Docket: 2009-3693(IT)G

BETWEEN:

JAGMOHAN SINGH GILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 2, 2012, at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Tokunbo Omisade

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the appellant's 2005 taxation year is dismissed, with costs to the respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of September 2012.

"Robert J. Hogan"

Hogan J.

Citation: 2012 TCC 302
Date: 20120906
Docket: 2009-3693(IT)G

BETWEEN:

JAGMOHAN SINGH GILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Introduction

[1] The appellant, Mr. Gill, is appealing from a Notice of Reassessment issued on June 27, 2008, which included an amount of $75,175 in the appellant's income for the 2005 taxation year. This amount from the redemption of his sister's individual retirement income ("IRA") was received by the appellant but not declared as income in his 2005 tax return. The IRA was bequeathed to the appellant upon his sister's death.

[2] The issue in this appeal is whether the Minister of National Revenue (the "Minister") properly included the amount received from the IRA in the appellant's income under clause 56(1)(*a*)(i)(C.1) of the *Income Tax Act* (Canada) (the "*ITA*").

II. Background

[3] The parties filed an agreed statement of facts, and no additional facts were introduced at the hearing.

[4] The appellant's sister, a citizen of the United States (US), died on November 17, 2004. At the time of her death, she held an IRA with the OFI Trust Company. The IRA named the appellant as the beneficiary of the account. In the 2005 taxation year, the appellant received a lump-sum amount of $75,175 on the redemption of the IRA. He did not include this amount in his 2005 income tax return.

[5] The parties agree that the appellant did not receive the amount as an allowance or pension for being discharged on account of age. Similarly, the appellant did not receive the amount in consideration of past services. The parties also agree that the amount the appellant received does not fall within the ordinary meaning of "pension benefit".

[6] The parties agree that the IRA was a "foreign retirement arrangement" as defined in subsection 248(1) of the ITA and section 6803 of the *Income Tax Regulations*. The parties also acknowledge that the lump sum received by the appellant would be subject to US tax if he was a US resident.

[7] The Minister reassessed the appellant on June 27, 2008 to include the lump sum as "U.S. pension" income. The Minister confirmed the reassessment on September 16, 2009 on the basis that the amount received by the appellant should be included in income under clause 56(1)(*a*)(i)(C.1).

III. Procedural Issue: Is the Respondent Barred from Invoking Clause 56(1)(*a*)(i)(C.1) as a Basis for Reassessment?

[8] According to the appellant, the respondent should be barred from arguing that the amount he received should be included in his income on the basis of clause 56(1)(*a*)(i)(C.1). He contends that the reassessment having been made on the basis that the lump sum was pension income, to allow the respondent to argue that he is liable under clause (C.1) would be tantamount to issuing a new assessment.

[9] Subsection 152(9) is relevant to this issue. It reads as follows:

> The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act
>
> *(a)* there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and
>
> *(b)* it is not appropriate in the circumstances for the court to order that the evidence be adduced.

[10] The appellant's argument is based on the view that there is a distinction between the basis for an assessment and an argument supporting an assessment. He argues that the basis for an assessment is the determination of the nature of the amount in question. On this view, the description of the lump-sum amount as "U.S. pension" in the Notice of Reassessment reveals that the basis of the reassessment is that the amount received by the appellant was a pension benefit.

[11] The appellant argues that the Crown cannot change the basis of an assessment. He relies on Sharlow J.A.'s decision in *Canada v. Loewen*[1]. In that decision, Justice Sharlow wrote:

> The basis of any assessment is a matter of historical fact, and does not change. The basis of a reassessment normally includes the facts relating to the increased taxable income, as the Minister perceived those facts when the reassessment was made. It also includes the manner in which the Minister applied the facts to the relevant law when making the reassessment, and any conclusions of law that guided the application of the facts to the law. . . .[2]

[12] In *The Queen v. Anchor Pointe Energy Ltd.*, Rothstein J.A. (as he then was) dismissed the notion that there is a meaningful distinction between the basis for an assessment and an argument in support of an assessment for the purpose of applying subsection 152(9).[3] In *Gould v. The Queen*,[4] Bowman C.J. of this Court also held that such a distinction was meaningless.

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[1] *Canada v. Loewen*, 2004 FCA 146, [2004] 4 F.C.R. 3.
[2] *Ibid.*, at para. 7.
[3] *The Queen v. Anchor Pointe Energy Ltd.*, 2003 FCA 294, 2003 DTC 5512 (*Anchor Pointe*), at para. 38.
[4] *Gould v. The Queen*, 2005 TCC 556, 2005 DTC 1311, at para. 16.

[13] In *Walsh et al v. The Queen*, the Federal Court of Appeal described the conditions under which the Crown could bring forward an alternative argument under subsection 159(9).[5] Richard C.J. listed these as being:

> 1) the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment;
>
> 2) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(*a*) and (*b*), which speak to the prejudice to the taxpayer; and
>
> 3) the Minister cannot use subsection 152(9) to reassess outside the time limitations in subsection 152(4) of the Act, or to collect tax exceeding the amount in the assessment under appeal.[6]

[14] None of the above factors come into play in this case. The same transaction is at issue (the transfer of the lump sum that originated from the appellant's sister's IRA). Paragraphs 152(9)(*a*) and (*b*) do not apply. Finally, the Minister is not attempting to reassess the appellant outside the normal limitation period or increase the tax owing shown in the Notice of Reassessment.

[15] Instead, what the respondent has done is argue that the amount stated in the Notice of Reassessment as to be included as "U.S. pension" should be included as an amount under clause 56(1)(*a*)(i)(C.1). This is consistent with the notice of confirmation, which cites the same provision. In addition, the description of the amount as being "U.S. pension" does not appear to be an indication that the Minister believed that the appellant received pension income. The term is used simply to identify the payment received by the appellant that is the object of the assessment. Undoubtedly, it would have been better to describe the amount as an "IRA payment" subject to tax under clause 56(1)(*a*)(i)(C.1). Nonetheless, I believe that the Minister gave the appellant sufficient notice of his position by describing the amount as "U.S. pension" subject to tax under clause 56(1)(*a*)(i)(C.1) in the Minister's confirmation of the assessment. The Minister did not in any way alter the assessment by clarifying in the notification of confirmation the position that had been taken in the reply to the appellant's Notice of Appeal.

[16] The appellant has not been prejudiced by the Crown's actions. The Minister's initial Reply to the Notice of Appeal indicated, as a ground relied on, that the amount the appellant received was "properly assessed as income pursuant to

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[5] *Walsh et al. v. The Queen*, 2007 FCA 222, 2007 DTC 5441 (*Walsh*).
[6] *Ibid.*, at para. 18.

ss. 56(1)(a)(i)(C.1) of the *Act*."[7] The Amended Reply makes this more explicit by including as factual assumptions the statements that the IRA was a "foreign retirement arrangement" as defined by subsection 248(1) of the ITA and section 6803 of the *Income Tax Regulations* and that the amount at issue would be subject to tax in the US if the appellant were a US resident.[8] The appellant consented to the filing of the Amended Reply.[9] Indeed, these same factual assumptions appear as facts in the Agreed Statement of Facts submitted by the parties.[10]

IV. Appellant's Position as to the Proper Interpretation of Clause 56(1)(*a*)(i)(C.1)

[17] The appellant submits that clause 56(1)(*a*)(i)(C.1) does not cover the amount at issue in this appeal. That provision reads as follows:

> **56.** (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,
>
> > (*a*) any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,
> >
> > > (i) a superannuation or pension benefit including, without limiting the generality of the foregoing,
> > >
> > > . . .
> > >
> > > (C.1) the amount of any payment out of or under a foreign retirement arrangement established under the laws of a country, except to the extent that the amount would not, if the taxpayer were resident in the country, be subject to income taxation in the country,
> > > . . .
>
> [Emphasis added.]

[18] This provision treats superannuation or pension benefits as income, and such benefits include those items enumerated in clauses (A) to (C.1). Clause (C.1) covers payments out of or under a foreign retirement arrangement established in another country, except to the extent the amount would not be subject to taxation in that country if the taxpayer were resident there.

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[7] Reply to the Notice of Appeal, at para. 13.
[8] Amended Reply to the Notice of Appeal, at para. 9A.
[9] Agreed Statement of Facts, at para. 17.
[10] *Ibid.*, at para. 19.

[19] Subsection 248(1) of the *ITA* defines a "foreign retirement arrangement" as a "prescribed plan or arrangement". In turn, section 6803 of the *Income Tax Regulations*[11] defines a prescribed plan or arrangement as "a plan or arrangement to which subsection 408(*a*), (*b*) or (*h*) of the United States' *Internal Revenue Code of 1986*, as amended from time to time, applies."

[20] The appellant relies on the words "without limiting the generality of the foregoing" in subparagraph (i) of paragraph 56(1)(*a*). The appellant argues that these words suggest an intention on the part of Parliament that the items listed in clauses (A) to (C.1) should be taxed only if they constitute superannuation or pension benefits as those terms are generally understood.[12]

[21] The appellant relies on the reasons in *Re Law Society of Upper Canada and Attorney General of Ontario;*[13] in support of his view that the case dealt with whether the Law Society of Upper Canada had the authority to establish a regional system for the election of benchers. Borins J. considered the language of subsection 62(1) of the *Law Society Act*, which stated:

> Subject to section 63, Convocation may make rules relating to the affairs of the Society and, without limiting the generality of the foregoing,
>
> . . .
>
> 6. providing for the time and manner of and the methods and procedures for the election of benchers.

[22] Borins J. determined that establishing a regional system for the election of benchers was not captured by the phrase "the affairs of the Society".[14] He then turned his mind to the matter of whether authority to do so was granted by paragraph 6 of subsection 62(1), but before doing so he suggested that such an inquiry may not have been required:

> Having reached this conclusion, it may be unnecessary to consider whether para. 6 of s. 62(1) confers this power on Convocation to approve rules concerning the regional election of benchers. This is because it would appear that the use of the words "without limiting the generality of the foregoing" are [*sic*] intended to mean that the reference to the particular subjects is not intended to modify the meaning of the wider general language. . . .[15]

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[11] *Income Tax Regulations*, CRC 1978, c. 945, as amended.
[12] Transcript, at pp. 5-6.
[13] *Re Law Society of Upper Canada and Attorney General of Ontario* (1995), 21 O.R. (3d) 666 (Ont. Ct. – Gen. Div.) (*Re Law Society of Upper Canada*).
[14] *Ibid.*, at p. 677.
[15] *Ibid.*, at pp. 679-680 (emphasis added).

[23] Under this interpretation, the Convocation could only make rules under paragraph 6 to the extent that such rules related to the affairs of the Society defined without regard to the paragraph itself. It should be noted that, despite the above statement, Borins J. went on to consider the scope of paragraph 6 and concluded that it did not provide authority for the Convocation to establish a regional system for the election of benchers.

[24] The appellant suggests that the words "without limiting the generality of the foregoing" in subparagraph (i) of paragraph 56(1)(*a*) require that an amount must be superannuation or pension income in order for it to be included in income under that subparagraph. Thus, even if an amount fits within one of the inclusionary clauses of subparagraph 56(1)(*a*)(i), it should only be included in income if it is a superannuation or pension benefit under the standard definition of those terms.

[25] The appellant relies on the principles enunciated in *Abrahamson v. M.N.R.*, a decision of Judge Rip (as he then was), to submit that lump-sum amounts from IRAs such as he received are not superannuation or pension income.[16] I note that *Abrahamson* was decided prior to the enactment of clause 56(1)(*a*)(i)(C.1).

V. Respondent's Position

[26] The Respondent argues that clause 56(1)(*a*)(i)(C.1) must be interpreted as encompassing the amount received by the appellant.

[27] The Crown points to *Kaiser v. The Queen*, a decision of Rowe D.J.[17] In that case, the taxpayer was a US citizen residing in Canada. Upon the death of his father, the taxpayer received a lump-sum amount as the beneficiary of his father's US IRAs. At issue was whether this amount was to be included in the taxpayer's income under clause 56(1)(*a*)(i)(C.1).

[28] The taxpayer in that case argued that the amounts should only be included under clause (C.1) if they constituted superannuation or pension benefits.[18] As the amount was not a pension or superannuation benefit of the taxpayer's, he argued, it should not be included in his income.[19]

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[16] *Abrahamson v. M.N.R.*, 91 DTC 213, 1990 CarswellNat 534 (TCC) (*Abrahamson*).
[17] *Kaiser v. The Queen*, 95 DTC 13, 1994 CarswellNat 1093 (TCC) (*Kaiser*).
[18] *Ibid.*, p. 16 (DTC), at para. 13 (CarswellNat).
[19] *Ibid*.

[29] Rowe D.J. rejected this view, concluding that the amount should be included on a plain reading of the provision. He wrote:

> It is worthwhile to look again at the precise wording of clause 56(1)(*a*)(i)(C.1) and at its constituent components. It refers to a "superannuation or pension benefit including, without restricting the generality of the foregoing, the amount of *any* payment *out of or under* a foreign retirement arrangement. . . ."[20]

[30] Later on in the judgment, he emphasized the broad nature of the provision:

> . . . To be taxable in this instance, the important qualification is that the funds represent an amount of any payment out of or under that foreign retirement arrangement, not that the amount is received by a particular person only under circumstances to which the statutory and common law definitions of "superannuation and pension benefit" apply. . . .[21]

[31] The appellant argues that the reasoning in *Kaiser* should not apply because Rowe D.J. did not consider the effect of the phrase "without limiting the generality of the foregoing".[22] He submits that this constituted an error in statutory interpretation.[23] For this reason, he argues that the Court should not be bound by Rowe D.J.'s decision.[24]

[32] The Crown also points to the Technical Notes accompanying the proposed subsection 56(12), where it is stated that "Clause 56(1)(a)(i)(C.1) generally requires that payments received by a taxpayer from a foreign retirement arrangement (FRA) be included in computing the taxpayer's income as a superannuation or pension benefit."[25]

VI. Analysis

[33] In my view, clause 56(1)(*a*)(i)(C.1) calls for the inclusion in income of the amount received by the appellant from the IRA.

[34] With regard to the language of the provision, I note the following. First, the language of clause (C.1) is very broad. It purports to include "*any* payment out of or

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[20] *Ibid.*, p. 16 (DTC), at para. 15 (emphasis in original).
[21] *Ibid.*, pp. 18-19 (DTC), at para. 20 (CarswellNat).
[22] Transcript, at pp. 20-22.
[23] *Ibid.*
[24] *Ibid.*, at pp. 42-43.
[25] Canada, *Department of Finance*, *Technical Notes*, (July 2010).

under a foreign retirement arrangement". There is in that clause no suggestion that the payment must fit within the common law definition of superannuation or pension benefit in order for it to be included in income.

[35] Second, Parliament has used the word "including" in subparagraph 56(1)(*a*)(i). Professor Sullivan states that an inclusionary definition "enlarges the ordinary (or technical) meaning of the defined terms by including things that might normally be thought to fall outside their denotation."[26] This fits in with the view that amounts described by clause (C.1) should be included in a taxpayer's income even though they do not meet the standard definition of superannuation or pension benefits.

[36] Third, this interpretation is consistent with the phrase "without limiting the generality of the foregoing". Special attention should be paid to the word "limiting" in that phrase. The *Canadian Oxford Dictionary* defines "limit" as meaning to "restrict".[27] Similarly, *Black's Law Dictionary* defines "limit" as "[a] restriction or restraint" or "[a] boundary or defining line".[28] Interpreting clause (C.1) as including lump-sum payments from IRAs does not restrict the ambit of subparagraph 56(1)(a)(i); rather, it expands it. Superannuation and pension income are still included in income by virtue of the general inclusion of those items. Clause (C.1) imposes no restriction in that regard. Rather, it includes as superannuation or pension income an item that would not ordinarily be viewed as such.

[37] The words of the provision are precise and unequivocal and thus, in line with the Supreme Court of Canada's guidance in *Canada Trustco*,[29] they should play a dominant role in the interpretive process.

[38] The scheme of section 56 provides generally for the inclusion in a taxpayer's income of revenue originating from a wide variety of sources other than an office, employment, business, property or a capital gain. It is perfectly consistent with this scheme to include in income amounts received out of, or under, an IRA.

[39] For all of these reasons, the appeal is dismissed with costs to the respondent.

Signed at Ottawa, Canada, this 6th day of September 2012.

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[26] Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007), at p. 70.
[27] *Canadian Oxford Dictionary*, 2d ed. (Don Mills, ON: Oxford University Press, 2004), *s.v.* "limit".
[28] *Black's Law Dictionary*, 9th ed. (St Paul, MN: West, 2009), *s.v.* "limit".
[29] *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, [2005] 5 CTC 215.

"Robert J. Hogan"

Hogan J.

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COURT FILE NO.:	2009-3693(IT)G
STYLE OF CAUSE:	JAGMOHAN SINGH GILL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 2, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	September 6, 2012

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Tokunbo Omisade

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada