

Docket: 2008-3314(IT)I

BETWEEN:

VIRGINIA PEREIRA-JENNINGS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on June 8, 2009, at Toronto, Ontario

By: The Honourable Justice E.A. Bowie

Appearances:

Agent for the Appellant: Syvon Jennings
Counsel for the Respondent: Aleksandra Lipski

JUDGMENT

The appeals from reassessments made under the *Income Tax Act* for the 2003, 2004 and 2005 taxation years are dismissed.

Signed at Ottawa, Canada, this 18th day of June, 2009.

E.A. Bowie”

Bowie J.

Citation: 2009 TCC 330
Date: 20090618
Docket: 2008-3314(IT)I

BETWEEN:

VIRGINIA PEREIRA-JENNINGS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] The amount that a taxpayer may contribute to a registered retirement savings plan (RRSP) under the *Income Tax Act*¹ (the *Act*) depends upon her earned income for the year, unused contribution room from prior years, past service pension adjustments, and other factors. For present purposes, it is sufficient to know that in the taxation years 2003, 2004, and 2005, the appellant in this case was in the position of having made contributions greater than the permissible limit, and therefore had what is referred to in the *Act* as a “cumulative excess amount in respect of RRSPs”. This made her liable to pay a tax under subsection 204.1(2.1),² and therefore a person to whom Part X.1 of the *Act* applied in each of those years. A taxpayer who finds herself in this situation may apply to the Minister of National Revenue (the Minister) under subsection 204.1(4) to waive this tax. This can be accomplished by filing form T3012A whereby she may obtain the Minister’s consent for the financial institution to refund the excess amount to her without withholding tax. However, as a person to whom Part X.1 of the *Act* applies, she must file a return under subsection 204.3(1) on form T1-OVP, and pay the tax, within 90 days after the year end, unless the tax has been waived before the end of that 90-day period.

¹ R.S. 1985 c.1 (5th supp.), as amended.

² This and the other provisions of the *Act* referred to in these Reasons for Judgment are reproduced in Appendix A.

[2] In the present case, it is not disputed that the appellant had a “cumulative excess amount in respect of RRSPs” during each of the taxation years 2003, 2004 and 2005. The required return T1-OVP was not filed within the 90-day period following the end of each of those years, nor was the tax either paid or waived within those periods. The Minister therefore assessed a penalty, together with interest on it, for each of the three years. The penalty is provided for by subsection 162(1), and the interest by subsection 161(11); these are made applicable by subsection 204.3(2). It is from those assessments that Ms. Pereira-Jennings now appeals.

[3] The appellant was not present when her appeals were heard. She was represented by her husband, Mr. Syvon Jennings. No witnesses were called, and the only evidence before me was a bundle of 16 documents that were entered as the appellant’s Exhibit A-1 on consent of counsel for the respondent. It is not disputed that the penalty in question is one to which a defense of due diligence applies. The appellant’s position is that the documents in Exhibit A-1 establish that the appellant did in fact exercise due diligence in respect of the filing of the required T1-OVR returns. The respondent’s position is that she did not. The resolution of this dispute requires an examination of the events following the end of the 2003 taxation year, insofar as they are revealed by the very limited evidence available.

[4] The documents numbered 12, 13 and 14 in Exhibit A-1 are copies of form T3012A in relation to contributions totaling \$30,035 made by the appellant to RRSPs of which she was the annuitant in 2003. They are dated March 26, 2004, and they appear to be three copies of the same form. There is no signature in the space provided for the contributor’s signature, the space for the “Contract or plan number” is left blank, and it is not known when the Canada Revenue Agency (CRA) received this form. Document 10 is the first page only of a letter dated May 1, 2007 from Revenue Canada to the appellant. It states in part

You sent us forms T3012A in March of 2004, and we wrote to you on May 4, 2004 requesting copies of the applicable RRSP receipts. You did not reply to us until December of 2005. This was not a reasonable delay, and you also could have removed the funds immediately without forms T3012A,

[5] Mr. Jennings’ contention is that by sending these unsigned forms to the CRA in March 2004 the appellant, as he put it, “began the process” of rectifying her overcontribution, and that she should therefore be dealt with as though she had effectively remedied the cumulative excess amount prior to the expiry of 90 days following the end of her 2003 taxation year. He argued that if the forms that she sent in March 2003 were inadequate, then it was up to CRA officials to so advise her, and that the respondent is therefore responsible for any delay beyond that point in time.

[6] Documents 4, 8 and 9 are all forms T3012A signed by the appellant in respect of overcontributions made in 2003 to RRSPs of which her husband Syvon Jennings is the annuitant. They are dated December 22, 2005, and they appear to have been received on January 26, 2006 by the CRA. In each case the amount is \$10,000. Documents 5, 6 and 7 are similar forms relating to the appellant's overcontributions made in 2004 to her husband's RRSPs. On February 21, 2007 R. Cormier signed these six forms giving the Minister's approval to refund the amounts without withholding tax.

[7] Nowhere in the documents introduced for the appellant is there a Part X.1 return for any of the taxation years 2003, 2004 or 2005. The Minister's assumptions pleaded in paragraph 19 of the Reply to the Notice of Appeal include the assumption that the appellant first filed Part X.1 returns for each of these years on March 5, 2007. There is no evidence to suggest otherwise. The only explanation that the appellant's agent offered for the delay was his averment that by filing unsigned forms without enclosing the required receipts, the appellant had exercised due diligence in relation to her filing requirements, and that CRA officials by not advising her of the inadequacy of these forms somehow became responsible for her default. To succeed in a defense of due diligence requires more than passive good faith and good intentions. It requires the taxpayer to present cogent evidence of positive steps taken by the taxpayer to comply with the requirements of the statute: see *Pillar Oilfield Projects Ltd. v. Canada*.³ This falls far short of satisfying the requirements of a defense of due diligence.

[8] The appeals are therefore dismissed.

Signed at Ottawa, Canada, this 18th day of June, 2009.

“E.A. Bowie”

Bowie J.

³ [1993] G.S.T.C. 49.

APPENDIX A

PART I

161(11) Where a taxpayer is required to pay a penalty, the taxpayer shall pay the penalty to the Receiver General together with interest thereon at the prescribed rate computed,

- (a) in the case of a penalty payable under section 162, 163 or 235, from the day on or before which
 - (i) the taxpayer's return of income for a taxation year in respect of which the penalty is payable was required to be filed, or would have been required to be filed if tax under this Part were payable by the taxpayer for the year, or
 - (ii) the information return, return, ownership certificate or other document in respect of which the penalty is payable was required to be made,

as the case may be, to the day of payment;

- (b) in the case of a penalty payable for a taxation year because of section 163.1, from the taxpayer's balance-due day for the year to the day of payment of the penalty;
- (b.1) in the case of a penalty under subsection 237.1(7.4), from the day on which the taxpayer became liable to the penalty to the day of payment; and
- (c) in the case of a penalty payable by reason of any other provision of this *Act*, from the day of mailing of the notice of original assessment of the penalty to the day of payment.

162(1) Every person who fails to file a return of income for a taxation year as and when required by subsection 150(1) is liable to a penalty equal to the total of

- (a) an amount equal to 5% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and
- (b) the product obtained when 1% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 12, from the date on which

the return was required to be filed to the date on which the return was filed.

PART X.1

- 204.1(2.1) 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.
- 204.1(4) Where an individual would, but for this subsection, be required to pay a tax under subsection 204.1(1) or 204.1(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.
- 204.3(1) Within 90 days after the end of each year after 1975, a taxpayer to whom this Part applies shall
- (a) file with the Minister a return for the year under this Part in prescribed form and containing prescribed information, without notice or demand therefor;
 - (b) estimate in the return the amount of tax, if any, payable by the taxpayer under this Part in respect of each month in the year; and
 - (c) pay to the Receiver General the amount of tax, if any, payable by the taxpayer under this Part in respect of each month in the year.
- 204.3(2) Subsections 150(2) and 150(3), sections 152 and 158, subsections 161(1) and 161(11), sections 162 to 167 and Division J of Part I are applicable to this Part with such modifications as the circumstances require.

CITATION: 2009 TCC 330

COURT FILE NO.: 2008-3314(IT)I

STYLE OF CAUSE: VIRGINIA PEREIRA-JENNINGS and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 8, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice E.A. Bowie

DATE OF JUDGMENT: June 18, 2009

APPEARANCES:

Agent for the Appellant:	Syvon Jennings
Counsel for the Respondent:	Aleksandra Lipski

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	N/A

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada