

**Date: 20080926**

**Docket: T-14-08**

**Citation: 2008 FC 1083**

**Ottawa, Ontario, September 26, 2008**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**RODNEY GENE TORRANCE**

**Applicant**

**and**

**MINISTER OF NATIONAL REVENUE AND  
CANADA REVENUE AGENCY**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S., 1985, c. F-7, of a letter dated December 5, 2007 (called the Notice of Confirmation by the Applicant), where the Minister of National Revenue and the Canada Revenue Agency (the Respondents) rejected Mr. Rodney Gene Torrance's (the Applicant) Notice of Objection filed in response to his Notice of Assessment for the 1998 taxation year. The Applicant is self-represented.

## **FACTUAL BACKGROUND**

[2] On August 29, 1998, the Applicant was involved in a serious accident requiring long-term hospitalization. Due to these circumstances, the Applicant was unable to file his 1997 and 1998 income tax returns on time. The Applicant was self-employed at the time of his accident.

[3] The Applicant applied for the Voluntary Disclosures Program (VDP) for his 1997 and 1998 income tax returns by letter dated May 10, 2006 and was accepted by letter dated August 3, 2006.

[4] The Applicant filed his income tax return with the Canada Revenue Agency (CRA) for the 1998 taxation year on October 20, 2006. He filed his 1998 return pursuant to the VDP. The Applicant's 1997 income tax return was also filed in 2006.

[5] On January 22, 2007, the Applicant's 1998 taxation year was assessed. The balance payable of the 1998 return consisted solely of CPP premiums calculated at \$451.41. However, due to the application of subsection 30(5)(a) and (b) of the *Canada Pension Plan* (the CPP), the total tax payable by the Applicant for that year was zero. This resulted in a Notice of Assessment showing that there was no tax payable, otherwise known as a "nil assessment".

[6] The Applicant served a Notice of Objection to the assessment of his 1998 taxation year on April 23, 2007. The Applicant's Notice of Objection was reviewed by Liz Melissa, Team Leader with the CRA.

[7] By letter dated December 5, 2007, the Minister rejected the Applicant's objection with respect to the assessment of the 1998 taxation year as it was a nil assessment.

## **ISSUE**

[8] The Court finds that the only issue in this case is: Did the Minister commit a reviewable error in rejecting the Notice of Objection dated April 23, 2007, with respect to the Applicant's 1998 Notice of Assessment?

## **PRELIMINARY ISSUE**

[9] In its oral argument, the Respondent states that the Applicant included material produced at Tabs G and I of his Application Record that was neither before the decision maker, nor included in the Applicant's affidavit material.

[10] The Applicant is entitled to rely only on material that was before the decision maker in making his arguments for judicial review before the Court (see *Smith v. R.*, [2001] 2 C.T.C. 189, 2001 D.T.C. 5231 (F.C.A.) at paragraph 7). Therefore, the material produced at Tabs G and I of the Applicant's Record will not be considered by the Court.

## **RELEVANT LEGISLATION**

[11] This application concerns the following provisions of the CPP:

**30.** (5) The amount of any contribution required by this Act to be made by a person for a year in respect of their self-employed earnings for the year is deemed to be zero where

(a) the return of those earnings required by this section to be filed with the Minister is not filed with the Minister before the day that is four years after the day on or before which the return is required by subsection (1) to be filed; and

(b) the Minister does not assess the contribution before the end of those four years.

**51.** (1) The pensionable earnings of a contributor for a month (in this subsection referred to as the “particular month”) are the amount determined by the formula

$A \times B$

where

A is the earnings for which the contributor is deemed by section 52 to have made a contribution for the particular month; and

B is

(...)

(b) in any other case, the ratio  $G/D$  where G is the Maximum Pensionable

**30.** (5) Lorsque aucune déclaration des gains pour une année provenant du travail qu’une personne exécute pour son propre compte n’a été produite auprès du ministre, ainsi que l’exige le présent article, et ce au plus tard quatre ans après la date à laquelle elle est tenue de produire pour l’année en question la déclaration visée au paragraphe (1), le montant de toute cotisation qui, d’après la présente loi, doit être versé par elle pour l’année, à l’égard de semblables gains, est réputé nul sauf si, avant l’expiration de ces quatre ans, le ministre a évalué la cotisation pour l’année à l’égard de ces gains.

**51.** (1) Les gains ouvrant droit à pension d’un cotisant pour un mois donné est le produit de :

$A \times B$

où :

A représente les gains au titre desquels le cotisant est réputé selon l’article 52 avoir versé une cotisation pour le mois,

B représente :

(...)

b) dans tous les autres, le quotient de  $G/D$ , où :

Earnings Average in respect of the contributor for the year in which a benefit becomes payable to the contributor under this Act or under a provincial pension plan, and D is as described in paragraph (a).

G représente le maximum moyen des gains ouvrant droit à pension pour l'année au cours de laquelle une prestation lui devient payable en vertu de la présente loi ou d'un régime provincial de pensions, D à la valeur indiquée à l'alinéa a).

**52.(2)** For the purpose of calculating the pensionable earnings of a contributor for a month in any year for which the contributor made no contribution, the amount of the earnings for which a contribution shall be deemed to have been made for any month in the year shall be deemed to be zero.

**52.(2)** Dans le calcul des gains d'un cotisant ouvrant droit à pension pour un mois compris dans une année quelconque concernant laquelle le cotisant n'a versé aucune cotisation, le montant des gains à l'égard desquels une cotisation est réputée avoir été payée pour tout mois de l'année est réputé nul.

**52.(3)** For the purposes of this Part,

**52.(3)** Pour l'application de la présente partie :

(a) a contributor shall be deemed to have made a contribution for any year for which his unadjusted pensionable earnings exceed his basic exemption for the year, and shall be deemed to have made no contribution for any year for which his unadjusted pensionable earnings do not exceed his basic exemption for the year; and

a) un cotisant est réputé avoir versé une cotisation pour une année quelconque à l'égard de laquelle ses gains non ajustés ouvrant droit à pension excèdent son exemption de base pour l'année, et il est réputé n'avoir versé aucune cotisation pour une année quelconque dans le cas contraire;

(b) a contributor shall be deemed to have made a contribution for earnings for

b) un cotisant est réputé avoir versé une cotisation pour des gains afférents à tout mois pour

any month for which a contribution is deemed by subsection (1) to have been made by him.

lequel une cotisation est, selon le paragraphe (1), réputée avoir été versée par lui.

[12] Subsection 220(3.1) of the *Income Tax Act*, 1985, c. 1 (5<sup>th</sup> Suppl.), is also referred to by the

Applicant in his submissions:

**220.(3.1)** The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

**220.(3.1)** Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

## ANALYSIS

[13] The Applicant relies on subsection 18.1(4) of the *Federal Courts Act* in stating that the decision of the CRA dated December 5, 2007, to refuse his Notice of Objection for the 1998 taxation year amounted to a refusal by the CRA to exercise its jurisdiction.

[14] The Applicant argues that the refund from his 1997 Notice of Assessment is considered a payment on time to the CPP contributions on self-employment earnings and the CRA should have applied the 1997 refund to the amount owing in 1998, which was entirely made up of contributions due on self-employment earnings. The Applicant contends that the CRA should have prorated the amount of the contributions due to the fact that the Applicant became disabled on August 29, 1998.

[15] The Applicant believes he is deemed to have made his CPP premium contributions under subsection 52(3)(a) and (b) or subsection 51(1)(b) of the CPP. The Applicant is worried that subsection 52(2) of the CPP may apply and that his pensionable earnings would be deemed to be zero for the 1998 taxation year. His Notice of Objection is in relation to this concern.

[16] In its letter dated December 5, 2007, the Respondents state that:

The Voluntary Disclosures Program allows for returns to be processed beyond the 4 year time limit without assessing penalties. The Program cannot override the statutory requirements as legislated under the Canada Pension Plan. Therefore, your CPP payable on self-employed earnings is nil in accordance with section 30 of the Canada Pension Plan.

[17] The Respondents cite *Nathan Cohen v. Her Majesty The Queen*, 80 DTC 6250 (F.C.A.), in support of the principle that the Minister may only act in accordance with the law, to argue that the Minister cannot override the statutory requirements of the CPP.

[18] The Federal Court of Canada has stated that a taxpayer may not appeal a “nil assessment”, since an assessment which assesses no taxes is not an assessment. There is no valid objection to an assessment pursuant to the *Income Tax Act* where there is no tax owing for that year (*Bormann v. The Queen*, 2006 FCA 83, 2006 DTC 6147 at paragraph 8).

[19] The Applicant alleges that subsection 220(3.1) of the *Income Tax Act* should apply to permit the payment of CPP contributions for the 1998 taxation year. However, this provision provides that the Minister may waive or cancel any portion of penalty or interest otherwise payable by the taxpayer, which is not requested by the Applicant in his submissions.

[20] As well, the Taxpayer Relief Provisions, IC07-1, do not apply to the case at bar since there is no penalty or interest, nor is there a refund to be processed or a reassessment to be made to the Applicant’s income tax return for 1998. The statutory requirements for income tax purposes are followed and the VDP waives all penalties and interest which may be applicable to the filing of the 1997 and 1998 income tax returns.

[21] The jurisprudence referred to by the Applicant in his memorandum illustrates the Court’s broad and generous approach when addressing the unfortunate circumstances of an Applicant. However, subsection 30(5)(a) and (b) of the CPP overrides any discretion that the Court might have had in the case at bar.



Fiduciary duty

[22] The Applicant believes that the Minister had a fiduciary duty to demand the filing of the Applicant's income tax returns and to assess these returns when the Applicant had not paid the full required contribution for the 1998 income tax year nor filed his income tax return on time or in the years that followed.

[23] The Respondents state that the Minister has no fiduciary obligation to demand the Applicant's income tax returns or to assess the non-filed returns when the Applicant did not file at the time required by the *Income Tax Act*. Taxpayers are responsible for correctly filing their income tax returns on time since the *Income Tax Act* provides for a self-assessing system. The Minister is not responsible for pursuing taxpayers to file their return when required (*Powell v. Canada*, 2001 DTC 209, 103 A.C.W.S. (3d) 227).

[24] Even if the Applicant did not intend to avoid his responsibility to submit his tax returns, the failure to report his earnings within the designated timeframe justifies the application of subsection 30(5)(a) and (b) of the CPP (*Maltais v. Canada (Minister of National Revenue)*, 91 DTC 1385, [1991] C.T.C. 2651).

[25] The Minister did not have a fiduciary obligation to demand the filing of the Applicant's income tax returns, as the *Income Tax Act* calls for a self-assessing system. Furthermore, the existence of a fiduciary obligation is not pertinent to the argument of the Applicant to request the application of an income tax refund to the CPP contributions due in another taxation year.

Refunds from previous years

[26] The Applicant argues that an income tax refund that resulted from filing his return of income for 1996, received in 1999, ought to have been applied to the CPP premiums with respect to the 1998 year.

[27] The Respondents reply that the CRA could not apply the refund from the Applicant's 1996 taxation year to CPP premiums with respect to the 1998 taxation year as the Applicant had not yet filed his 1998 income tax return, therefore there were no premiums outstanding. It was impossible for the CRA to know what premiums the Applicant owed until the Applicant filed his return reporting his self-employed earnings in 2006.

[28] Furthermore, any application of income tax refunds from the 1996 taxation year do not form any part of the decision under review by this Court and is irrelevant as to whether or not the decision maker erred in rejecting the Applicant's Notice of Objection.

[29] For these reasons, the Minister did not commit a reviewable error in rejecting the Notice of Objection dated April 23, 2007. The application is therefore dismissed without costs.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application be dismissed without costs.

“Michel Beaudry”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-14-08

**STYLE OF CAUSE:** **RODNEY GENE TORRANCE and  
MINISTER OF NATIONAL REVENUE  
AND CANADA REVENUE AGENCY**

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** September 9, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Beaudry J.

**DATED:** September 26, 2008

**APPEARANCES:**

Rodney Gene Torrance  
(self-represented) FOR APPLICANT

Victor Caux FOR RESPONDENT

**SOLICITORS OF RECORD:**

Not applicable FOR APPLICANT

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