

Docket: 2006-3803(IT)I

BETWEEN:

ALDO ASTORINO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on February 26, 2010, at Montreal, Québec

Before: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:                   The Appellant himself  
Counsel for the Respondent:       Janie Payette

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**JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2001 taxation year is dismissed.

Signed at Toronto, Ontario, this 10th day of March 2010.

"Campbell J. Miller"

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C. Miller J.

Citation: 2010 TCC 144  
Date: 20100310  
Docket: 2006-3803(IT)I

BETWEEN:

ALDO ASTORINO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Miller J.

[1] Mr. Astorino needed a loan in 2001. Unfortunately, to get the loan he got caught up in an arrangement that required the transfer of his RRSP. The issue in this informal procedure appeal is whether the transfer of his RRSP resulted, pursuant to either subsections 146(8) or 56(2) of the *Income Tax Act* (the "Act"), in income taxable in Mr. Astorino's hands.

[2] Not having had any luck in approaching a bank for a loan, Mr. Astorino responded to an advertisement in the local paper. Upon visiting what he believed to be the offices of an organization called National Business Investment ("NBI"), he was advised that if he transferred his locked-in RRSP with SunLife to them, he could borrow the \$7,000 he required. Mr. Astorino proceeded to sign a number of documents on April 20, 2001:

- a) a Revenue Canada form (T2033) entitled Direct Transfer under paragraph 146(16)(a) or 146.3(2)(e). He left blank Parts A, B and C, which required, respectively, the identity of the RRSP transferor, the amount to be transferred and the identity of the RRSP transferee.
- b) a cash loan agreement in which NBI in Trust inc. agreed to lend him \$8,165, with the following provision:

The borrower agrees to reimburse the principal and interest pertaining to the above-mentioned amount according to one of the following options:

B (checked by Mr. Astorino) Through a proxy and designation of a representative (attach original form)

- c) a Power of Attorney in which Mr. Astorino appoints NBI in Trust inc.:

...

to be my legally authorized representative until end of life inclusive; to collect on my behalf any monies owing and payable to me, as well as any interest due on these monies, based on the amounts invested in trust and managed according to the directions given below to NBI in Trust inc.:

Sum under management: \$11,500

...

I hereby approve and agree to approve and confirm any actions undertaken under the power of attorney issued by me to the above-mentioned legal representative or agent; this shall include his having access to, and rights for the issuance or the request for issuance of any necessary document, and in total to perform all functions herein expressed or implied to ensure all decisions and acts required to efficiently manage the sums covered by this Power of Attorney to the betterment of the identified parties herein defined.

...

[3] Someone from NBI or Canadian Corporation Creations Centre ("CCCC") filled in the Revenue Canada direct transfer form naming Spectrum (SunLife) as the transferor RRSP, designating all of Mr. Astorino's RRSP for transfer and naming CCCC as the registered pension plan to which the property should be transferred. It was clear that Mr. Astorino did not pay a great deal of attention to the form, nor appreciate the risk he ran in signing blank documents and providing the broad power of attorney. He simply wanted what he believed to be a loan, and indeed, three weeks after signing these documents, he did receive \$7,466 from NBI. Spectrum (SunLife) did transfer Mr. Astorino's RRSP in the amount of \$12,751 to CCCC on May 11, 2001.

[4] Mr. Lalonde, a Canada Revenue Agency ("CRA") manager of registered plan compliance provided a useful timeline of the events surrounding the purported CCCC registered pension plan and its activities, from the Federal Government's perspective.

CCCC was incorporated by Letters Patent in February 2000 with the objective to help establish and promote the interests of small businesses. In minutes of CCCC dated June 15, 2000, it was resolved to take all steps necessary to establish a pension plan for employees and members of CCCC. On June 21, 2000, a trust was established for the purpose of administering a trust account for the CCCC pension. In December 2000, the Government of Canada notified CCCC that its pension plan was registered effective July 24, 2000. In June 2001, CRA advised CCCC that it wished to review its affairs. In July 2001, CCCC advised the CRA that it never had any members in the pension plan, nor had there been any transfers in or out of the plan, so they were not opposed to the cancellation of the registration of the plan. In December 2001, CRA notified CCCC of its intention to revoke the registration of the pension plan and also advised Financial Services Commission of Ontario ("FSCO") that it intended to do so, effective July 24, 2000. In the December 11, 2001 correspondence to the FSCO, CRA stated:

...

The Minister intends to revoke the Plan's registration because the Plan does not comply with the prescribed conditions for registration set out in subsection 8501(1) of the *Income Tax regulations* (ITR). Specifically, it is a condition of registration that the Plan comply with paragraphs 8502(a) of the ITR. Paragraph 8502(a) requires that the primary purpose of a registered pension plan be to provide periodic payments to individuals after retirement and until death in respect of their service as employees. As the information and documentation requested in this regard have not been provided, we have concluded that the Plan has failed to comply with this requirement.

...

[5] It was clear by further correspondence from CRA to FSCO in the summer of 2002 that the CRA did revoke the Plan's registration under subsection 147.1(11) of the *Act*, effective July 24, 2000.

[6] From the Province of Ontario's perspective, the FSCO revoked the registration of CCCC's pension plan, stating in part that the plan accepted transfers of funds from locked-in retirement accounts from individuals "who do not receive remuneration from an employer that belongs to the plan. Therefore such persons are not employees, within the meaning of section 1 of the *Act*, of an employer that belongs to the plan. The plan's acceptance of such transfers contravenes the terms of the plan."

[7] Further, the FSCO indicated in its reasons for its order of revocation:

In transferring or allowing the transfer of funds from the pension fund to NBI in Trust, NBI Canada or CCCC bank accounts, the pension trust fund as the named administrator has permitted the use or diversion of funds for purposes other than the purpose of the plan in contravention of the trust agreement and subsection 22(1) of the *Act*.

The FSCO provided many other reasons for the revocation.

[8] Mr. Astorino was notified of the revocation and that he could contact the Provincial Government for a form, which, upon completion, would allow him to receive some compensation. He completed the form, submitted it and received \$1,000 of compensation.

[9] Although the RRSP funds transferred from Spectrum (SunLife) to CCCC were in excess of \$12,000, at the time of assessment, CRA was only aware that Mr. Astorino received a cheque of \$7,466 and assumed this represented 70% of the total of his RRSP (based on CCCC's *modus operandi*) and therefore assessed Mr. Astorino for  $\$7,466 \times 100$  divided by 70 or \$10,665.

[10] So where does all this leave Mr. Astorino from a tax perspective?

Issues:

- a) Does subsection 146(16) of the *Act* apply to Mr. Astorino's transfer of his RRSP to CCCC, resulting in no inclusion in income?
- b) If not, does subsection 146(8) of the *Act* apply to bring some or all of the amount assessed into Mr. Astorino's income?
- c) Does subsection 56(2) of the *Act* apply to bring some or all of the amount assessed into Mr. Astorino's income?

[11] Bear in mind that the Government is limited to the \$10,665 assessed and cannot, through this appeal process, seek the greater amount of \$12,751, which was the full amount of Mr. Astorino's RRSP.

Analysis

[12] The following are relevant subsections of the *Act* for consideration:

a) subsection 146(8):

146(8) 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.

b) subsection 146(16):

146(16) Notwithstanding any other provision in this section, a registered retirement savings plan may at any time be revised or amended to provide for the payment or transfer before the maturity of the plan, on behalf of the annuitant under the plan (in this subsection referred to as the "transferor"), of any property thereunder by the issuer thereof

(a) to a registered pension plan for the benefit of the transferor or to a registered retirement savings plan or registered retirement income fund under which the transferor is the annuitant, or

(b) to a registered retirement savings plan or registered retirement income fund under which the spouse or common-law partner or former spouse or common-law partner of the transferor is the annuitant, where the transferor and the transferor's spouse or common-law partner or former spouse or common-law partner are living separate and apart and the payment or transfer is made under a decree, order or judgment of a competent tribunal, or under a written separation agreement, relating to a division of property between the transferor and the transferor's spouse or common-law partner or former spouse or common-law partner in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership,

and, where there has been such a payment or transfer of such property on behalf of the transferor before the maturity of the plan,

(c) the amount of the payment or transfer shall not, solely because of the payment or transfer, be included in computing the income of the transferor or the transferor's spouse or common-law partner or former spouse or common-law partner,

(d) no deduction may be made under subsection (5), (5.1) or (8.2) or section 8 or 60 in respect of the payment or transfer in computing the income of any taxpayer, and

(e) where the payment or transfer was made to a registered retirement savings plan, for the purposes of subsection (8.2), the amount of the payment or transfer shall be deemed not to be a premium paid to that plan by the taxpayer.

c) subsection 56(2):

56(2) A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person (other than by an assignment of any portion of a retirement pension pursuant to section 65.1 of the *Canada Pension Plan* or a comparable provision of a provincial pension plan as defined in section 3 of that Act or of a prescribed provincial pension plan) shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to the taxpayer.

[13] Subsection 146(8) of the *Act* requires that Mr. Astorino bring into income amounts received by him as benefits out of or under his RRSP. Subsection 146(16) of the *Act*, however, specifically provides an exception, allowing for a transfer of funds from an RRSP to a Registered Pension Plan without triggering an inclusion in income. I must first then address the application of subsection 146(16) of the *Act* to Mr. Astorino's circumstances, and, if subsection 146(16) of the *Act* does not apply, I shall then return to subsection 146(8) of the *Act*. The Respondent argues further that if subsection 146(8) of the *Act* does not capture the funds transferred, then subsection 56(2) of the *Act* does.

Application of 146(16)

[14] Subsection 146(16) of the *Act* effectively provides for a rollover from an RRSP to a Registered Pension Plan. An interesting question here is what is the effect of a retroactive cancellation of a Registered Pension Plan's registration? In a case dealing with very similar circumstances involving CCCC and NBI, the case of *Bonavia v. Her Majesty the Queen*<sup>1</sup> (currently under appeal) Justice Favreau had little difficulty concluding:

[15] ... The vehicle offered by the promoters of the scheme was a pension plan that was registered at the time the capital of the appellant's RRIF was transferred.

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<sup>1</sup> 2009 TCC 289.

[16] Unfortunately for the appellant, the registered pension plan was not a pension plan that met the prescribed conditions for registration so that it has been retroactively deregistered by the Minister. Consequently, the two transfers of the capital of the Fund to a bank account held by CCCC constituted a withdrawal of the capital of the appellant's RRIF which had to be included in the appellant's income for the 2001 taxation year pursuant to subsection 146.3(5) of the *Act*.

...

[15] The authority for the revocation of Registered Pension Plan is found in subsection 147.1(11):

147.1(11) Where, at any time after a pension plan has been registered by the Minister,

- (a) the plan does not comply with the prescribed conditions for registration,
- (b) the plan is not administered in accordance with the terms of the plan as registered,
- (c) the plan becomes a revocable plan,
- (d) a condition imposed by the Minister in writing and applicable with respect to the plan (including a condition applicable generally to registered pension plans or a class of such plans and a condition first imposed before 1989) is not complied with,
- (e) a requirement under subsection (6) or (7) is not complied with,
- (f) a benefit is paid by the plan, or a contribution is made to the plan, contrary to subsection (10),
- (g) the administrator of the plan fails to file an information return or actuarial report relating to the plan or to a member of the plan as and when required by regulation,
- (h) a participating employer fails to file an information return relating to the plan or to a member of the plan as and when required by regulation, or
- (i) registration of the plan under the *Pension Benefits Standards Act, 1985* or a similar law of a province is refused or revoked,



the Minister may give notice (in this subsection and subsection (12) referred to as a "notice of intent") by registered mail to the plan administrator that the Minister proposes to revoke the registration of the plan as of a date specified in the notice of intent, which date shall not be earlier than the date as of which,

- (j) where paragraph (a) applies, the plan failed to so comply,
- (k) where paragraph (b) applies, the plan was not administered in accordance with its terms as registered,
- (l) where paragraph (c) applies, the plan became a revocable plan,
- (m) where paragraph (d) or (e) applies, the condition or requirement was not complied with,
- (n) where paragraph (f) applies, the benefit was paid or the contribution was made,
- (o) where paragraph (g) or (h) applies, the information return or actuarial report was required to be filed, and
- (p) where paragraph (i) applies, the registration referred to in that paragraph was refused or revoked.

It is clear that the Government does have legislative authority to revoke a registration retroactively, provided such date of revocation is not earlier than the happening of certain events. I am satisfied that the plan was deregistered effective the moment of its purported registration. It never qualified as a Registered Pension Plan, notwithstanding what Mr. Astorino might have thought. In that regard, a diligent review of CCCC's documents might have caused the reasonable prospective customer to, at the very least, inquire how can I be part of a pension plan set up for employees and members of an organization to which I have absolutely no connection. Red lights should have been flashing, though, to be fair to Mr. Astorino, had he inquired with the CRA at that time whether the CCCC Pension Plan was registered, he would have been advised that, yes it was. I must however give effect to the retroactive nature of the revocation order – to do otherwise would ignore the clear legislative authority of the Government to do so, and also could open the door to further nefarious schemes. Subsection 146(16) of the *Act* does not apply to Mr. Astorino's transfer of his RRSP, as the transferee plan was not a Registered Pension Plan.

Application of subsection 146(8) of the *Act*

[16] The Crown contends that if subsection 146(16) of the *Act* does not apply, then Mr. Astorino's withdrawal of funds from his RRSP and into CCCC is caught by subsection 146(8) of the *Act* as an amount received by Mr. Astorino as a benefit out of or under the RRSP. Again, referring to Justice Favreau's reasons in *Bonavia*, after considering the extended meaning of "receive" and the concept of constructive receipt, he concluded that the amounts transferred out of Mr. Bonavia's Registered Retirement Income Fund ("RRIF") to CCCC were caught by subsection 146.3(5) of the *Act*. Subsection 146.3(5) of the *Act* is the equivalent RRIF provision to the subsection 146(8) of the *Act* RRSP provision, with the difference that subsection 146.3(5) of the *Act* does not refer to amounts received "as benefits", as does subsection 146(8) of the *Act*.

[17] It is those additional words "as benefits", in subsection 146(8) of the *Act* that gives me pause. For subsection 146(8) of the *Act* to apply, Mr. Astorino must have received amounts as benefits out of or under his RRSP. What did he receive? By directing the transfer of funds into the CCCC Pension Plan, Mr. Astorino did constructively receive the funds transferred. This conclusion is supported by reference to the case law set forth in Justice Favreau's reasons in *Bonavia* (see particularly Justice McArthur's comments in *Toth v. R*<sup>2</sup> and Justice Bowman's comments in *Belusic v. R*<sup>3</sup>, both referred to by Justice Favreau). The question becomes whether, in the circumstances facing Mr. Astorino, he "received" such amounts "as benefits" under the RRSP. He transferred the funds so he could get a loan of approximately \$7,500 – there was certainly some benefit, but was it the full amount that was received as a benefit? CCCC's *modus operandi* appears to have been to lend up to 70% of the value they received from the duped customer and keep the rest. Mr. Astorino was unlikely to ever have seen the balance of his funds. While this may at first blush suggest the benefit was less than the full amount, unfortunately for Mr. Astorino, that approach does not hold water. Once Mr. Astorino signed over the full amount of his RRSP to CCCC he had, at that moment, the benefit of the full amount, and indeed used the full amount to secure the "loan" for a lesser amount. It was his decision to give CCCC the power to deal with the funds – all of the funds. By giving up control over the full amount, he has not limited his benefit from the RRSP to just the amount he ultimately received. No, he had the benefit of the full amount and thus falls squarely within the purview of subsection 146(8) of the *Act*.

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<sup>2</sup> 2006 TCC 116.

<sup>3</sup> 3 CTC 2908.

Application of subsection 56(2) of the Act

[18] While it is unnecessary to have to turn to subsection 56(2) of the *Act*, I do so for completeness' sake. I again agree with Justice Favreau that, even if not caught by subsection 146(8) of the *Act* (or in his case 146.3(5) of the *Act*), the amounts would nevertheless be included in the Appellant's income by the application of subsection 56(2) of the *Act*, as the four conditions for the application of that provision have been met:

- a) the payment was to a third party, CCCC;
- b) it was made at the direction of the Appellant by signing the documents he signed in April 2000;
- c) it was for the benefit of the Appellant as he directed the transfer so he could access the funds;
- d) the payment would have been included in his income if it had come directly out of his RRSP to him.

[19] As indicated to Mr. Astorino at the trial, it was a dangerous practice to sign documents in blank and to so readily grant authority to an unknown entity through a power of attorney. Mr. Astorino did get what he wanted, the \$7,500 cash, but he also got more than he bargained for, the loss of the balance of his RRSP and a tax bill on some amounts that never made their way into his pockets. A harsh lesson learned.

[20] The appeal is dismissed. Mr. Astorino was made aware that the *Bonavia* case is under appeal. If he wishes to preserve his right to benefit from the possibility of a decision from the Federal Court of Appeal that reverses Justice Favreau's decision, his option would be to appeal this decision.

Signed at Toronto, Ontario, this 10th day of March 2010.

"Campbell J. Miller"

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C. Miller J.

CITATION: 2010 TCC 144

COURT FILE NO.: 2006-3803(IT)I

STYLE OF CAUSE: ALDO ASTORINO AND HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Montreal, Québec

DATE OF HEARING: February 26, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF JUDGMENT: March 10, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Janie Payette

COUNSEL OF RECORD:

For the Appellant:	
Name:	n/a
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada