

Docket: 2009-397(IT)I

BETWEEN:

ALICE LIPCZAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 16, 2009, at Toronto, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Ian Theil

JUDGMENT

The appeal from the assessment made under the *Income Tax Act (ITA)* for the 2005 taxation year is allowed with costs, if any, and the assessment is referred back to the Minister for reconsideration and reassessment on the basis that the amount of \$20,000 does not have to be included in the appellant's income for 2005 pursuant to subsection 146(8) and section 146.01 of the ITA.

Signed at Ottawa, Canada, this 9th day of October 2009.

"Lucie Lamarre"

Lamarre J.

Citation: 2009 TCC 507
Date: 20091009
Docket: 2009-397(IT)I

BETWEEN:

ALICE LIPCZAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal under the informal procedure from an assessment made by the Minister of National Revenue (**Minister**) under the *Income Tax Act (ITA)* for the appellant's 2005 taxation year. More precisely, in assessing the appellant, the Minister included in her income for 2005 an amount of \$20,000 that she withdrew in that same year from her Registered Retirement Savings Plan (**RRSP**) under a Home Buyers' Plan (**HBP**). The HBP is a program implemented under the ITA that allowed an individual to withdraw up to \$20,000¹ in a calendar year from his or her RRSP to buy or build a qualifying home. If all the conditions required by the ITA are met, an HBP participant does not have to include eligible withdrawals from his or her RRSP in his or her income for the year in which the withdrawals were made. Generally, the eligible withdrawals must be paid back into the RRSP within a period of no more than 15 years.

[2] The provisions of the ITA applicable to the HBP are found at paragraph 56(1)(h.1), subsection 146(8) and section 146.01. I reproduce hereunder the provisions that are of importance in the present case, as applicable for the taxation year at issue:

¹ The maximum is now \$25,000 for withdrawals made after January 27, 2009.

56.(1) Amounts to be included in income for year - Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,

(h.1) Home Buyers' Plan - amounts required by section 146.01 to be included in computing the taxpayer's income for the year;

146(8) Benefits [and withdrawals] taxable - There shall be included in computing a taxpayer's income for a taxation year the total of all amounts received by the taxpayer in the year as benefits out of or under registered retirement savings plans, other than excluded withdrawals (as defined in subsection 146.01(1) or 146.02(1)) of the taxpayer and amounts that are included under paragraph (12)(b) in computing the taxpayer's income.

146.01(1) Definitions – In this section,

“completion date”, in respect of an amount received by an individual, is

- (a) where the amount was received before March 2, 1993, October 1, 1993,
- (b) where the amount was received after March 1, 1993 and before March 2, 1994, October 1, 1994, and
- (c) in any other case, October 1 of the calendar year following the calendar year in which the amount was received;

“designated withdrawal” of an individual is an amount received by the individual, as a benefit out of or under a registered retirement savings plan, pursuant to the individual's written request in the prescribed form referred to in paragraph (a) of the definition "eligible amount" (as that definition read in its application to amounts received before 1999), paragraph (a) of the definition "regular eligible amount" or paragraph (a) of the definition "supplemental eligible amount";

“eligible amount” of an individual is a regular eligible amount or supplemental eligible amount of the individual;

“excluded withdrawal” of an individual means

- (a) an eligible amount received by the individual,

“qualifying home” means

- (a) a housing unit located in Canada, or

(b) a share of the capital stock of a cooperative housing corporation, the holder of which is entitled to possession of a housing unit located in Canada,

except that, where the context so requires, a reference to a qualifying home that is a share described in paragraph (b) means the housing unit to which the share described in that paragraph relates;

“regular eligible amount” of an individual means an amount received at a particular time by the individual as a benefit out of or under a registered retirement savings plan if

(a) the amount is received pursuant to the individual’s written request in a prescribed form in which the individual sets out the location of a qualifying home that the individual has begun, or intends not later than one year after its acquisition by the individual to begin, using as a principal place of residence,

(b) the individual entered into an agreement in writing before the particular time for the acquisition of it or with respect to its construction,

(c) the individual

(i) acquires the qualifying home (or a replacement property for the qualifying home) before the completion date in respect of the amount, or

(ii) dies before the end of the calendar year that includes the completion date in respect of the amount,

(d) neither the individual nor the individual’s spouse or common-law partner acquired the qualifying home more than 30 days before the particular time,

(e) the individual did not have an owner-occupied home in the period

(i) that began at the beginning of the fourth preceding calendar year that ended before the particular time, and

(ii) that ended on the 31st day before the particular time,

(f) the individual’s spouse or common-law partner did not, in the period referred to in paragraph (e), have an owner-occupied home

(i) that was inhabited by the individual during the spouse’s or common-law partner’s marriage or common-law partnership to the individual, or

(ii) that was a share of the capital stock of a cooperative housing corporation that relates to a housing unit inhabited by the individual during the spouse's or common-law partner's marriage or common-law partnership to the individual,

(g) the individual

(i) acquired the qualifying home before the particular time and is resident in Canada at the particular time, or

(ii) is resident in Canada throughout the period that begins at the particular time and ends at the earlier of the time of the individual's death and the earliest time at which the individual acquires the qualifying home or a replacement property for it,

(h) the total of the amount and all other eligible amounts received by the individual in the calendar year that includes the particular time does not exceed \$20,000, and

(i) the individual's HBP balance at the beginning of the calendar year that includes the particular time is nil;

(2) Special rules - For the purposes of this section,

(a) an individual shall be considered to have acquired a qualifying home if the individual acquired it jointly with one or more other persons;

(a.1) an individual shall be considered to have an owner-occupied home at any time where, at that time, the individual owns, whether jointly with another person or otherwise, a housing unit or a share of the capital stock of a cooperative housing corporation and

(i) the housing unit is inhabited by the individual as the individual's principal place of residence at that time, or

(ii) the share was acquired for the purpose of acquiring a right to possess a housing unit owned by the corporation and that unit is inhabited by the individual as the individual's principal place of residence at that time;

(b) where an individual agrees to acquire a condominium unit, the individual shall be deemed to have acquired it on the day the individual is entitled to immediate vacant possession of it;

(c) except for the purposes of subparagraph (g)(ii) of the definition "regular eligible amount" and subparagraph (f)(ii) of the definition "supplemental eligible amount", an individual or a specified disabled person in respect of the individual is deemed to have acquired, before the completion date in respect of a designated withdrawal received by the individual, the qualifying home in respect of which the designated withdrawal was received if

(i) neither the qualifying home nor a replacement property for it was acquired by the individual or the specified disabled person before that completion date, and

(ii) either

(A) the individual or the specified disabled person

(I) is obliged under the terms of a written agreement in effect on that completion date to acquire the qualifying home (or a replacement property for it) on or after that date, and

(II) acquires the qualifying home or a replacement property for it before the day that is one year after that completion date, or

(B) the individual or the specified disabled person made payments, the total of which equalled or exceeded the total of all designated withdrawals that were received by the individual in respect of the qualifying home,

(I) to persons with whom the individual was dealing at arm's length,

(II) in respect of the construction of the qualifying home or a replacement property for it, and

(III) in the period that begins at the time the individual first received a designated withdrawal in respect of the qualifying home and that ends before that completion date; and

(d) an amount received by an individual in a particular calendar year is deemed to have been received by the individual at the end of the preceding calendar year and not at any other time if

(i) the amount is received in January of the particular year (or at such later time as is acceptable to the Minister),

(ii) the amount would not be an eligible amount if this section were read without reference to this paragraph, and

(iii) the amount would be an eligible amount if the definition "regular eligible amount" in subsection (1) were read without reference to paragraph (i) of that definition and the definition "supplemental eligible amount" were read without reference to paragraph (h) of that definition.

[3] In the present case, the issue is whether the withdrawal of \$20,000 by the appellant from her RRSP in 2005 is a "regular eligible amount" and therefore an "excluded withdrawal" from an RRSP under an HBP. If the answer is in the affirmative, the \$20,000 did not have to be included in her income for 2005 and the assessment under appeal is wrong. If it is in the negative, the \$20,000 had to be included in income in 2005 and the assessment would have to be confirmed.

Facts

[4] The facts are not in dispute; they are set out in paragraph 11 of the Reply to the Notice of Appeal, which reads as follows:

11. In determining the Appellant's tax liability for the 2005 taxation year, the Minister assumed the following facts:

- a) the Appellant withdrew the amount of \$20,000.00 ("the RRSP Withdrawal") on June 14, 2005, under a Home Buyers' Plan, from a registered retirement savings plan issued by Ing Bank of Canada;
- b) the Appellant entered into a written agreement with *West Harbour City (1) Residences Corp.*, before the RRSP Withdrawal and in respect thereof, for the construction of a condominium ("the housing unit") to be located in Toronto, Ontario;
- c) the Appellant made payments totalling \$41,774.00 between June 10, 2005 and April 25, 2006 for the construction of the housing unit;
- d) the written agreement with *West Harbour City (1) Residences Corp.* required the Appellant to take possession of the housing unit on May 1, 2008;
- e) the Appellant did not take possession of either the housing unit, or another housing unit located in Canada, before October 1, 2006;
- f) the Appellant was not obliged under a written agreement in effect on October 1, 2006 to acquire any other housing unit located in Canada, in respect of the RRSP Withdrawal, before October 1, 2007;

- g) the Appellant has not taken possession of either the housing unit or another housing unit located in Canada, in respect of the RRSP Withdrawal;
- h) the Appellant did not pay in the 2005 taxation year, or within 60 days after the end of the taxation year, any amount in respect of the RRSP Withdrawal to a registered retirement savings plan under which she is the annuitant;
- i) the Appellant did not include any amount in respect of the RRSP Withdrawal in computing income for the 2005 taxation year;
- j) the Appellant was resident in Canada throughout all relevant taxation years.

[5] In the Reply to the Notice of Appeal, the respondent submits that the appellant did not acquire the housing unit before the completion date (namely October 1, 2006, as per the definition of “completion date” reproduced above) in respect of the RRSP withdrawal. The respondent also submits that the appellant was not obliged under a written agreement in effect on October 1, 2006 (the completion date) in respect of the RRSP withdrawal to acquire any other housing unit located in Canada before October 1, 2007. The respondent therefore concludes that the RRSP withdrawal in the amount of \$20,000 was not a “regular eligible amount” and not an “excluded withdrawal” within the meaning of subsection 146.01(1) of the ITA. The respondent thus determined that the RRSP withdrawal in the amount of \$20,000 was a benefit received in the 2005 taxation year out of or under an RRSP, within the meaning of subsection 146(8) of the ITA, and that that amount was properly included in income for that year pursuant to paragraph 56(1)(h.1) of the ITA.

[6] In court, counsel for the respondent asked the appellant to produce the agreement of purchase and sale that was signed on May 23, 2005 (Exhibit R-1, Tab 2). In this agreement, it is stipulated that the appellant was to take possession of her unit on May 1, 2008. The appellant acknowledged that when she withdrew the funds from her RRSP on June 14, 2005, she did not expect to take possession of her condominium unit before May 1, 2008, because it could not have been habitable before that date. Nevertheless, the contractor required payments to be made in 2005 and 2006 in order for construction to start (these are the payments totalling \$41,774 referred to in paragraph 11 c) of the Reply to the Notice of Appeal above and detailed in Exhibit R-1, Tab 2, paragraph 2).

[7] Counsel for the respondent’s argument is that the appellant did not comply with all the conditions required in order for the \$20,000 withdrawal to be considered a regular eligible amount. He argues that the appellant, while knowing she would not take possession of her unit before May 1, 2008, withdrew the funds from her RRSP

too early in the process. She should, according to counsel, have waited at least until 2006 to do so. His analysis of section 146.01 of the ITA is mainly based on the purpose of the legislation introducing the HBP.

[8] He stated that RRSPs are created to help citizens to provide for their own retirement, and to that end, money inside RRSPs grows through compound interest and tax on that money is deferred.

[9] HBPs work against the accumulation, on a tax-deferred basis, of that money and interest. According to counsel, the key determinant is how long the money is going to be outside the RRSP being put to work in the real estate and construction sectors.

[10] This is why, he argued, Parliament enacted the definition of “regular eligible amount”, which requires the HBP participant to acquire the qualifying home within a time frame which, in principle, ends at the completion date (which is October 1 of the calendar year after the year in which the amount is received) if the amount is not to be taxable.

[11] In the present case, the money was withdrawn from the appellant’s RRSP on June 14, 2005. Therefore, the completion date and thus the time limit for acquiring the qualified home was October 1, 2006. There are extensions provided for in subsection 146.01(2) of the ITA where the qualified home is not acquired before the completion date. Counsel for the respondent suggests that these extensions only apply when unforeseen delays occur, not if it is known in advance that the date of acquisition will be after the completion date, as is the case here. Indeed, counsel reminded the Court that in the agreement of purchase and sale the appellant accepted May 1, 2008 as the date of possession. She withdrew the funds from her RRSP in June 2005. She thus knew at that time that she would not acquire the housing unit before the completion date. She could not therefore have intended to begin using the unit as her principal residence before the completion date as required under both paragraphs (a) and (c) of the definition of “regular eligible amount” read together. According to counsel, knowing that, she nevertheless withdrew the funds too early and could not therefore take advantage of the tax deferral with respect to the withdrawal.

[12] The appellant, on the other hand, said that she relied on different publications posted on the web site of the Canada Revenue Agency (**CRA**), which she filed as Exhibits A-1 (2005 publication), A-2 (2009 publication) and A-3 (CRA guide on HBPs). She understood from these publications that, as long as she had a written

agreement in place within the required time frame, she was deemed to have acquired her unit before the completion date. Her understanding was that the paragraph (a) intention requirement referred to by counsel for the respondent applied only once the unit was built, that is, when the unit became habitable and not before.

Analysis

[13] The issue is whether the \$20,000 withdrawal made on June 14, 2005 is a “regular eligible amount” as defined in subsection 146.01(1) of the ITA. The definition of “regular eligible amount” requires that all the conditions described in paragraphs (a) to (i) of the definition be met. I will analyze each condition with which the respondent takes issue.

(a) The amount must be received pursuant to the individual’s written request in a prescribed form in which the individual sets out the location of a qualifying home that the individual intends, not later than one year after its acquisition by the individual, to begin to use as a principal residence.

[14] In that regard, paragraph 146.01(2)(b) states that, where an individual agrees to acquire a condominium unit, the individual shall be deemed to have acquired it on the day the individual is entitled to immediate vacant possession of it.

[15] The appellant herein filed a written request in a prescribed form, on June 13, 2005, for an amount of \$20,000. In that request she set out the location of the qualifying home and indicated that she intended to occupy it as her principal place of residence no later than one year after buying or building it (Exhibit R-1, Tab 1). By virtue of the application of paragraph 146.01(2)(b), she would be deemed to have acquired the qualifying home on the day she was entitled to immediate vacant possession of it. According to the agreement of purchase and sale, that date was intended to be May 1, 2008 (Exhibit R-1, Tab 2, paragraph 3). At the time of the hearing, however, the housing unit was still not ready for vacant possession. Nevertheless, the appellant has always intended, from the date of the withdrawal of the funds to the present, to occupy it as her principal place of residence not later than one year after its acquisition, which is deemed under paragraph 146.01(2)(b) to be on the day she is entitled to vacant possession of it.

[16] I agree with the appellant that this first condition has been met.

(b) The individual entered into an agreement in writing before the particular time for the acquisition of the qualifying home or with respect to its construction.

[17] This condition has also been met, as confirmed by the agreement filed as Exhibit R-1, Tab 2, entered into on May 23, 2005.

(c) The individual

- (i) acquires the qualifying home before the completion date (October 1, 2006) in respect of the amount, or
- (ii) [not applicable]

[18] In that regard, paragraph 146.01(2)(c) states that *except for the purposes of subparagraph g(ii) [the Canadian residency requirement] of the definition “regular eligible amount”, an individual is deemed to have acquired, before the completion date in respect of a designated withdrawal received by the individual, the qualifying home in respect of which the designated withdrawal was received if*

- (i) *the qualifying home was not acquired by the individual before that completion date, and*
- (ii) *either*

(A) [not applicable] or

(B) *the individual made payments, the total of which equalled or exceeded the total of all designated withdrawals that were received by the individual in respect of the qualifying home,*

- (I) *to persons with whom the individual was dealing at arm’s length,*
- (II) *in respect of the construction of the qualifying home, and*
- (III) *in the period that begins at the time the individual first received a designated withdrawal in respect of the qualifying home and that ends before that completion date.*

[19] In the present case, the qualifying home was not acquired before the completion date (October 1, 2006) and the appellant made payments totalling approximately \$41,774 to West Harbour City (I) Residences Corp. (an arm's length party) in respect of the qualifying home between June 14, 2005 (date of withdrawal of the \$20,000 from her RRSP) and October 1, 2006 (the completion date) (as per the agreement of purchase and sale, Exhibit R-1, Tab 2, paragraph 2).

[20] All the conditions that are required under paragraph c) of the definition of "regular eligible amount" in subsection 146.01(1) and paragraph 146.01(2)(c) in order for the qualifying home to be deemed to have been acquired before the completion date have accordingly been met.

[21] None of the other conditions stated in paragraphs (d) to (i) of the definition of "regular eligible amount" are at issue as the respondent acknowledges that they have been met.

[22] The problem raised by counsel for the respondent is that the deemed date of acquisition for the purposes of paragraph (a) of the same definition (which would be the date on which the unit would be habitable under the deeming provision in paragraph 146.01(2)(b)) and the deemed date of acquisition for the purposes of paragraph (c) of the definition (which is stated to be before the completion date) are conflicting.

[23] According to counsel, the date of acquisition cannot be considered to occur after the completion date in the former case and before the completion date in the latter case. It must be one or the other.

[24] According to his interpretation, the deeming provision in paragraph 146.01(2)(c) should have precedence over the deeming provision in paragraph 146.01(2)(b). The reason for that, he argues, is simply that paragraph 146.01(2)(c) is drafted in such a way that the only exception to the deeming provision therein applies to the residency requirement (subparagraph (g)(ii) of the definition of "regular eligible amount" in subsection 146.01(1)). Counsel argued that if Parliament enunciated an exception in paragraph 146.01(2)(c) and not in paragraph 146.01(2)(b), it is because it wanted the special deeming provision in paragraph 146.01(2)(c) to apply to all the other provisions of the definition, which is not the case for paragraph 146.01(2)(b).

[25] To analyze each condition required in the relevant definition in subsection 146.01(1) one by one, without giving precedence to the deeming provision in

paragraph 146.01(2)(c), thus allowing both deeming provisions to apply at the same time, would in counsel's view effectively remove entirely the timing requirement for the HBP. He concluded that, from a government policy point of view, this would not make sense, as anyone who handed money over to an arm's length party who planned to build a qualifying home in the distant future would be eligible no matter how long it took to build the home. In fact, the person would be eligible even if, in the end, the qualifying home was never built.

[26] That may be so, but in my view, this interpretation suggested by counsel for the respondent does not emerge from the provisions of the ITA or from the publications posted on the CRA web site. Moreover, counsel for the respondent did not present to the Court any documentation, such as technical notes, that sustains his argument.

[27] Although it is true that the interaction of the two deeming provisions results in two different deemed dates of acquisition, the question at issue is whether the withdrawal from the RRSP is eligible for the purposes of an HBP. There is a timing requirement, but I see nothing to suggest that the extensions provided for in subsection 146.01(2) apply only where there are unforeseen delays. As long as the amounts withdrawn from the RRSP were used for the construction of the qualifying home before the completion date, it does not matter after that when the housing unit was ready to be occupied. The only requirement at that point is that the individual intends to take possession of the unit for the purpose of occupying it as a principal residence not later than one year after it is available for vacant possession. The time limit imposed by the completion date is complied with as long as payments equalling at least the total of the withdrawals are made to the contractors or the suppliers (with whom the individual deals at arm's length) prior to that completion date for the construction of the qualifying home. There is no reason, in the present case, to read into the provisions of the Act a meaning beyond that of the wording used by Parliament, as the respondent suggested.

[28] I reproduce here paragraph 43 of the decision by the Supreme Court of Canada in *Shell Canada Ltd. v. Canada.*, [1999] 3 S.C.R. 622:

43 . . . The Act is a complex statute through which Parliament seeks to balance a myriad of principles. This Court has consistently held that courts must therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention: *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, at para. 41, *per* Iacobucci J.; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 112, *per* Iacobucci J.; *Antosko, supra*, at p. 328, *per* Iacobucci J. Finding unexpressed legislative intentions under the guise of purposive

interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act.

[29] I therefore conclude that the appellant has shown on a balance of probabilities that all the requirements were met in order for the amount of \$20,000 to qualify as a regular eligible amount and, therefore, as an excluded withdrawal pursuant to subsection 146(8) and section 146.01 of the ITA.

[30] The appeal is allowed with costs, if any, and the assessment is referred back to the Minister for reconsideration and reassessment on the basis that the amount of \$20,000 does not have to be included in the appellant's income for 2005 pursuant to subsection 146(8) and section 146.01 of the ITA.

Signed at Ottawa, Canada, this 9th day of October 2009.

"Lucie Lamarre"

Lamarre J.

CITATION: 2009 TCC 507

COURT FILE NO.: 2009-397(IT)I

STYLE OF CAUSE: ALICE LIPCZAK v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 16, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: October 9, 2009

APPEARANCES:

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Name:

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