

Docket: 2008-3786(IT)I

BETWEEN:

FRANK J. BURCHILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 9, 2009, at Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Natasha Reid

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2005 taxation year is dismissed, without costs.

Signed at Vancouver, British Columbia, this 30th day of September 2009.

“L.M. Little”

Little J.

Citation: 2009 TCC 492
Date: 20090930
Docket: 2008-3786(IT)I

BETWEEN:

FRANK J. BURCHILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. Facts

[1] The Appellant is a retired Federal Civil Servant. The Appellant was also employed by Carleton University as a sessional lecturer and he was employed by the Government of the Yukon Territory.

[2] In reporting his income for the 2005 taxation year, the Appellant reported pension income of \$171,567.89. The pension was issued by the Public Works Government Services of Canada (“PWGSC”).

[3] In the 2005 taxation year, the Appellant received Old Age Security (“OAS”) payments in the amount of \$5,706.63.

[4] On April 3, 2006, the Minister of National Revenue (the “Minister”) issued a Notice of Reassessment for the 2005 taxation year to include pension income of \$171,567.89 and to include the OAS payments in the Appellant’s income.

[5] On April 4, 2006, the Appellant made a request to the Minister to allocate the pension income of \$171,567.89 that he had received in a lump sum in 2005 retroactively to taxation years dating as far back as 1992.

[6] The Minister accepted the request made by the Appellant. On May 3, 2006, the Minister Reassessed the Appellant's 2005 taxation year to allocate \$158,706.00 of his pension income to prior taxation years. However, the OAS payments remained unchanged.

[7] The Appellant filed a Notice of Objection dated June 18, 2008.

B. Issues

[8] The issues are whether:

a) the Appellant is entitled to additional non-refundable tax credits in calculating the tax on pension/superannuation payments allocated to prior taxation years;

b) the Appellant was properly assessed arrears interest on the tax on pension/superannuation that had been allocated by the Minister to prior taxation years;

c) the Appellant was properly assessed a repayment of social benefits of \$5,706.63 in respect of OAS received by the Appellant in 2005; and

d) the Appellant is entitled to an Age Credit for the purpose of computing his non-refundable tax credits for the 2005 taxation year.

C. Analysis and Decision

[9] During the hearing the Appellant stated that he was dropping his claim that he is entitled to non-refundable tax credits (see 8(a) above).

[10] Section 110.2 of the *Income Tax Act* (the "Act") was introduced in the Act in 2000 to provide some relief to taxpayers by allowing them to deduct, in computing their taxable income for the year, the specified portion of a qualifying amount received in that year. A tax is levied pursuant to section 120.31 of the Act on the amount deducted. Subsection 120.31(3) provides for a "notional interest", based on the rate of interest on tax refunds applicable to the relevant period as computed for

the year beginning on May 01 of the year following the relevant preceding year and ending immediately before the year in which the lump sum payment is received.

[11] Counsel for the Respondent said that the special calculation contained in section 120.31 of the *Act* is available with respect to the lump sum pension payment that the Appellant had received in 2005. Counsel for the Respondent also noted that the special calculation is favourable to the Appellant when compared with the situation where the lump sum does not apply. Counsel for the Respondent said:

... if the special calculation does not apply, the full amount of the lump sum must be included in the Appellant's income for 2005.

This engages higher marginal tax rates which more than overtake the notional interest component of the special calculation.

(Transcript, page 69, lines 8-14)

[12] Counsel for the Respondent also stated that subparagraph 56(1)(a)(i) of the *Act* specifies that pension or superannuation amounts must be included in income when they are received. (Underlining added). In support of her position, counsel referred to the decision in *Lessard v. The Queen*, 2007 FCA 9, 2008 D.T.C. 6259, where the Federal Court of Appeal upheld the decision of Lamarre Proulx, J. (see *Lessard v. The Queen*, 2006 TCC 45, 2007 D.T.C. 1658). Justice Lamarre Proulx had held that pursuant to clause 56(1)(a)(i)(B) of the *Act*, any amount received in the year in payment of a benefit under a provincial pension plan must be included in the calculation of income in the year it was received. (Underlining added).

[13] The Appellant had argued that because he was entitled to the pension amounts in prior years and had opted not to be paid the amounts in prior years, the amounts should be included in his income for those earlier years, notwithstanding that he actually received the full lump sum in 2005.

[14] The Appellant had argued that the monthly pension amounts were “deemed” to have been received by him when they became available to him. He suggested that the pension amounts were taxable in the years in which they were receivable (i.e., 1992 to 2005).

[15] In support of his position, the Appellant filed the following court decisions:

Green v. Minister of National Revenue, 50 D.T.C. 320; and
Blenkarn v. M.N.R., 63 D.T.C. 581.

[16] The *Green* decision dealt with interest and not pension income. Furthermore, this was a decision of the Income Tax Appeal Board interpreting a provision of the *Income War Tax Act*. In my opinion this decision is not applicable to the tax treatment of pension income specifically provided for in the current *Act*.

[17] The Appellant also referred to the *Blenkarn* decision in support of his argument. This was a 1963 decision of Chairman Cecil L. Snyder, Q.C., of the Tax Appeal Board. I would first note that the *Blenkarn* case has never been cited in any other court decision. Furthermore, Chairman Snyder said at page 582:

... The T4. issued by the Department of National Defence stated that salary of \$707.02 had been paid to the appellant in 1960. However, counsel for the Minister conceded that the portion of that amount, approximately \$150, which was earned in December, 1960, but not received until 1961 should be included in 1961 income and the assessment for 1960 should be amended accordingly.

(Underlining added)

[18] In my opinion, the *Blenkarn* decision lends some support to the Minister's argument that the important factor was when the payment was received and not when the payment was receivable.

[19] I also agree with counsel for the Respondent when she said:

... The fact that the Appellant was entitled to amounts in prior years, and the fact that it was the Appellant who caused the amounts not to be paid to himself, are irrelevant. He was in fact not paid the amounts until 2005.

(Transcript, page 73, lines 8-12)

[20] The Appellant has stated that "notional interest" should not have been imposed by the Minister in the Reassessment. Since the Appellant requested the special calculation provided for in section 120.31 he must also recognize that the Minister will apply the "notional interest" that is provided in subsection 120.31(3).

[21] In my opinion, the Minister was correct in the calculation of the notional interest as specified in subsection 120.31(3).

[22] The Appellant also argued that since the Federal Government owed him money (i.e., the amount owing by PWGSC), any amounts that he owed should be offset by those amounts plus interest. I have concluded that there is no basis for this argument before the Tax Court of Canada. Any dispute that the Appellant has regarding the amount owed to him by PWGSC cannot be reviewed or considered by the Tax Court. The Tax Court has the authority to review an Assessment issued under the *Act*. The Tax Court does not have the authority to order an “offset” of monies owed by PWGSC to the Appellant to offset his income tax liability.

[23] I have carefully considered the various points made by the Appellant on the tax treatment of the lump sum payment and I reject them. In my opinion, the Minister was correct when he calculated the tax plus the notional interest as provided for in the special calculations as requested by the Appellant.

Old Age Security Payment

[24] The question is whether the Appellant was properly assessed with regard to an OAS payment.

[25] Subsection 180(2) of Part 1.2 of the *Act* imposes a “clawback” tax on Federal OAS benefits. The *Act* provides that to the extent that the taxpayer’s net income exceeds a threshold of \$50,000.00, the benefits are subject to a 15% tax. Counsel for the Respondent noted that the *Act* refers to net income and not taxable income.

[26] In support of her position, counsel for the Respondent referred to the following court decisions:

Fenner v. The Queen, 2006 TCC 396, 2006 D.T.C. 3222;
Stoddard v. The Queen, 2007 TCC 380, 2007 D.T.C. 1288; and
Parisée v. The Queen, 2009 TCC 132, 2009 D.T.C. 1161.

In this situation, when the Appellant’s income was reduced (as he had requested), his taxable income for 2005 was approximately \$18,000.00. However, because of the wording contained in subsection 110.2(2), the Appellant’s net income for 2005 was over \$177,000.00 at which point OAS payments begin to be “clawed back”.

[27] I agree with the position as outlined by counsel for the Respondent regarding OAS payments.

Age Credit

[28] Subsection 118(2) of the *Act* provides that an individual who is 65 years of age (or older) may claim the Age Credit. The Age Credit is reduced if the person's net income exceeds the threshold.

[29] Counsel for the Respondent stated that the same analysis that covers OAS payments also applies with respect to the Age Credit. Counsel for the Respondent noted that the entitlement to the Age Credit is determined by reference to a taxpayer's net income rather than their taxable income.

[30] I agree with the position as argued by counsel for the Respondent regarding the Age Credit.

[31] The appeal is dismissed, without costs.

Signed at Vancouver, British Columbia, this 30th day of September 2009.

“L.M. Little”

Little J.

CITATION: 2009 TCC 492

COURT FILE NO.: 2008-3786(IT)I

STYLE OF CAUSE: Frank J. Burchill and
Her Majesty The Queen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 9, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: September 30, 2009

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Natasha Reid

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
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