Docket: 2018-342(IT)I

BETWEEN:

IAN RASMUSSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 11, 2019, at Montréal, Québec

By: The Honourable Justice Réal Favreau

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Julien Dubé-Senécal

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* dated July 28, 2016 for the 2015 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 28th day of May 2019.

"Réal Favreau"

Favreau J.

Citation: 2019 TCC 124
Date: 20190528
Docket: 2018-342(IT)I

BETWEEN:

IAN RASMUSSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a reassessment made pursuant to the *Income Tax Act*, R.S.C. 1985, c.1 (5th Suppl.), as amended (the "*Act*") dated July 28, 2016 with respect to the 2015 taxation year of the Appellant.

[2] On March 24, 2016, the Appellant filed his income tax return for the 2015 taxation year in which he reported pension income in the amount of $60,963 and claimed a deduction against this income in the amount of $60,963.

[3] On July 28, 2016, the Minister of National Revenue (the "Minister") reassessed the Appellant's 2015 taxation year and denied the deduction in the amount of $60,963 claimed by the Appellant.

[4] In order to establish and maintain the reassessment, the Minister relied on the following assumptions of fact:

a) the Appellant immigrated to Canada from Australia on December 10, 2013 and has been a Canadian resident as of that date;

b) from 1991 to 2013;

   i. the Appellant served as a police officer with the *Queensland Police Service* in Australia;

ii. the Appellant and his employer both contributed to *QSuper*, the superannuation fund for Queensland government employees.

c) the Appellant's employment with the *Queensland Police Service* ended on January 25, 2013;

d) starting on January 26, 2013, the Appellant has been eligible for and has received payments from his *QSuper* pension plan;

e) during the 2015 taxation year, the Appellant received *QSuper* pension payments totalling $60,963 CAD (Canadian Dollars).

[5] The sole issue in this appeal is to determine whether the full amount of $60,963 should be included in the Appellant's income for the 2015 taxation year as an amount received from a superannuation or pension fund or plan pursuant to subparagraph 56(1)(*a*)(i) of the *Act.*

[6] In his Notice of Appeal, the Appellant stated that the "tax-free component," as listed on the "PAYG Payment Summaries" is not taxable because it represents "the return of personal after-tax contributions," that were paid by him, into a Defined Employee Benefit Plan. For the 2015 taxation year, the "tax-free component" of the Appellant's pension amounted to $37,407 AUD for the period of July 1, 2014 to June 30, 2015 and $38,040 AUD for the period of July 1, 2015 to June 30, 2016.

[7] The Appellant testified at the hearing and he provided information concerning his source of income from Australia.

[8] He stated that his foreign income was in the form of a "superannuation income stream" as he held a "Defined Benefit Account" with *QSuper*, a provider of superannuation. The "superannuation income stream" that he received was in the form of a fortnightly pension, since he has been found "totally and permanently disabled" ("TPD"). This pension includes a "tax-free component" that is not subject to tax in Australia.

[9] The Appellant entered into evidence his Australian notices of assessment for the years ended June 30, 2015 and June 30, 2016 and PAYG Payment Summary-Superannuation Income Stream for the same periods. The notices of assessment show that no tax was payable in Australia by the Appellant and the PAYG

Payment Summaries show the amount of the "tax-free component" referred to in paragraph 6 above.

[10] The Appellant provided the following description of the *QSuper*:

> QSuper has been established by the QSuper Act 1990 to provide benefits for current and previous Queensland public section employees and employees of Queensland Government entities, such as departments, statutory bodies and government owned enterprises. The Fund consists of Defined Benefit, Accumulation and Income accounts.

[11] Queensland police officers enjoy a range of attractive benefits and conditions, including the security of being a member of the *QSuper* superannuation scheme with the 18% employer superannuation contributions and a 6% employee contribution. Membership to the plan is a compulsory condition of employment and the standard rate of the employee's contribution is 6% of his salary.

[12] The employee's contribution to the plan is taken directly from his paycheque and is not deductible in computing his income for tax purposes. The Appellant is saying that his contribution is after-tax because he was not able to deduct it in computing his income in Australia.

[13] The Appellant further explained that he retired on January 25, 2013 due to a sickness or injury causing the TPD. As of that date, he had the option to receive $659,436.81 AUD in a lump sum payment or a TPD indexed lifetime pension of $2,210.68 AUD paid fortnightly. Because he was at that time under the age of 55, he chose to receive his pension benefit by installments. The pension benefit to which the Appellant was entitled to was calculated as a percentage of his salary for superannuation purposes up to a maximum of 75% of his salary.

ANALYSIS

[14] The relevant provisions of the *Act* are as follows:

> **Amounts to be included as income from office or employment**
>
> 6(1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable
>
> …

Employee benefit plan benefits

(g) the total of all amounts each of which is an amount received by the taxpayer in the year out of or under an employee benefit plan or from the disposition of any interest in any such plan, other than the portion thereof that is

(i) a death benefit or an amount that would, but for the deduction provided in the definition of that term in subsection 248(1), be a death benefit,

(ii) a return of amounts contributed to the plan by the taxpayer or a deceased employee of whom the taxpayer is an heir or legal representative, to the extent that the amounts were not deducted in computing the taxable income of the taxpayer or the deceased employee for any taxation year,

(iii) a superannuation or pension benefit attributable to services rendered by a person in a period throughout which the person was not resident in Canada, or

(iv) a designated employee benefit (as defined in subsection 144.1(1));

Amounts to be included in income for year

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

Pension benefits, unemployment insurance benefits, etc.

(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,

(A) the amount of any pension, supplement or spouse's or common-law partner's allowance under the Old Age Security Act and the amount of any similar payment under a law of a province,

(B) the amount of any benefit under the Canada Pension Plan or a provincial pension plan as defined in section 3 of that Act,

(C) the amount of any payment out of or under a specified pension plan, and

> (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,
>
> but not including
>
> (D) the portion of a benefit received out of or under an employee benefit plan that is required by paragraph 6(1)(g) to be included in computing the taxpayer's income for the year, or would be required to be so included if that paragraph were read without reference to subparagraph 6(1)(g)(ii),
>
> (E) the portion of an amount received out of or under a retirement compensation arrangement that is required by paragraph 56(1)(x) or 56(1)(z) to be included in computing the taxpayer's income for the year,
>
> 248. **superannuation or pension benefit** includes any amount received out of or under a superannuation or pension fund or plan (including, except for the purposes of subparagraph 56(1)(a)(i), a pooled registered pension plan) and, without restricting the generality of the foregoing, includes any payment made to a beneficiary under the fund or plan or to an employer or former employer of the beneficiary under the fund or plan
>
> (a) in accordance with the terms of the fund or plan,
>
> (b) resulting from an amendment to or modification of the fund or plan, or
>
> (c) resulting from the termination of the fund or plan; (prestation de retraite ou de pension)

[15] The relevant provision of the Convention between Canada and Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income is the following:

> Article 18
>
> **Pensions and Annuities**
>
> 1. Pensions and annuities arising in a Contracting State for the benefit of and paid to a resident of the other Contracting State may be taxed in that other State.
>
> 2. Pensions and annuities arising in a Contracting State in a year of income or taxation year may be taxed in that State and according to the law of that State but the tax so charged shall not exceed the lesser of:

> a) 15 per cent of the pension or annuity received in the year; and
>
> b) the tax that would be payable in respect of the pension or annuity received in the year if the recipient were a resident of the Contracting State in which the pension or annuity arises.
>
> However, the limitation on the tax that may be charged in the Contracting State in which pensions and annuities arise does not apply to payments of any kind under an income-averaging annuity contract.
>
> 3. Any alimony or other maintenance payment arising in a Contracting State and paid to a resident of the other Contracting State, shall be taxable only in the first-mentioned State.

[16] The fundamental question here is to determine whether the *QSuper* superannuation scheme was a superannuation or pension fund or plan. A superannuation or pension benefit is defined by subsection 248(1) of the *Act* to include any amount received out of or under a superannuation or pension fund or plan and, without restricting the generality of the foregoing, includes any payment made to a beneficiary under the fund or plan … in accordance with the terms of the fund or plan ….

[17] The *Act* does not otherwise define what is a superannuation or pension fund or plan.

[18] Subparagraph 56(1)(*a*)(i) of the *Act* provides that "… there shall be included in computing the income of a taxpayer for a taxation year, … any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of, a superannuation or pension benefit …".

[19] Payments out of or under a "foreign retirement arrangement" established under the laws of a country are not included under subparagraph 56(1)(*a*)(i) of the *Act* if the amount would not be subject to income taxation in the foreign country if the taxpayer were resident in that country. The expression "foreign retirement arrangement" is defined in section 248 of the *Act* for this purpose to mean a plan or arrangement prescribed by regulation. The only "foreign retirement arrangement" so prescribed under Regulation 6803 is a United States Individual Retirement Account ("IRA").

[20] Payments received out of or under an employee benefit plan that is required by paragraph 6(1)(*g*) of the *Act* to be included in computing the taxpayer's income for the year are also not included under subparagraph 56(1)(*a*)(i).

[21] Under paragraph 6(1)(*g*) of the *Act*, all amounts received out of or under an employee benefit plan or from a disposition of an interest in the plan constitute income from an office or employment to the recipient in the year in which the amounts were received, other than the portion thereof that is a superannuation or pension benefit attributable to services rendered by the recipient in a period throughout which the recipient was not resident in Canada.

[22] In *Abrahamson v M.N.R.*, 91 D.T.C. 213, this Court held that:

> … the words 'superannuation or pension benefit' in subparagraph 56(1)(a)(i) of the *Act* contemplate a payment of a fixed or determinable allowance paid at regular intervals to a person usually, but not always, as a result of the termination of employment for the purpose of providing that person with a minimum means of existence; the formal program for the payment of the specified benefits, or the way the benefits are to be carried out, must be organized or promoted by a person other than the beneficiary since the beneficiary's right to receive the superannuation or pension benefits is determined by the superannuation or pension plan contemplated by subparagraph 56(1)(a)(i). In other words, the regularity and amount of the payments are made in accordance to the term of a plan and not at the discretion or direction of the beneficiary.

[23] In *Woods v. The Queen*, 2010 TCC 106, Justice Boyle stated at paragraph 30: (a) that a "superannuation or pension fund or plan is an arrangement which provides for payment of regular post-retirement income to employees and determines the entitlement, the amounts and frequency of such payments;" (b) that "a superannuation or pension fund or plan may also provide for other entitlements and payments to or for the benefit of the employees that relate to retiring from work;" and (c) that "any amount received from a superannuation or pension fund or plan is a superannuation or pension benefit except where the Act specifically provides otherwise."

[24] In *R v. Herman*, 1978 CarswellNat 210, the Federal Court wrote at paragraph 13:

> In taxing superannuation or pension income the Act appears to make no distinction as to the origin of it. It merely taxes all of it when received by a taxpayer resident in Canada and liable to Canadian income tax. In this case, it differs from the taxation of annuities in which only the interest element is taxable

> as income and part of each annuity payment received would represent a return of the annuitant's capital and be treated as such.

[25] In *Ruparel v. Canada*, 2012 TCC 268, Justice Webb (as he then was) stated that there were no provisions in the *Act* which provided for the deduction of the capital elements of pension payments. In *Ruparel*, benefits received by the taxpayer were included in income under section 56 of the *Act*.

[26] The Convention between Canada and Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (the "Treaty") does not prohibit the taxation of the pension benefits by Canada. Article 18 of the Treaty allows Australia to tax pensions and annuities at a rate of 15% of the pension or annuity received in the year. The Appellant has stated that no taxes were charged in Australia. If taxes had been charged in Australia, he could have claimed a foreign tax credit in Canada.

[27] Based on all of the foregoing, I have concluded that the amounts received by the Appellant from the *QSuper* were superannuation or pension benefits and that they had to be included in his income in accordance with subparagraph 56(1)(a)(i) of the *Act* regardless that he was unable to deduct the contributions to the *QSuper* when he made them.

[28] It is an unfortunate situation that the Appellant is required to include in his income amounts that could be viewed as a return of contributions made by him from after-tax dollars but the Appellant's appeal must be determined based on the *Act* as it is written.

[29] The appeal is dismissed.

Signed at Ottawa, Canada, this 28th day of May 2019.

"Réal Favreau"

Favreau J.

CITATION:	2019 TCC 124
COURT FILE NO.:	2018-342(IT)I
STYLE OF CAUSE:	IAN RASMUSSEN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Québec
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APPEARANCES:

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COUNSEL OF RECORD:

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