legislation does not support a conclusion that CRA has advanced. Put another way, while the CRA view may be the most reasonable view to take, it is not justified when the relevant legislation is applied.

[15] The Appellant also relied on the Statement of Partnership Income, Form T5013. Although he referenced the membership code listed in the form, there was nothing further, either in that form or in his evidence, that converted his earnings into non-pensionable earnings. In fact, this form characterizes his earnings as a retired partner as professional income which is to be included in the calculation of contributory earnings pursuant to sections 13 and 14 of the *CPP*.

[16] Lastly, the Appellant relied on an opinion of Deloitte & Touche LLP, contained in a letter dated June 7, 2013, that his income was exempt from *Canada Pension Plan* contributions as it was a retiring allowance under subsection 96(1.1) of the *ITA*. Following my preceding analysis this interpretation of the relevant legislation is simply not correct.

[17] Finally, even if I had agreed with the Appellant's argument and his interpretation of the provisions, I would still be required to dismiss his appeal because of the wording contained in subsection 38(4) of the *CPP*:

> **Refund of excess — self-employed person**
>
> **(4)** If a person has paid, on account of the contributions required to be made by the person for a year in respect of the person's self-employed earnings, an amount in excess of the contributions, the Minister
>
> > **(a)** may refund that part of the amount so paid in excess of the contributions on sending the notice of assessment of the contributions, without any application having been made for the refund; and
> >
> > **(b)** must make such 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, in respect of a disability pension, is notified after September 1, 2010 of a decision under subsection 60(7) or 81(2), a decision under subsection 82(11) or 83(11) as those subsections read immediately before their repeal or a decision under section 54 or 59 of the Department of Employment and Social Development Act, 10 years — after the end of the year.

[18] Paragraph 38(4)(a) gives the Minister discretion to refund excess contributions in respect of self-employed earnings without any application by the contributor. Where there has been an application for a refund under paragraph 38(4)(b), the Minister must make the refund provided that the application has been made in writing not later than four years after the end of the year. The Appellant argued that he is within the four year period as that period started to run from the

date of the assessment which was on September 11, 2009. The Respondent argued that the four year period commences at the end of the year in question, being the 2008 taxation year and not when the Appellant learned of his assessment. Counsel relied on the decision in *Tharle v The Queen*, 2011 TCC 325, [2011] 5 CTC 2187, where the Court concluded that the four year limitation period set out in paragraph 38(4)(b) commences from the year end in question and not with the assessment. I agree with the conclusion reached in *Tharle* that this four year timeline to demand the Minister provide a refund of excess *CPP* contributions begins to run at the end of the calendar year in which those *Canada Pension Plan* contributions were owed.

[19] Subsequent to the conclusion of the hearing, the Appellant submitted several documents which he intended to produce at the hearing for the Court's consideration but had neglected to do so. These included a T1 adjustment request for the Appellant's 2009 taxation year regarding a refund of excess *Canada Pension Plan* contributions and a letter dated February 3, 2014 from CRA advising that *Canada Pension Plan* contributions for 2009 had been deleted.

[20] These documents are in respect to an entirely different taxation year than the 2008 taxation year which is before me. Aside from this, the documents are not properly before me. The Appellant has not requested me to reopen the hearing but has asked that I give consideration to these documents.

[21] In the absence of a provision in the *Informal Procedure Rules* governing the admission of new evidence, I refer to subsection 138(1) of the *Tax Court of Canada Rules (General Procedure)* which provides:

> **138 (1)** The judge may reopen a hearing before judgment has been pronounced for such purposes and upon such terms as are just.

[22] In *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983, the Supreme Court of Canada set out a two part test to assist courts in determining whether the discretion to reopen a hearing to admit new evidence should be exercised. This Court confirmed that test in *Benaroch v The Queen*, 2015 TCC 91. The first part of the test is whether the new evidence would have changed the result. I have already concluded that, since the new evidence relates to an adjustment in respect to the Appellant's 2009 taxation year, it is not relevant to my determination of the issue for the 2008 taxation year nor would it have changed my analysis in respect to the relevant legislative provisions. The second prong of the test is whether the new evidence could have been obtained prior to the hearing by the exercise of reasonable diligence. The Appellant, in his

letter to the Court subsequent to the hearing, indicated that he was in possession of the documents at the time of the hearing. Consequently, the Appellant will not be permitted to reopen the hearing to introduce these documents and in light of my comments I am not giving further consideration to these documents in my reasons.

[23] For all of these reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 23rd day of March 2017.

"Diane Campbell"

Campbell J.

CITATION:	2017 TCC 46
COURT FILE NO.:	2016-905(IT)I
STYLE OF CAUSE:	TERENCE O. FREITAS AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 3, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	March 23, 2017

APPEARANCES:

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