

Docket: 2013-2733(IT)I

BETWEEN:

BRENDA MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 8, 2015, at Montréal, Quebec.

Before: The Honourable Justice Johanne D' Auray

Appearances:

Counsel for the appellant: Camille Janvier

Counsel for the respondent: Simon Vincent

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2010 taxation year is dismissed, without costs.

Signed at Ottawa, Canada, this 11th day of May 2015.

“Johanne D' Auray”

D' Auray J.

Translation certified true
On this 23rd day of June, 2015
Janine Anderson, Translator

Citation: 2015 TCC 118

Date: 20150511

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BRENDA MARTIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR JUDGMENT

D' Auray J.

INTRODUCTION

[1] This is an appeal pursuant to the informal procedure from a reassessment made on October 31, 2011, by the Minister of National Revenue (the Minister) for the 2010 taxation year, according to which he added to the appellant's income an amount of \$39,335 as income from a Registered Retirement Savings Plan.

FACTS

[2] The appellant was holding a sum of money in a Registered Retirement Savings Plan (RRSP) with Compagnie de Fiducie du Groupe Investors Ltée (the Trust Company).

[3] On May 15, 2008, the Canada Revenue Agency (the CRA) filed a certificate of indebtedness with the Federal Court under section 223 of the *Income Tax Act* (the Act). At the time, the appellant had a tax debt of \$321,793.78.

[4] On June 3, 2008, the CRA registered a notice of legal hypothec in respect of the appellant's RRSP. The hypothec was entered in the register of personal and movable real rights.

[5] On December 5, 2008, the appellant declared bankruptcy.

[6] The CRA chose to not submit a proof of claim to the trustee to participate in the division of assets of the bankruptcy as an ordinary creditor for the unsecured portion of its debt.

[7] On December 10, 2009, a bankruptcy discharge order was issued in respect of the appellant by the Supreme Court of British Columbia.

[8] On January 19, 2010, an interim garnishment order was issued in favour of the Minister. That order provided that any amount owing or that would become owing by the Trust Company to the appellant, and more specifically the amounts invested in the RRSP held by the Trust Company in the name of and on behalf of the appellant, be seized in response to the certificate filed on May 15, 2008, in the Federal Court.

[9] On February 26, 2010, the CRA obtained a final garnishment order. By virtue of that order, the Minister garnished the RRSP that was covered by the legal hypothec to satisfy a portion of the amount remaining owing under the certificate filed on May 15, 2008.

[10] On May 7, 2010, the trustee was discharged.

[11] On October 31, 2011, the Minister issued a reassessment for the 2010 taxation year in which he added in computing the appellant's income an amount of \$39,335 as RRSP income.

[12] The Minister considered the RRSP amount he had seized to be taxable income for the appellant's 2010 taxation year. The Minister therefore included that amount in the appellant's income, which the appellant objects to.

Issue

[13] The issue is whether the Minister correctly added the amount of \$39,335 from the RRSP in computing the appellant's income for the 2010 taxation year.

Appellant's arguments

[14] The appellant claims that the Minister was not entitled to include the amount of \$39,335 in computing her income for the 2010 taxation year.

[15] The appellant argues that the Minister's secured debt was part of the provable claims because all the creditors had a provable claim in the bankruptcy. Consequently, she contends that all debts, including debts to secured creditors, were extinguished by the bankrupt's order of discharge. As a result, the appellant was released from all of her tax debt, whether it was secured or not. In support of her position that the Minister's debt is extinguished, the appellant relies on *Beaudoin v The Queen*, 2004 TCC 152, rendered by Justice Angers of this Court.

[16] At the hearing, the appellant argued that the Minister's security survived the bankruptcy, but that the tax debt was extinguished. The appellant claims that secured creditors simply have an additional tool that gives them an advantage over other creditors.

[17] The appellant also submits that she was divested of her RRSP at the time of her bankruptcy.

Respondent's arguments

[18] According to the respondent, the appellant received an amount of \$39,335 as RRSP income, thus triggering the inclusion of that amount in her income for the 2010 taxation year in accordance with paragraph 56(1)(h) and subsection 146(8) of the Act.

[19] The respondent maintains that the bankruptcy released the bankrupt from her provable claims. In the respondent's view, the secured debt does not constitute a provable claim under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the BIA). She argues that the debt remained after the bankruptcy to the extent of the security. In support of her position, counsel for the respondent referred to, in particular, the judgment of the Superior Court of Québec in *Gagnon c Fiducie Desjardins*, [1992] RJQ 2244 (approved by the Court of Appeal of Québec, [1993] JQ No 1645).

[20] The respondent argued that the RRSP was not included in the appellant's bankruptcy assets. The respondent submits that the BIA was amended so that RRSPs are not included in a trustee's seisin. Thus, when the RRSP amount was withdrawn from the appellant's account by reason of the seizure to pay a portion of the debt owing to the Minister, the appellant had to include that amount in computing her income. The respondent claims that it is as if the appellant had withdrawn her RRSP to send it to the Minister as payment of her debt.

ANALYSIS

[21] The BIA creates a particular legislative framework. In bankruptcy, the status of the creditor is very important because the situation of a secured creditor is different from that of an unsecured creditor.

[22] The following provisions of the BIA are relevant in this case:

Definitions

2. In this Act,

“creditor” means a person having a claim provable as a claim under this Act;

“secured creditor” means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes:

...

“claim provable in bankruptcy”, “provable claim” or “claim provable” includes any claim or liability provable in proceedings under this Act by a creditor;

Property of the bankrupt

67 (1) The property of a bankrupt divisible among his creditors shall not comprise (b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

...

Claims provable

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

...

Creditors shall prove claims

124. (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

Proof by delivery

(2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

Who may make proof of claims

(3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

Proof by secured creditor

127. (1) Where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount realized.

May prove whole claim on surrender

(2) Where a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove his whole claim.

Debts not released by order of discharge

178. (1) An order of discharge does not release the bankrupt from

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

(a.1) any award of damages by a court in civil proceedings in respect of

- (i) bodily harm intentionally inflicted, or sexual assault, or
- (ii) wrongful death resulting therefrom;

(b) any debt or liability for alimony or alimentary pension;

(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

(g) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student;

(g.1) any debt or obligation in respect of a loan made under the *Apprentice Loans Act* where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or

(ii) within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or

(h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

Claims released

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

[23] In my opinion, it is apparent from the definitions of the terms “creditor” and “secured creditor” and from section 121 of the BIA that a secured debt does not constitute a provable claim under the BIA.

[24] As several authors have pointed out, secured creditors are strangers to bankruptcy.

[25] In certain situations, a secured creditor may, however, wish to participate in the bankruptcy process. Secured debts are included as part of provable claims only in the following circumstances:

- Where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount realized (subsection 127(1) BIA);
- Where a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove his whole claim (subsection 127(2) BIA);

- Secured creditors may assess their security and prove the unsecured portion of their debt (subsection 128(2) BIA).

[26] By not participating in the bankruptcy, a secured creditor will not be entitled, for the unsecured portion, to a distribution amongst the creditors if there is one. Furthermore, secured creditors cannot take personal action against bankrupts for the unrecovered portion of their debt once the bankrupt is discharged.

[27] The relevant provisions of the Act in this appeal are paragraph 56(1)(h) and subsection 146(8).

[28] The inclusion in income of RRSP amounts is prescribed by paragraph 56(1)(h) of the Act, which reads as follows:

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) Registered retirement savings plan, etc. -- amounts required by section 146 in respect of a registered retirement savings plan or a registered retirement income fund to be included in computing the taxpayer's income for the year;

[29] Paragraph 56(1)(h) of the Act references the relevant rules of section 146 of the Act. Subsection 146(8) of the Act reads as follows:

(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.

[30] The definition of "benefit" can be found in subsection 146(1) of the Act and reads as follows:

146(1) In this section,

"benefit" includes any amount received out of or under a retirement savings plan other than:

...

[31] In order for paragraph 56(1)(h) of the Act to apply, the appellant must have received, in the 2010 taxation year, amounts as benefits out of or under her RRSP.

[32] The case law is clear: the term “receive” must be interpreted broadly. Receive obviously means to benefit or profit from (*Morin v Canada*, [1974] F.C.J. No 907 (QL) (F.C.T.D.), at paragraph 23).

[33] Furthermore, the Minister’s legal hypothec constitutes a security under the BIA (*Minister of National Revenue v Keith G Collins Ltd*, 2008 MBCA 92). The appellant has also not challenged this point.

[34] In this case, the evidence has established that the Minister did not submit a proof of claim. The Minister instead chose to realize his security outside the bankruptcy proceeding.

[35] In *Beaudoin v The Queen*, *supra*, Justice Angers of this Court made the following comments at paragraph 13:

[13] In the instant case, for reasons that were not explained, the amount invested with La Laurentienne was not assigned to the trustee of the assignment under the *Bankruptcy and Insolvency Act*. It is equally clear that the amount was not directly paid to the appellant, though the payment of the amount by La Laurentienne could be beneficial to the appellant in the sense that it serves to pay down the appellant's debt to the Minister, thereby constituting an “indirect receipt” that would require the appellant to add the amount to his income for the taxation year in issue. However, since the tax debt was cancelled by the order discharging the appellant, one can, in my view, conclude that La Laurentienne’s payment of RRSP income to the Minister, with a view to paying an extinguished debt, is not an amount received by the appellant as a benefit within the meaning of subsection 146(8) of the Act because the appellant obtained no sum of money or advantage as a result of the payment.

[Emphasis added.]

[36] The facts in this case are distinguishable from the facts in that decision. First, in *Beaudoin*, there was no secured debt, because no security was taken by the Minister. Second, at the time when *Beaudoin* was rendered, RRSPs constituted property that fell within a trustee’s seisin, which is no longer the case following the legislative amendment. Subsection 67(b.3) of the BIA, which applies in this case, excludes an RRSP from property divisible among creditors. Subsection 67(b.3) reads as follows:

Property of the bankrupt

67 (1) The property of a bankrupt divisible among his creditors shall not comprise (b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

...

[37] As a result, *Beaudoin* is of no assistance to the appellant.

[38] The Superior Court of Québec stated the following in *Gagnon c Fiducie Desjardins, supra*:

[TRANSLATION]

15 Finally, subsection 178(2) of the *Bankruptcy Act* states the following: “. . . an order of discharge releases the bankrupt from all claims provable in bankruptcy”. Of course, that discharge is subject to the cases set out in subsection 1 of the same section; the English version is very specific in that regard.

22 The discharge ruling obtained by the applicant does not make the security held by the respondent disappear, namely because it does not constitute a provable claim under the *Bankruptcy Act*.

23 In fact, the Court is of the opinion that the discharge ruling releases the bankrupt from the provable claims that a secured creditor is able to produce in the context of sections 127 and 128 of the *Bankruptcy Act*.

24 Furthermore, the provisions of the *Bankruptcy Act* prevent secured creditors from taking personal action against bankrupts. Creditors must pay themselves using the security that was given to them. In other words, the obligation that supports the security remains, but the specific provisions of the *Bankruptcy Act* mean that payment can only come from realizing that security.

[Emphasis added.]

[39] The order of discharge releases the bankrupt from the debts that constitute provable claims, with the exception of those listed in subsection 178(1) of the BIA.

[40] Because secured debts do not constitute provable claims in a bankruptcy, bankrupt debtors are not released from them.

[41] For the secured creditor, the release of the bankrupt signifies that no personal action is possible to collect the balance not recovered by the realization of a security.

[42] In this case, the Minister decided to exclude himself from the bankruptcy proceeding and to realize his security after the appellant's release.

[43] Because the secured debt of \$39,335 is not a provable claim, the appellant was not released from it.

[44] The RRSP also remains the property of the appellant after her release under subsection 67(b.3) of the BIA because, as stated earlier, RRSPs do not fall within a trustee's seizin. Consequently, the appellant would have been taxed if she had decided to withdraw the amounts invested in it. The tax consequence is the same whether the Minister seizes the RRSP funds or the appellant withdraws them.

[45] The seizure by the Minister of the RRSP held by the Trust Company is beneficial for the appellant, in the sense that it reduces a portion of her tax debt. It is, in my opinion, a benefit received indirectly by the appellant under subsection 146(8) of the Act, requiring her to include that amount in computing her income for the taxation year in dispute.

DECISION

[46] As a result, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 11th day of May 2015.

“Johanne D' Auray”

D' Auray J.

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THE QUEEN
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