Docket: 2006-3535(IT)G

BETWEEN:

GEORGE BONAVIA, JR.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 26, 2008, at Ottawa, Canada

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Robert McMechan
Counsel for the Respondent:	Daniel Bourgeois Pascal Tétrault

JUDGMENT

The appeal from a notice of reassessment dated April 28, 2005 whereby the Minister of National Revenue added $118,097 to the appellant's income for the 2001 taxation year is dismissed with costs in accordance with the attached reasons for judgment.

Signed at Montreal, Quebec, this 28th day of May 2009.

"Réal Favreau"

Favreau J.

Citation: 2009 TCC 289
Date: 20090528
Docket: 2006-3535(IT)G

BETWEEN:

GEORGE BONAVIA, JR.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau, J.

[1] This is an appeal from a Notice of Reassessment dated April 28, 2005 whereby the Minister of National Revenue (the "Minister") added $118,097 to the appellant's income for the 2001 taxation year on the basis that it was a benefit to him out of or under a registered retirement savings plan under paragraph 56(1)(h) and subsection 146(8) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Suppl). as amended (the "*Act*").

[2] The facts relevant to this appeal are described in the Statement of Agreed Facts dated November 26, 2008 and filed by the parties at the hearing. The parties also agreed to the authenticity of the documents included in the Joint Book of Documents filed as Exhibit A-1 in this appeal. The Statement of Agreed Facts reads as follows:

> 1. On June 7, 1999, an amount of $126,661.80 (the "retirement savings") was paid out of the Appellant's public service pension plan and transferred into a locked-in RRSP, account number [. . .], held with the Royal Bank of Canada (the "Royal Bank").[1]
>
> 2. On June 28, 1999, the Appellant entered into an agreement with the Royal Bank establishing a Life Income Fund (the "Fund") pursuant to the *Pension*

[1] Book of documents, tabs 1 and 5

Benefits Standards Act, 1985 and he also made an application to the Royal Bank to be paid the maximum allowable monthly income payments from the Fund in order to meet his living expenses.[2]

3. On July 8, 1999, $126,999.31 was transferred from the Appellant's locked-in RRSP to the Fund.[3] Throughout the period from July 1999 to March 2001, the Appellant received monthly payments from the Fund, in amounts ranging from $601.89 to $641.08 (the "monthly payments"), which were deposited directly in his personal chequing account.[4]

4. The Fund was registered as a retirement income fund under the *Income Tax Act*.

Appellant's Dealings with NBI in Trust inc.

5. On February 6, 2001 the Appellant made a loan application to NBI in Trust inc. ("NBI").[5]

6. On February 6, 2001 the Appellant also signed a Power of Attorney.[6]

7. On March 1, 2001, the Appellant executed Revenue Canada Form T2151. At some time subsequent to March 1, 2001, the Form T2151 that had been executed by the Appellant was stamped "Canadian Corporation Creation Centre 1062363 RREMCCCC".[7]

8. On March 19, 2001, $74,975 was transferred from the Fund to a bank account held by Canadian Corporation Creation Centre ("CCCC") with Canada Trust, account number [. . .]. On April 23, 2001, $42,959.43 was transferred from the Fund to same account of CCCC.

9. On March 27, 2001, NBI issued a cheque to the Appellant for $52,167.00, which was cashed on March 30, 2001.[8]

10. On April 30, 2001, NBI issued a cheque to the Appellant for $30,501.00, which was cashed on or about May 1, 2001.[9]

Reassessment Under Appeal

---

2 Book of documents, tabs 2 and 4
3 Book of documents, tabs 6 and 33
4 Book of documents, tab 33
5 Book of documents, tab 17
6 Book of documents, tab 18
7 Book of documents, tab. 19
8 Book of documents, tab 21
9 Book of documents, tab 22

11. On April 4, 2005, an auditor from the Canada Revenue Agency informed the Appellant that $118,097.14 would be added to his income for the 2001 taxation year as a withdrawal from his registered pension plan.[10]

12. Prior to being contacted by the Revenue Canada auditor in 2005, the Appellant had never heard of, and had no knowledge about, CCCC.

13. By Notice of Reassessment dated April 28, 2005, the Canada Revenue Agency added $118,097 to the Appellant's income for the 2001 taxation year on the basis that it was a benefit to him out of or under a registered retirement savings plan under para. 65(1)(h) and subsec. 146(8) of the *Income Tax Act*.[11]

14. The Appellant objected to the reassessment by Notice of Objection received by the Canada Revenue Agency on June 15, 2005.[12]

15. On August 31, 2006, the Canada Revenue Agency issued a Notification of Confirmation to the Appellant on the basis that:

> *"the amount of $118,097 that you transferred to "Régime de retraite des employés et members* [sic] *de Canadian Corporation Creation Centre" is a benefit out of or under a registered retirement savings plan. The amount has been included in your income according to paragraph 56(1)(h) and subsection 146(8)."*[13]

Unlawful Activity by CCCC and NBI

16. Subsequently, the Appellant was informed by the Ministry of the Attorney General, Province of Ontario, that he had been the victim of unlawful activity by CCCC and NBI, and was eligible for compensation of $117,934.43, to be paid on a pro-rata basis amongst the victims of their unlawful activity.[14]

17. On March 22, 2007, the Appellant received compensation from the Government of Ontario as a victim of crime by CCCC and NBI, in the pro-rated amount of $92,731.05, which he is using to buy years of pensionable service with the Government of Canada.[15]

CCCC and NBI

---

10 Book of documents, tab 41
11 Book of documents, tab 44
12 Book of documents, tab 46
13 Book of documents, tab 48
14 Book of documents, tab 53
15 Book of documents, tab 54

18. NBI was a corporation incorporated under the *Ontario Business Corporations Act* on November 15, 1999.

19. CCCC was incorporated under the *Canada Corporations Act* for which letters patent were issued on February 23, 2000.

20. According to its articles of incorporation, the initial directors of CCCC were Michel Rolland, Pierre Lesage and David McKenzie. Its stated objects were, *inter alia*, to attract small business entrepreneurs, to promote their interests and to provide various services to its members.

21. On June 21, 2000, CCCC created a trust purportedly to administer a pension plan for its employees and members.[16]

22. On July 18, 2000, Michel Roland, as president of CCCC, applied for registration of a pension plan called "Régime de retraite des employés et membres de Canadian Corporation Creation Center" (the "Plan").[17] The registration was granted by Canada Customs Revenue Agency ("CCRA") as it then was on December 19, 2000, effective July 24, 2000, under section 147.1 of the *Income Tax Act*.[18]

23. On or about March 30, 2001, $254,044.33 was transferred from CCCC's Canada Trust account to a bank account held by NBI with Canada Trust (number [. . .]). On or about May 2, 2001, an amount of $250,000.00 was transferred from CCCC's Canada Trust account to another Canada Trust account held by NBI (number [. . .]).

24. On September 28, 2001, the Financial Services Commission of Ontario revoked the Plan's provincial registration.[19]

25. On December 11, 2001, CCRA issued a Notice of intent to revoke in accordance with subsection 147.1(11) of the *Act* on the grounds that the Plan did not comply with the conditions for registration set out in subsection 8501(1) of the *Income Tax Regulations* ("the *Regulations*"). Particularly:

    a) the Plan's primary purpose was not to provide periodic payments to individuals after retirement in respect of their service as employees; and

    b) there was no employer-employee relationship between CCCC and the members of the Plan.[20]

---

16 Book of documents, tab 8
17 Book of documents, tabs 9 and 10
18 Book of documents, tab 16
19 Book of documents, tab 27

26. CCCC did not appeal the Notice of Intent to Revoke.

27. On January 11, 2002, a Notice of Revocation was issued in accordance with subsection 147.1(12) of the *Act* with an effective date of revocation of July 24, 2000, the Plan's original effective date.

28. The Appellant had no knowledge of any of the facts admitted in paragraphs 18 through 27 of this Statement of Agreed Facts, until after he was contacted by the auditor in 2005.

[3] The issue to be decided is whether the amount of $118,097.14 is to be included in computing the appellant's income for the 2001 taxation year:

(a) on the basis that the amounts were received by the appellant in 2001 "out of or under" his registered retirement income fund (the "RRIF") within the meaning of subsection 146.3(5) of the *Act*;

(b) in the alternative, on the basis that the transfer of the funds from the Royal Bank to CCCC was made pursuant to the direction of the appellant and for his benefit, within the meaning of subsection 56(2) of the *Act*.

[4] The Minister has changed the basis of the reassessment because the Fund established by the appellant at the Royal Bank was registered as a retirement income fund within the meaning subsection 146.3(1) of the *Act* and not as a registered retirement savings plan.

[5] The appellant's position is that he did not receive any amount in his 2001 taxation year as a benefit out of or under a registered retirement savings plan or a registered retirement income fund. He submits that the agreement with NBI was a loan agreement and that the total amount of $82,668 received in 2001 was the advancement of the loan.

[6] The appellant further contends that he did not enter into an arrangement whereby his rights and obligations under his Fund were released or extinguished, and that he did not direct the Royal Bank to transfer any amount from his Fund to CCCC.

[7] The appellant further submits that he applied to NBI for a loan and that:

---

[20] Book of documents, tab 32

(a) the Power of Attorney given to NBI was only to permit it to recover the amount of its loan plus the interest charged, through its receipt of monthly payments due to the appellant;

(b) Form T-2151 was signed on the understanding that it was necessary to protect his retirement savings by ensuring that they continued to be held by a registered plan;

(c) withdrawals from his registered retirement savings plan were not authorized by him and documents purporting to authorize any such withdrawals were fraudulently created;

(d) NBI and CCCC created arrangements and documents with the intention of deceiving the appellant and others who might rely on them by creating an appearance different from what really occurred, i.e. theft of registered retirement savings;

(e) transfers from the Fund were solely the result of a fraud and a scheme in which the appellant was the victim, such that no effect should be given to them for the purposes of the *Act*.

Analysis

[8] The rules governing RRIF are found in section 146.3 of the *Act*. A "retirement income fund" is defined in paragraph 146.3(1) of the *Act* as follows:

> **"retirement income fund"** means an arrangement between a carrier and an annuitant under which, in consideration for the transfer to the carrier of property, the carrier undertakes to pay to the annuitant and, where the annuitant so elects, to the annuitant's spouse or common-law partner after the annuitant's death, in each year that begins not later than the first calendar year after the year in which the arrangement was entered into one or more amounts the total of which is not less than the minimum amount under the arrangement for that year, but the amount of any such payment shall not exceed the value of the property held in connection with the arrangement immediately before the time of the payment.

[9] When a "retirement income fund" is accepted for registration by the Minister, it becomes a RRIF. To be registered as a RRIF, the contract between the annuitant and the carrier must contain very strict conditions relating to the use of the property held in connection with the fund which are described in subsection 146.3(2) of the

Act. In particular, the conditions found in the following provisions shall be complied with:

> **Paragraph 146.3(2)(b)**
>
> (b) the fund provides that payments thereunder may not be assigned in whole or in part;
>
> **Subparagraph 146.3(2)(c)(ii)**
>
> (ii) the property held in connection with the fund cannot be pledged, assigned or in any way alienated as security for a loan or for any purpose other than that of the making by the carrier to the annuitant those payments described in paragraph (a);
>
> **Paragraph 146.3(2)(d)**
>
> (d) the fund provides that, except where the annuitant's spouse or common-law partner becomes the annuitant under the fund, the carrier shall, as a consequence of the death of the annuitant, distribute the property held in connection with the fund at the time of the annuitant's death or an amount equal to the value of such property at that time;
>
> **Paragraph 146.3(2)(g)**
>
> (g) the fund requires that no benefit or loan, other than
>
> (i) a benefit the amount of which is required to be included in computing the annuitant's income,
>
> (ii) an amount referred to in paragraph (5)(a) or (b), or
>
> (iii) the benefit derived from the provision of administrative or investment services in respect of the fund,
>
> that is conditional in any way on the existence of the fund may be extended to the annuitant or to a person with whom the annuitant was not dealing at arm's length; and
>
> [. . .]

[10] Subsection 146.3(5) of the *Act* requires that all amounts received by a taxpayer in a taxation year out of or under a RRIF shall be included in computing his income for the year. The opening words of subsection 146.3(5) of the *Act* reads as follows:

> **(5) Benefits taxable** – There shall be included in computing the income of a taxpayer for a taxation year all amounts received by the taxpayer in the year out of or under a registered retirement income fund other than the portion thereof that can reasonably be regarded as
>
> (a) part of the amount included in computing the income of another taxpayer by virtue of subsections (6) and (6.2);
>
> (b) an amount received in respect of the income of the trust under the fund for a taxation year for which the trust was not exempt from tax by virtue of subsection (3.1); or
>
> (c) an amount that relates to interest, or to another amount included in computing income otherwise than because of this section, and that would, if the fund were a registered retirement savings plan, be a tax-paid amount (within the meaning assigned by paragraph (b) of the definition "tax-paid amount" in subsection 146(1)).

[11] Section 146.3 of the *Act* contains a series of rules aimed at preventing the revision, amendment or substitution of fund that does not comply with the requirements of section 146.3 of the *Act* for its acceptance by the Minister for registration for the purpose of the *Act*. Those rules are found in subsections 146.3(11), (12) and (13) of the *Act* which read as follows:

> **(11) Change in fund after registration** — Where, on any day after a retirement income fund has been accepted by the Minister for registration for the purposes of this Act, the fund is revised or amended or a new fund is substituted therefor, and the fund as revised or amended or the new fund substituted therefor, as the case may be, (in this subsection referred to as the "amended fund") does not comply with the requirements of this section for its acceptance by the Minister for registration for the purposes of this Act, the following rules apply:
>
> (a) the amended fund shall be deemed, for the purposes of this Act, not to be a registered retirement income fund; and
>
> (b) the taxpayer who was the annuitant under the fund before it became an amended fund shall, in computing the taxpayer's income for the taxation year that includes that day, include as income received out of the fund at that time an amount equal to the fair market value of all the property held in connection with the fund immediately before that time.
>
> **(12) Idem** — For the purposes of subsection (11), an arrangement under which a right or obligation under a retirement income fund is released or extinguished either wholly or in part and either in exchange or substitution for any right or obligation, or otherwise (other than an arrangement the sole object and legal effect of which is to

> revise or amend the fund) or under which payment of any amount by way of loan or otherwise is made on the security of a right under a retirement income fund, shall be deemed to be a new fund substituted for the retirement income fund.
>
> **(13) Idem** — Where at any time a benefit or loan is extended or continues to be extended as a consequence of the existence of a registered retirement income fund and that benefit or loan would be prohibited if the fund met the requirement for registration contained in paragraph (2)(g), for the purposes of subsection (11), the fund shall be deemed to have been revised or amended at that time so that it fails to meet the requirement for registration contained in paragraph (2)(g).

[12] When the appellant made a loan application to NBI, he had received monthly payments from the Fund from July 1999 to March 2001 in amounts ranging from $601.89 to $641.08 which were deposited in his personal chequing account. To obtain the loan, the appellant signed a Power of Attorney and executed Form T-2151 which is required by CCRA to transfer money from the Fund.

[13] The appellant testified that he simply wanted to obtain a loan to buy a house and to assign his monthly payments to the reimbursement of the loan. According to him, he never authorized the encroachment of the capital of the Fund which was to stay intact. However, he did accept that the capital of the Fund be transferred to another registered plan by signing Form T-2151. The appellant also stated that he never had any knowledge of CCCC and never discussed with NBI the transfer of the capital of the Fund to CCCC.

[14] What the appellant intended to do was to obtain a loan on the security of the monthly payments from his RRIF which is contrary to the object and spirit of the *Act* and to the terms and conditions of his RRIF. The conditions enunciated in paragraph 146.3(2)*b*) of the *Act* specifically provide that payments under a RRIF may not be assigned in whole or in part.

[15] This means that the appellant had to transfer the capital of his RRIF into another registered plan which cannot be another RRIF and that is the reason why the appellant signed a Form T-2151. The appellant also testified that he might very well have signed a Form T-2033. The vehicle offered by the promoters of the scheme was a pension plan that was registered at the time the capital of the appellant's RRIF was transferred.

[16] Unfortunately for the appellant, the registered pension plan was not a pension plan that met the prescribed conditions for registration so that is has been retroactively deregistered by the Minister. Consequently, the two transfers of the

capital of the Fund to a bank account held by CCCC constituted a withdrawal of the capital of the appellant's RRIF which had to be included in the appellant's income for the 2001 taxation year pursuant to subsection 146.3(5) of the *Act*.

[17] The *Act* assumes that any transfer of property held in connection with the Fund made at the direction of the annuitant is an amount received by the annuitant under the RRIF. An exception to this rule is found in subsection 146.3(14) of the *Act* which deems a transfer to another RRIF not to be an amount received by the annuitant out of or under a RRIF.

[18] The word "received" for the purpose of the *Act* includes not only cash or property in the hands of the taxpayer but also benefits or advantages obtained or enjoyed from something without necessarily having it in one's hands. This interpretation was retained by the Federal Court, Trial Division, in *Morin v. R.*, 75 D.T.C. 5061 at paragraph 24:

> "We regret to say that this proposition seems to us absolutely inadmissible, because the word 'receive' obviously means to get or to derive benefit from something, to enjoy its advantages without necessarily having it in one's hands."…

[19] The extended meaning of the word "received" for the purposes of the *Act* has been applied by the Courts, namely in *Simser v. R.*, 2005 D.T.C. 5001 (Federal Court of Appeal) and in *Bertrand v. R.*, 2007 D.T.C. 190 (Tax Court of Canada).

[20] In addition to the extended meaning of the word "received", the Courts have also applied the concept of "constructive receipt". In *Belusic v. R.*, 3 C.T.C. 2908, Justice Bowman set out in paragraph 13, the conditions for the application of "constructive receipt" concept to a payment to a third party:

> […] I should think that for there to be constructive receipt of the $3,281.30 by the appellant as the result of the payment by Canada Post to the City of London, one or both of two conditions would need to be met:
>
> (a) the appellant would need to have authorized or in any event acquiesced in the payment; or
>
> (b) even if he had not authorized or acquiesced in the payment, at least he would have had to be under a legal obligation to make the repayment so that the payment by Canada Post to the City of London had the effect of relieving him of that obligation.

[21] This approach was applied by this Court in *Toth v. R.*, 2006 D.T.C. 2479. The Court found that Mr. Toth had received the amounts under his RRSP despite the fact that Mr. Toth derived no benefit whatsoever from the proceeds of his RRSP and the payment was not authorized or the result of a legal obligation.

[22] Considering the facts of this case and the appellant's evidence, it seems clear to me that the amounts transferred out of his RRIF with the Royal Bank were properly included in the calculation of his income under subsection 146.3(5) of the *Act*. The transfer of funds was for the purpose of serving a future debt and was therefore to his benefit. Furthermore, the transfer of funds was authorized by the appellant. Finally, by signing the Power of Attorney, the appellant was under a legal obligation to the transfer of funds to NBI but he was relieved of that legal obligation when NBI chose to have the payment directed to another entity, CCCC.

[23] Even if it was considered that the amounts transferred were not received by the appellant pursuant to subsection 146.3(5) of the *Act*, the amounts would nevertheless have to be included in the income of the appellant pursuant to subsection 56(2) of the *Act*.

[24] Subsection 56(2) of the *Act* reads as follows:

> **Indirect payments** — A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person (other than by an assignment of any portion of a retirement pension pursuant to section 65.1 of the Canada Pension Plan or a comparable provision of a provincial pension plan as defined in section 3 of that Act or of a prescribed provincial pension plan) shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to the taxpayer.

[25] The purpose of subsection 56(2) of the *Act* is to prevent tax avoidance through income splitting. It is a specific tax avoidance provision in the sense that it can only operate to prevent income splitting when the four preconditions to its application are specifically met.

[26] The Supreme Court of Canada recognized in *Newman v. M.N.R.*, 98 D.T.C. 6297 that subsection 56(2) of the *Act* requires the application of four conditions. In paragraph 32 of that case, the Court referred to the four preconditions in the following terms:

> In order for s. 56(2) to apply, four preconditions, each of which is detailed in the language of the s. 56(2) itself, must be present:
>
> (1) the payment must be to a person other than the reassessed taxpayer;
>
> (2) the allocation must be at the direction or with the concurrence of the reassessed taxpayer;
>
> (3) the payment must be for the benefit of the reassessed taxpayer or for the benefit of another person whom the reassessed taxpayer wished to benefit; and
>
> (4) the payment would have been included in the reassessed taxpayer's income if it had been received by him or her.

[27] It seems to me that the four prerequisites are present in this instance for the following reasons:

(a) payment to another person: on March 19, and on April 23, 2001, the amounts of $74,975 and 42,959.43 respectively were transferred from the appellant's Fund to CCCC;

(b) at the direction or with the appellant's concurrence: in March 2001, the appellant executed Form T-2151. He understood that this executed form could only be used for one purpose — to authorize the Royal Bank to transfer the capital of his Fund. The appellant cannot repudiate the authorization on the basis that the name of CCCC was stamped after the fact because he signed a blank document;

(c) the payment is for the benefit of the appellant: without the transfer of funds, the appellant would not have been able to obtain the funds necessary to purchase the house. The appellant testified that he was made aware that the funds had been transferred by the fact that he had received the loan. There was a direct correlation between the funds obtained from NBI and transfer of the capital of his Fund to CCCC;

(d) the payment would have been taxable if received by the appellant: if the amounts had been paid directly to the appellant, it would have been included in his income pursuant to subsection 146.3(5) of the *Act*.

[28] The appellant was, at the very least, negligent in signing the documents that led to the inclusion in his income of the amounts in issue. The Federal Court of Appeal clearly stated in *Norm v. R.*, 2007 D.T.C. 6111 that a taxpayer should not

escape the consequences of his actions on the basis of fraud and mistake. At paragraph 22 of that case, the Court stated the following:

> By purchasing the shares in a non-qualified investment, subsection 146(1) was automatically triggered. Undoubtedly, this result is harsh but it would be unfair to exempt a taxpayer from his or her tax obligation on the basis of mistake or fraud.

[29] The same reasoning was applied in *Vankerk v. R.*, 2006 D.T.C. 6199, *Dubuc c. R.*, 2004 D.T.C. 2811 and in *Deschamps v. R.* [2007] 3 C.T.C. 2298. In *Deschamps*, this Court made the following statement at paragraph 15:

> The appellant may have failed to exercise care in signing these documents but that does not relieve him of the consequences.

[30] For these reasons, the appeal is dismissed with costs.

Signed at Montreal, Quebec, this 28th day of May 2009.

"Réal Favreau"

Favreau J.

CITATION:	2009 TCC 289
COURT FILE NO.:	2006-3535(IT)G
STYLE OF CAUSE:	George Bonavia, Jr. v. Her Majesty the Queen
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	November 26, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	May 28, 2009

APPEARANCES:

Counsel for the Appellant:	Robert McMechan
Counsel for the Respondent:	Daniel Bourgeois Pascal Tétrault

COUNSEL OF RECORD:

For the Appellant:

Name:	Robert McMechan
Firm:	Robert McMechan, LLB, LLM Ottawa, Canada

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada