

Docket: 2007-1096(IT)I

BETWEEN:

ROSAMUND LENNOX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on February 18, 2009 at St. Catharines, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

Agent for the Appellant:

Paul Beck

Counsel for the Respondent:

Alexandra Humphrey

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**JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* for the 2005 taxation year is allowed, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is liable for tax under subsection 204.1(2.1) for the period January to July, inclusive, 2005 together with all attendant penalties and interest.

The filing fee of \$100 shall be refunded to the Appellant.

Signed at Ottawa, Canada, this 7th day of July, 2009.

“G. A. Sheridan”

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Sheridan, J.

Citation: 2009TCC360  
Date: 20090707  
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BETWEEN:

ROSAMUND LENNOX,

Appellant,

and

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Respondent.

### **REASONS FOR JUDGMENT**

Sheridan, J.

[1] In 2005, the Appellant made an over-contribution to her RRSP account of \$20,071. The Minister of National Revenue assessed tax for the 2005 taxation year on the “cumulative excess amount” under subsection 204.1(2.1) of the *Income Tax Act* which reads:

(2.1) Tax payable by individuals – contributions after 1990. Where, at the end of any month after December, 1990, 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.

[2] The Appellant acknowledges that she over-contributed to her RRSP account in 2005 but argues that her liability for subsection 204.1(2.1) tax ought to be limited to January, February and March 2005. During that period, she had not yet realized that she had made the over-contribution and concedes that there was a cumulative excess amount in her RRSP account at the end of each of those months. Immediately on learning of her mistake on April 25, 2005 (indeed, the very next day), she instructed her accountant, Mr. Paul Beck, to advise the CRA of the error and to take the necessary steps to reverse the over-contribution and to request a waiver of the tax under subsection 204.1(4):

(4) Waiver of tax. Where an individual would, but for this subsection, be required to pay a tax under subsection (1) or (2.1) in respect of a month and the individual establishes to the satisfaction of the Minister that

(a) the excess amount or cumulative excess amount on which the tax is based arose as a consequence of reasonable error, and

(b) reasonable steps are being taken to eliminate the excess, the Minister may waive the tax.  
[Emphasis added.]

[3] The CRA acknowledged receipt of the materials in May 2005, there was further communication in July and the amount was ultimately removed from her RRSP account before the end of August 2005.

[4] The Minister then applied subsection 204.1(2.1) to assess tax on the cumulative excess amount for the period January to August 2005. At the hearing, counsel for the Respondent advised that the Minister was now of the view that no tax should have been assessed for August as there was no cumulative excess amount in her account at the end of that month. Counsel presented the following amendments to the Reply to the Notice of Appeal: that the cumulative amount in respect of undeducted RRSP premiums remaining in all registered retirement savings plans at the end of the 2005 taxation year be reduced from \$200,852 to \$140,497, making for a revised Part X.1 tax of \$1,404.97; she further advised that the Minister would no longer be relying on assumptions 10(g), (h), (k) and (m) of the Reply to the Notice of Appeal. Finally, counsel requested that the appeal be allowed to permit the Minister to reassess tax, penalties and interest only for the period January to July 2005.

[5] The Minister's position is that the language of subsection 204.1(2.1) is mandatory: "[w]here, at the end of any month ... 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". Accordingly, notwithstanding the Appellant's efforts to correct her error, on a proper interpretation of the legislative provision, the Minister was required to assess subsection 204.1(2.1) tax for each month the overpayment amount remained in her RRSP account i.e., from January to July 2005. While the Minister has the discretion to waive the penalty under subsection 204.1(4) in the present matter, he chose not to do so. (At the time of the hearing, the Minister's review of the Appellant's request for a waiver had not yet been completed; counsel for the Respondent later advised that the request had been denied.)

[6] The Appellant argued that her liability under subsection 204.1(2.1) should have ceased upon her notification of the Minister of her error and the taking of all reasonable steps to correct it. It is her contention that after April 26, 2005, it was beyond her control to remove the over-payment from her account. That it continued to remain there at the end of April, May, June and July 2005 was the direct result of the Minister's delay in processing her request.

[7] In my view, the Minister's interpretation of subsection 204.1(2.1) is the correct one. The condition precedent to the taxpayer's liability for tax under that provision is the existence of a "cumulative excess amount in respect of registered retirement savings plans". There is no question that the over-payment was not refunded to the Appellant until early August 2005; thus, subsection 204.1(2.1) automatically operates to impose liability for the period January to July. As Noël, A.C.J. (as he then was) wrote in *Canada v. Simard-Beaudry Inc.*<sup>1</sup>, "... the taxpayer's liability results from the Act and not from the assessment". That section 204.1 includes a ministerial discretionary power to waive the tax triggered upon the fact of the over contribution indicates Parliament's intention that subsection 204.1(2.1) be mandatory in effect.

[8] As for the Appellant's request that the penalty be waived, subsection 204.1(4) confers on the Minister the discretion to decide whether, according to the criteria set out in paragraphs (a) and (b), a waiver is justified; that the power is discretionary is shown by the words "to the satisfaction of the Minister" and "may waive" as they appear in subsection 204.1(4). Counsel is correct in her submission that it is beyond the jurisdiction of the Tax Court of Canada to review the correctness of the Minister's exercise of his discretion to deny the Appellant's request for a waiver<sup>2</sup>. That would be a matter for the Federal Court. Though it is not my decision to make, given the timely steps taken by the Appellant, it is my opinion that the Minister's decision to refuse her request seems a harsh one.

[9] In view of the Minister's concession in respect of the error in the assessment, the appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is liable for tax under subsection 204.1(2.1) for the period January to July, inclusive, 2005 together with all attendant penalties and interest.

Signed at Ottawa, Canada, this 7th day of July, 2009.

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<sup>1</sup> 71 D.T.C. 5511 at paragraph 20.

<sup>2</sup> *Neubauer v. R.*, 2006 TCC 457 at paragraph 10.

“G. A. Sheridan”

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Sheridan, J.

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PLACE OF HEARING: St. Catharines, Ontario  
DATE OF HEARING: February 18, 2009  
REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan  
DATE OF JUDGMENT: July 7, 2009

APPEARANCES:

Agent for the Appellant: Paul Beck  
Counsel for the Respondent: Alexandra Humphrey

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.  
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