Docket: 2019-1823(IT)I

BETWEEN:

DAVID WYRSTIUK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 16, 2021 at Toronto, Ontario

Before: The Honourable Justice Gaston Jorré, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Morgan Mckenna Andrea Jackett

JUDGMENT

In accordance with the attached Reasons for Judgment, the Appeal from the Assessment of Part X.1 Tax dated 27 March 2018 in respect of the 2015 tax year is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that:

1. The amount of Part X.1 Tax is to be reduced from $1,106.[28] to $682.[33].
2. The penalty is to be reduced from $188.[07] to $116.
3. Interest shall be recomputed to take account of the reduction in the amounts of tax and penalty.

There will be no order as to costs.

Signed at Ottawa, Canada, this 26th day of January 2022.

"G. Jorré"

Jorré D.J.

Citation: 2022 TCC 10
Date: 2022 01 26
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BETWEEN:

DAVID WYRSTIUK,

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REASONS FOR JUDGMENT

Jorré D.J.

Introduction

[1] The Canada Revenue Agency (CRA) assessed the Appellant for Part X.1 tax in respect of over-contributions to a registered retirement savings plan. In addition, a late filing penalty and interest were assessed.

[2] The Appellant submits that there was no over-contribution.

[3] There are two aspects to this case.

[4] First, there is the question of principle, whether there was any over-contribution at all. This turns on whether an amount of about $165,000 received by the Appellant in 2014 from his former employer constitutes "earned income" as defined in the *Income Tax Act*.

[5] Second, there is the computation of the amount of tax.

Is there an overpayment?

[6] The facts are straightforward with respect to the first question.

[7] In 2013 the Appellant lost his employment after twelve years of service with his employer.

[8] He was unhappy with how he had been terminated and he retained counsel. The Appellant and his counsel negotiated a payment of approximately $165,000 in respect of the termination of his employment.[1] He received this amount in 2014 and included it in his taxable income.

[9] On 2 February 2015 the Appellant made Registered Retirement Savings Plan (RRSP) contribution of about $24,270.[2]

[10] On 27 March 2018 the Canada Revenue Agency (CRA) assessed the Appellant Part X.1 tax of $1,106.28 in respect of the 2015 taxation year. The tax was only on part of his contribution to his RRSP.[3] The Agency accepts that the Appellant had some contribution room.[4]

Analysis of the Overpayment Issue

[11] A variety of factors are considered in determining the maximum amount that may be contributed to an RRSP in a year. Only one of them matters for the purposes of this appeal.

[12] Section 146 of The *Income Tax Act* (the "Act") contains a limitation that the contribution cannot exceed 18% of the taxpayer's **earned income** in the preceding taxation year.[5]

[13] If the payment from his employer falls within **earned income** there is no over-contribution.

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[1] The Appellant did not provide any documents relating to the settlement and did not explain how the amount was computed. In assessing the Minister assumed that no part of the amount was for salary, wages or other remuneration. Nothing in the evidence would suggest that any portion of the payment was for salary, wages or unpaid benefits such as, for example vacation pay. With respect to "remuneration" see the discussion below on the Appellant's argument with respect to remuneration.

[2] I found the Appellant entirely credible and accept that the contribution was made on 2 February 2015 and not, as assumed by the Canada Revenue Agency, in January 2015.

[3] The Notice of Assessment is at the fourth and following pages of Tab 4 of Exhibit A-1.

[4] Some questions were raised at to whether anything other than the 27 March 2018 assessment of Part X.1 tax for 2015 was in issue. Although the T1 assessments of 2014 and 2015 are relevant to this appeal, it is clear from the notice of appeal and the notice of confirmation attached thereto (see tab 1 of Exhibit A-1; see also tab 4 of Exhibit A-1) that the appeal before the court was only of the 2015 Part X.1 assessment and nothing else.

[5] This is found in the definition of the term **RRSP deduction limit** in subsection 146(1) of the *Income Tax Act*. Other factors can further reduce or increase the deduction permitted.

[14] I will reproduce the relevant portions of the *Income Tax Act* that need to be considered in the course of the analysis below[6].

[15] **Earned income is defined** in subsection 146(1) of the *Act*:

> **"earned income"** of a taxpayer for a taxation year means
> …
> (a) the taxpayer's income … from
> (i) … employment, …

[16] Subsection 5(1) of the *Act* provides that:

> … , a taxpayer's income for a taxation year from … employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year.

[17] The Appellant submits that the payment in issue forms part of his remuneration from employment. The argument has a certain appeal given that the Appellant would not have received the amount had he not been previously employed by the payor and given that the word remuneration has a wide meaning.

[18] Alternatively, the Appellant argued that if the payment in issue was not remuneration and not earned income then he should not have been taxed on the payment at all.

[19] However, it is well established in the case law that such payments are not part of employment income. See, for example, the decision of the Federal Court of Appeal in the *Queen v. Atkins.*[7]

[20] While the Minister of National Revenue did, for a time, continue to argue that such payments were part of employment income, *Atkins* was never overturned.[8]

[21] The result of *Atkins* and other similar decisions was that such payments were not taxable until certain amendments to the ITA were enacted by Parliament.[9]

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[6] To facilitate reading the sections, I have delete all parts of the text that are irrelevant to the circumstances of this case.
[7] [1976] CTC 497, 1976 CanLII 1161 (FCA). The Federal Court of Appeal upheld the decision of the Trial Division.
[8] Indeed, in the Supreme Court of Canada decision in *Jack Crewe Ltd. v. MNR* 1980 CanLII 177 (SCC), [1980] 1 SCR 812 at 814-816 and 818-819, Justice Pigeon speaking for the Court in *obiter dicta* expressed doubt with respect to the correctness of the *Atkins* decision. That *obiter dicta* did not result in any decisions overturning *Atkins* or other similar decisions.

[22] As a result, there would have been merit to the Appellant's argument that this amount should not be taxable if the Appellant's termination by his employer had occurred before those amendments were enacted.

[23] However, those amendments were enacted and resulted in (b) of the definition of **retiring allowance** in subsection 248(1) of the *ITA*:

> "retiring allowance" means an amount (other than a superannuation or pension benefit, …) received
>
> (a) on or after retirement of a taxpayer from an … employment in recognition of the taxpayer's long service, or
>
> (b) **in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal,**
>
> (Emphasis added.)

[24] Paragraph 56(1)(a)(ii) of the *Act* reads:

> 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,
>
> …
>
> (ii) a retiring allowance, other than an amount received out of or under an employee benefit plan, a retirement compensation arrangement or a salary deferral arrangement,

[25] The amendment to (b) brought the type of payment in issue here into the definition of **retiring allowance**. That change when combined with paragraph 56(1)(a)(ii) results in the payment in issue being taxable.

[26] Section 56 is in Subdivision D (Other Sources of Income) of Division B of Part 1 of the *Act*.

[27] Consequently, the payment the Appellant received is other income rather than income from employment and does not qualify as **earned income** for the purpose of computing the amount of RRSP contribution he may make.[10]

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[9] This is a very simplified account of the evolution of the law on this point but it sets out the essence of the history.

[10] Salary or wages or wages are defined in subsection 248(1) of the *Act*:

Computation of the Amount of tax

[28] Subsection 204.1(2.1) of the *Act* is the charging section of the tax on over contributions. It reads:

> Where …, an individual has a cumulative excess amount in respect of registered retirement savings plans, the individual shall, in respect of that month, pay a tax under this Part equal to 1% of that cumulative excess amount.

[29] In very general terms the definition of cumulative excess amount of an individual at any time, insofar as it matters in this case, is: (the amount of undeducted RRSP premiums at that time) minus (any unused RRSP deduction room at the end of the preceding year plus the individual's permissible RRSP deduction for the year).[11]

[30] In working on this file I had some difficulty in understanding how the $1,106.[28] tax was computed. Among other things it took me some time to understand subparagraph 8t) in the CRA's assumed facts in the Reply to the Notice of Appeal. It reads:

> "the Appellant had a cumulative amount of $110,628.00 at the end of the 2015 taxation year in respect of undeducted RRSP premiums remaining in his RRSP, at the end of each month of the taxation year, that exceeded all deductible amounts for the taxation year plus an allowable exemption in the amount of $2,000.00 at the end of each month;"

[31] Eventually, given the provisions of the *Act* and given that the Minister assumed the contribution was made in January[12], it became clear that, expressed differently, subparagraph 8t) says:

> For each month of 2015, if one determines the amount that is (the undeducted amount of premiums at month end **minus** $2,000) and one then adds up those twelve amounts, the result is a cumulative excess amount of $110,628.

[32] Given that the excess was constant at the end of each month of 2015, mathematically, this means that the Minister assessed on the basis that, after taking

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"salary or wages", except in sections 5 … , means the income of a taxpayer from an … employment ... **but does not include** superannuation or pension benefits or **retiring allowances**;
(emphasis added)
This definition does not help answer the question here because the definition has no application to section 5 of the *Act* and it is section 5 that defines income from employment. In turn, it is income from employment which goes into the computation of earned income.

[11] See subsection 204.2(1.1).

[12] See paragraph 8.b) of the Reply.

account of the $2,000 exemption there was an undeducted premium of $9,219 at the end of each month[13] or, described differently, there was an undeducted premium of $11,219 at the end of every month before taking account of the $2,000 exemption.[14]

[33] Given that the RRSP contribution the Appellant made was $24,270, the CRA proceeded on the basis that there was contribution room of $13,051 available to the Appellant.[15]

[34] The Appellant brought to Court his 2014 T1 assessment and reassessment, his 2015 T1 assessment as well as his T1 OVP (Overpayment) assessment for 2015.[16]

[35] These documents make it easier to understand certain assumptions of the CRA found in the reply, show that the amount in one assumption appears to be erroneous[17] and provide additional critical information that appears to have been overlooked in the calculation.

[36] There are two errors in the calculation. First, given my finding that the contribution was in February not January, there is only an over-contribution for 11 months of 2015, not 12 months.

[37] Second, as will be explained below there is additional contribution room of $3,016 available in addition to the $13,051 that was used in the calculation.

[38] When the CRA Reassessed the Appellant's 2014 return, they treated his $24,270 RRSP contribution as having been a contribution for the 2014 tax year[18]. It is of course permissible for contributions made in the first 60 days of the following year to be deducted in the previous year.

[39] When one examines the 2014 T1 reassessment of the Appellant dated 5 February 2016[19] one sees[20] that the CRA treated the $24,270 RRSP contribution as

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[13] $110,628.00 divided by 12 = $9,219.

[14] The $2,000 exemption is found in C of the formula in paragraph 204.2(1.1)(b) of the *Act*.

[15] I will set out in the text and notes below how this amount of $13,051 appears to have been derived.

[16] The T1 assessments and reassessment are at Tab 3 of Exhibit A-1; the T1 OVP is at Tab 4 of the same Exhibit.

[17] Subparagraphs 8l), m), n), p) and q) are quite repetitive and could almost certainly have been consolidated into two short subparagraphs.

[18] That was not the taxpayer's intention and it is not entirely clear to me why this happened although it may relate to certain forms and what was or was not on them – or to the absence of a certain form. In any event, this has no practical consequence for the outcome of this appeal.

[19] See Tab 3 of Exhibit A-1.

having been made for the 2014 year. At the bottom of the page is an RRSP deduction limit statement where one sees quite clearly that there was a $3,726 deduction limit for 2014 and the Appellant was allowed to deduct that amount.

[40] One also sees a statement that the Appellant has $20,544[21] of unused contributions available for 2015.

[41] Similarly on the 19 May 2016 T1 notice of assessment for the Appellant's 2015 year it says that the unused RRSP contributions available for 2016 are $8,203[22]. Clearly $8,203 is based on the Appellant having $20,544 in unused contributions at the beginning of the 2015 year.[23]

[42] From all of this it is clear that contrary to the fact assumed in paragraph 8a) of the Reply to Notice of Appeal, the CRA did not assess the 2014 and 2015 T1 returns on the basis that there were undeducted RRSP premiums of $3,016 at the beginning of 2014.[24]

[43] It follows from this that the tax pursuant Subsection 204.1(2.1) of the *Act* should be recomputed to take account:

i) of the fact that there is an over-contribution during 11 months of the year and
ii) that the amount of the over-contribution in each of those 11 months is $6,203[25]
iii) As a result, the tax is to be reduced to $682.33[26] and the penalty will be reduced accordingly to $116. [27]

[44] Finally interest must be recomputed to take account of these changes.

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[20] At page 1 in the third paragraph of the narrative text.
[21] At the very bottom of the first page of the 2014 T1 Reassessment. $20,544 is clearly the result of subtracting the $3,726 deduction limit available from the $24,270 contribution made.
[22] See page 5 of the notice of assessment near the bottom of the RRSP Deduction Limit Statement; this notice of assessment is also at Tab 3 of Exhibit A-1.
[23] Given that $20,544 minus $12,341 equals $8,203. Even if the RRSP had been treated as being made in 2015 the end result would have been the same since the additional $3726 would have been available as contribution room in 2015.
[24] Had that been the case the 2014 T1 notice of reassessment would have shown unused RRSP contributions available for 2015 as $23,560 instead of $20,544. Similarly, the 2015 T1 notice of assessment would have shown RRSP contributions available for 2016 as $11,219 instead of $8,203.

[25] This is the result of taking the $24,270 contribution and subtracting from it 1) the allowable 2014 RRSP contribution of $3,726, 2) the allowable 2015 RRSP contribution of $12,341 and 3) the $2,000 exemption. ($24,270 - $3,726 - $12,341 - $2,000 = $5,493.
[26] $6203 x 1% x 11 months= $682.33.
[27] 17% of $682.33 = $116.

Conclusion

[45] For these reasons, the Appeal from the Assessment of Part X.1 Tax dated 27 March 2018 in respect of the 2015 tax year is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and redetermination on the basis that:

a) The amount of Part X.1 Tax is to be reduced from $1,106.28 to $682.33.

b) The penalty is to be reduced from $188.07 to $116.

c) Interest shall be recomputed to take account of the reduction in the amounts of tax and penalty.

Signed at Ottawa, Canada, this 26th day of January 2022.

"G. Jorré"

Jorré D.J.

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