Docket: 2007-3184(IT)I

BETWEEN:

RAMDAI MISIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 5, 2008, at Toronto, Ontario.

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Samantha Hurst

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the Appellant's 2005 taxation year is allowed, with costs, and the assessment is vacated.

Signed at Halifax, Nova Scotia, this 25th day of March 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC168
Date: 20080325
Docket: 2007-3184(IT)I

BETWEEN:

RAMDAI MISIR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether the Appellant was entitled to deduct $10,000 in computing her income in 2005 pursuant to subsection 146(8.2) of the *Income Tax Act* ("*Act*"). This subsection permits a taxpayer to deduct from his or her income an amount withdrawn from an RRSP provided that the taxpayer did not claim a deduction for the amount when it was contributed to the RRSP and provided that the amount is withdrawn by the taxpayer from the RRSP within the time period specified in paragraph 146(8.2)(c) of the *Act*. Paragraph 146(8.2)(c) of the *Act* provides as follows:

> 146(8.2) Where
>
> …
>
> (c) the payment is received by the taxpayer or the taxpayer's spouse or common-law partner in a particular taxation year that is
>
> (i) the year in which the premiums were paid by the taxpayer,

(ii) the year in which a notice of assessment for the taxation year referred to in subparagraph (i) was sent to the taxpayer, or

(iii) the year immediately following the year referred to in subparagraph (i) or (ii),

[2] The Appellant was employed by Bombardier but was laid off in 2002. She now only has a modest pension income and is supporting her parents. For several years she made contributions to her RRSP. She indicated that she would do this early in the year. However, the amounts that she contributed to her RRSP over the years were in excess of the amounts that she was permitted to deduct in computing her income. She was not aware of this until 2005.

[3] The following table was attached to the Reply and sets out the summary of the amounts contributed by the Appellant to her RRSP and the amounts deducted by the Appellant in computing her income:

Tax Year	Undeducted Contributions From Prior Years	Current Year Contributions (includes Transfers)	Total Contributions Available to Deduct	Repayments to HBP & LLP	Contributions Deducted (includes Transfers)
2007	9,121				
2006	9,121	1,085	10,206	1,085	0
2005	10,206	0	10,206	1,085	0
2004	10,206	1,085	11,291	1,085	0
2003	12,501	14,290	26,791	1,085	15,500
2002	9,077	6,346	15,423	1,100	1,822
2001	8,690	9,757	18,447	1,086	8,284
2000	8,690	6,203	14,893	1,086	5,117
1999	8,765	4,696	13,461	1,086	3,685
1998	8,690	6,500	15,190	1,086	5,339
1997	1,555	14,536	16,091	1,086	6,315
1996	1,186	8,586	9,772	1,086	7,131
1995	0	7,891	7,891	1,086	5,619
1994	0	5,602	5,602	0	5,602

[4] The column labeled "Repayments to HBP & LLP" is related to the home buyers plan payments that the Appellant was making to her RRSP to repay the home buyers plan loan that she had earlier received from her RRSP. Although the table indicated that there was no contribution made in 2005, the Appellant testified that she did make the required home buyers plan contribution of $1,085 in 2005 and I accept her testimony in this matter.

[5] No explanation was provided for the reference to “(includes Transfers)” and therefore it is not clear what was intended to be included as a “transfer”. However since the Canada Revenue Agency (“CRA”) in Interpretation Bulletin 337R4 — Retiring Allowances [Consolidated] (referred to below), refers to amounts contributed to an RRSP from a retiring allowance as a transfer, I assume that, for the purposes of this case, that the “includes transfers” would include amounts contributed from a retiring allowance.

[6] When the Appellant became aware of the fact that she had undeducted contributions to her RRSP that would be taxable when paid to her unless she withdrew the amounts within the time period permitted by subsection 146 (8.2) of the *Act*, she talked to a representative of the CRA, who told her that she could withdraw these amounts without incurring tax. She prepared the forms based on the advice she received from the CRA. These forms showed excess contributions for 1995, 1996, 1997, 1998 and 2001. Since the Appellant withdrew the funds in 2005, it is very important to determine the year in which the undeducted contributions were made, given the time limitations for a deduction under subsection 146(8.2) of the *Act* set out in paragraph 146(8.2)(c) of the *Act*.

[7] The Appellant testified that she filed her tax return each year before the deadline and therefore I conclude that the 2003 tax return would have been assessed in 2004. Therefore any undeducted amounts contributed in 2003 and withdrawn in 2005 would qualify for the deduction provided in subsection 146(8.2) of the *Act* as 2005 is the year following the year that the 2003 tax return was assessed.

[8] The assumptions made by the Minister in reassessing the Appellant were based on the assumption that for each year the amount that was deducted would first be considered to have been paid from the current year's contribution and then, if the amount deducted exceeded the current year's contribution, the excess amount deducted would be considered to be from the undeducted contributions from prior years. Although this is not expressly stated in the Reply, it is implicit in the assumption in paragraph 9(a) of the Reply that the Appellant had undeducted contributions in respect of the 1995, 1996, 1997, 1998 and 2001 taxation years. If the amount deducted each year would have been considered to have been paid first from the undeducted contributions from prior years, there would not be any undeducted contributions in respect of the 1995, 1996, 1997, 1998 and 2001 taxation years.

[9] The assumption in the Reply, then, was that the last payments made were the first ones credited towards the amounts deducted. On this basis, since the contributions deducted in 2003 exceeded the contributions made in 2003, the $10,000

that the Appellant withdrew from her RRSP in 2005 would have been in relation to premiums paid in 2002 or earlier, and hence would not be withdrawn within the time period permitted for a deduction under subsection 146(8.2) of the *Act*. The only amounts contributed in 2004 and 2005 were the home buyers plan repayments of $1,085 per year.

[10] However, the appeals officer for the CRA testified during the hearing, and she stated that the amounts deducted each year would first be considered to be from the undeducted contributions from prior years. If the amount deducted exceeded the undeducted contributions from prior years, then the excess would be considered to be paid from the amount contributed in that year. On this basis, the payments to the RRSP would be treated on a first-in, first-out basis. For example for the year 1996, the amount deducted of $7,131 would first be considered to be from the undeducted contributions from prior years (which would have been from 1995) of $1,186 and the balance of $5,945 would be from the contribution of $8,586 made in 1996. On this basis the contributions deducted in 2003 of $15,500 would first be considered to be from the undeducted contributions from prior years of $12,501, and the balance of $2,999 would be considered to be from the payment of $14,290 made in 2003. On this basis, the undeducted contributions from prior years in 2004 and 2005 of $10,206 would all relate to the amount contributed in 2003, and hence the withdrawal of $10,000 in 2005 would be made within the time restrictions in paragraph 146(8.2) of the *Act*.

[11] In my opinion, without considering the implications of paragraph 60(j.1) of the *Act*, the methodology recited by the appeals officer is the correct methodology to determine whether the amounts deducted in each year were from the undeducted contributions from prior years or the current year's contribution. Subsection 146(5) of the *Act* provides that there is a deduction for premiums paid after 1990 and there is nothing to suggest that deductions made in any particular year should first be considered to be from contributions made in that year. The application of a first-in, first-out approach is valid and in my opinion is the logical approach to be applied in this case, without considering the implications of paragraph 60(j.1) of the *Act*. The contributions deducted in each year, in this case, should first be considered to be from the undeducted contributions of prior years and any excess should then be considered to be from the contributions made in that particular year.

[12] The appeals officer testified that the amount in 2003 was a retiring allowance. There is no indication in the Reply that the amount in 2003 was paid from a retiring allowance. A retiring allowance is defined in subsection 248(1) of the *Act* as follows:

> "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;

[13] A retiring allowance is included in income under subparagraph 56(1)(a)(ii) of the *Act.*

[14] Paragraph 60(j.1) of the *Act* provides for an additional deduction for retiring allowance amounts that are contributed to an RRSP equal to $2,000 per year multiplied by the number of years that the individual was employed by the employer prior to 1996 (and an additional amount if the individual was employed prior to 1989 and had an equivalent number of years before 1989 in respect of which neither a pension plan nor a deferred profit sharing plan had vested in the employee).

[15] Counsel for the Respondent argued that the retiring allowance was not a premium as defined in subsection 146(1) of the *Act*. While it is correct that the retiring allowance itself is not a premium, when the amount received as a retiring allowance is contributed to an RRSP, the amount so contributed is a premium as defined in subsection 146(1) of the *Act*. This is the same result whether the individual actually receives the retiring allowance and then makes the contribution to his or her RRSP or whether the employer makes the contribution directly to the employee's RRSP (which may be done to avoid the withholding tax on the retiring allowance if the amount of the retiring allowance is equal to the additional deduction provided in paragraph 60(j.1) of the *Act*). If the employer makes the payment directly, the employee is still deemed to have received the retiring allowance and therefore the employee would still be deemed to have made the contribution to his or her RRSP.

[16] The amount shown as contributions by the Appellant in 2003 of $15,500 would be premiums paid by the Appellant even though a portion or all of this was funded by a retiring allowance that may have been paid directly by the Appellant's employer to the Appellant's RRSP.

[17] In Interpretation Bulletin 337R4 — Retiring Allowances [Consolidated], the CRA made the following comments in relation to paragraph 60(j.1) of the *Act* and the requirement to withhold tax from retiring allowance payments made directly to an RRSP of the employee:

> 19. Paragraph 60(j.1) provides for a deduction for all or part of a retiring allowance included in a taxpayer's income and transferred to an RPP or to an RRSP under which the taxpayer is the annuitant….
>
> …
>
> 25. Subject to § 26, a person paying a retiring allowance to a recipient is required, pursuant to paragraph 153(1)(c), to withhold tax therefrom in such amount as is prescribed by Regulation. However, the payer is not required to deduct income tax on the amount of retiring allowance transferred directly to the recipient's RPP. If the retiring allowance or a part thereof is paid directly to an RRSP (see §s 19 and 21), there is no requirement for the payer to withhold income tax on the transferred amount if the payer has reasonable grounds to believe the transfer is within the deduction limits under paragraph 60(j.1) or can be deducted pursuant to subsections 146(5) or (5.1). For more information, see the current version of the guide entitled Employers' Guide: Payroll Deductions (Basic Information).

[18] Since the Respondent has not pleaded paragraph 60(j.1) of the *Act* in the Reply nor has the Respondent made any assumptions in relation to the number of years prior to 1996 that the Appellant was employed by Bombardier or made any reference in the Reply to any retiring allowance, the Respondent had the onus of proving the facts required to determine the potential application of paragraph 60(j.1) of the *Act* to the question of whether the contributions deducted in 2003 were first from the undeducted contributions from prior years or first from the contributions made in 2003.

[19] In *Pollock v. The Queen*, [1994] 1 C.T.C. 3, 94 DTC 6050, Justice Hugessen, on behalf of the Federal Court of Appeal, made the following comments:

> Where, however, the Minister has pleaded no assumptions, or where some or all of the pleaded assumptions have been successfully rebutted, it remains open to the Minister, as defendant, to establish the correctness of his assessment if he can. In undertaking this task, the Minister bears the ordinary burden of any party to a lawsuit, namely to prove the facts which support his position unless those facts have already been put in evidence by his opponent. This is settled law.

[20] In *Loewen* 2004 FCA 146, Justice Sharlow, on behalf of the Federal Court of Appeal, made the following comments:

> 11 The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. **If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown.** This is well explained in Schultz v. R. (1995), [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (Fed. C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4 (S.C.C.)).
>
> (emphasis added)

[21] Leave to appeal the decision of the Federal Court of Appeal in *Loewen* to the Supreme Court of Canada was refused (338 N.R. 195 (note)).

[22] Since the Respondent has not led any evidence with respect to the facts that would be required to determine the potential application of paragraph 60(j.1) of the *Act* and in particular any evidence in relation to the number of years that the Appellant was employed by Bombardier prior to 1996 nor did counsel for the Respondent raise any argument in relation to the potential application of this paragraph of the *Act*, I cannot consider whether the application of paragraph 60(j.1) of the *Act* would alter the determination of whether the amount deducted in 2003 was first from the amount contributed in 2003 from the retiring allowance or from the undeducted contributions from prior years. As well the table attached to the Reply does not indicate any different treatment for the amounts deducted for 2003 from the treatment of the amounts deducted in the other years. As the Respondent has failed to establish the facts necessary to determine the application of paragraph 60(j.1) of the *Act*, the Respondent cannot succeed on this issue.

[23] As a result, the appeal is allowed and the assessment is vacated.

Signed at Halifax, Nova Scotia, this 25th day of March 2008.

"Wyman W. Webb"

Webb J.

CITATION:	2008TCC168
COURT FILE NO.:	2007-3184(IT)I
STYLE OF CAUSE:	RAMDAI MISIR AND HER MAJESTY THE QUEEN
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REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
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APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Samantha Hurst

COUNSEL OF RECORD:

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Firm:	

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