Docket: 2020-179(IT)I

BETWEEN:

AMANDA DUNN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 8, 2022, at Toronto, Ontario

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Tigra Bailey

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2017 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 18th day of April 2022.

"Patrick Boyle"

Boyle J.

Citation: 2022 TCC 44
Date: 20220425
Docket: 2020-179(IT)I

BETWEEN:

AMANDA DUNN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Boyle J.

[1] Ms. Dunn is appealing her 2017 reassessment, which has included in her income subject to tax $5,000 that she withdrew from her RRSP as part of her homebuyers plan ("HBP"). Her $5,000 was within the $5,000 maximum amount permitted to be withdrawn as an HBP, and the $5,000 was used to pay for her new Toronto condominium.

I. The Issue

[2] The only reason for the reassessment is that Ms. Dunn did not withdraw this $5,000 from her RRSP in the same year as she withdrew the initial $20,000 that she used to make the preconstruction deposit on the condominium, nor in the immediately following year. The reasons for the later timing of the second withdrawal were construction delays, and delayed occupancy and closing dates of over two years.

[3] Had Ms. Dunn withdrawn both amounts in the same year, or in two consecutive years, this issue would not have arisen. However, as it is, the $5,000 second withdrawal cannot satisfy the definition of "regular eligible amount" in subsection 146.01(1) because:

1) Her $20,000 HBP withdrawal was an outstanding HBP balance when she made the second withdrawal; and

2) The special rule or exception in paragraph 146.01(2)(d) that addresses HBP withdrawals over more than one year, only allows for a later withdrawal in the immediately following year.

II. The Facts

[4] The relevant, material facts of this case are very straightforward and are not disputed. I find the facts to be as follows:

- The appellant agreed to purchase the Toronto condominium preconstruction in 2015. That agreement contemplated a December 2015 completion.

- The appellant withdrew $20,000 from her RRSP as a HBP in 2015 and used that amount to pay the deposit in 2015.

- Due to construction delays, including those involving construction claims filed against the property, all of which were construction-related, outside the control of Ms. Dunn, and contrary to her interest in closing on schedule, her occupancy date was delayed until December 2017 and closing on the purchase was delayed until May 2018.

- Ms. Dunn used the $5,000 withdrawal towards the balance owing prior to closing.

- Ms. Dunn testified that in early 2016 she contacted the Canada Revenue Agency to explain the situation of delays in closing and was told that she would be able to withdraw the remaining $5,000 amount as part of her HBP and use it to pay the closing costs. The Respondent did not challenge Ms. Dunn's testimony that she contacted the CRA at that time or that the CRA official gave her that advice. I find that she did make that inquiry in early 2016 and was given that information.

- Had Ms. Dunn been given correct information by the CRA official, that her second withdrawal had to be made in the year following her first, she could have made that $5,000 second withdrawal in 2016 and used it towards the purchase closing costs of the condominium.

- Ms. Dunn was not taken to any informational publication of the CRA that was available at the time or now that would have indicated that there was this one-year limitation on further withdrawals.

III. Disposition

[5] The applicable HBP legislation is clear that Ms. Dunn's $5,000 second withdrawal cannot be an "eligible amount" under the HBP regime as it was not withdrawn in the same year as her initial $20,000 HBP withdrawal or in the following year.

[6] Ms. Dunn's 2017 $5,000 withdrawal was not a "regular eligible amount" under the HBP provisions. It can therefore not be an "excluded amount" under the RRSP provisions of the *Act.* It was therefore an RRSP withdrawal to be included in her income in 2017 in accordance with the provisions of the *Act*.

[7] This Court must apply the duly passed laws of Parliament as they are written. I have no discretion in that regard, equitable or otherwise. The HBP provisions appear to only contemplate an agreement to purchase a home extending into the following year. They were written decades ago and predate the modern reality of a red-hot residential construction market in cities like Toronto and Vancouver. It is nonetheless those rules that apply notwithstanding that Ms. Dunn was not engaged in any mischief.

[8] I do not disagree with Ms. Dunn that, in her particular circumstances, the application of the 2-year period and the resulting tax cost to her do not appear from a tax policy point of view to be appropriate, reasonable or just. I also do not disagree with her that it is most unlikely her circumstances give rise to the public interest concerns of the legislature and the Department of Finance that gave rise to the 2-year limitation being enacted. However, this Court has to apply the applicable law and can not choose not to do so out of concerns of fairness, equity or justice. As Justice Rothstein of the Federal Court of Appeal wrote in *Chaya* v. *Canada*, 2004 FCA 327:

> [4] The applicant says that the law is unfair and he asks the Court to make an exception for him. However, the Court does not have that power. The Court must take the statute as it finds it. It is not open to the Court to make exceptions to statutory provisions on the grounds of fairness or equity. If the applicant considers the law unfair, his remedy is with Parliament, not with the Court.

[9] The fact that Ms. Dunn diligently inquired of CRA regarding the very issue of delayed closings and HBP withdrawals does not change this. As written by the Federal Court of Appeal in *Klassen v. Canada* , 2007 FCA 339:

> [27] Finally, I see no basis in the appellant's contention that the assessment should be varied based on an officially induced error. It is trite law that the relief granted by the courts in an appeal against a reassessment under ITA must be based on the law. If in fact the appellant was misled through negligence, some other remedy may be available. However, no relief can be granted on this basis in the context of a tax appeal.

[10] To similar effect is what Justice Sharpe of the Ontario Court of Appeal wrote in his book Good Judgment: Making Judicial Decisions at page 127:

> "I would be very concerned about a judge who has never felt compelled to decide a case in a way that goes against the judge's personal views. That is simply an unpleasant but familiar part of the job. We are prepared to put our personal views to one side because that is what we have promised and because, at the end of the day, we must accept that it is necessary to tolerate occasional outcomes that we personally regard as wrong or unjust in order to preserve the overarching ideal of a legal order that exists separately and independently from the personal views of judges".

[11] For these reasons this Court must dismiss this appeal. While the Appellant cannot prevail in this Court, there is a possibility of recourse for her under the Financial Administration Act. This is a path for the Appellant to heed Justice Rothstein's comments and seek her remedy with Parliament. Subsection 23 of that act provides:

> Definitions
>
> 23 (1) In this section,
>
> […]
>
> (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.

[12] Had CRA communicated more clearly and fully with the Appellant about the existence and scope of the 2-year requirement after the problem came to light, this route may have been where the Appellant first pursued her request for relief

following confirmation by CRA Appeals rather than pursuing it in our Court. Remission orders under the FAA are wholly within the purview of the Minister of National Revenue ("MNR") and the Governor in Council or Cabinet. CRA has a process for taxpayers to seek the support of the MNR for such a remission order. If the Minister agrees with Ms. Dunn's position, and my comments above, that the results of the application of the 2-year period in this particular case appear to be unfair, unjust, unreasonable and outside the scope of the public interest being protected by its enactment, which hopefully she will, a request made by the Minister for such a remission order will move forward for approval to be considered by Cabinet. This will be a process entirely independent from this Court and to be determined by the Minister and the Governor in Council alone. They may well be aware of considerations that have not been brought to the attention of this Court by either party in this proceeding.

[13] The above passage from *Klassen* is quoted by Justice Paris in his informal decision in this Court in *Chitalia*, 2017 TCC 227, another HBP decision where a Canadian first-time homebuyer was caught by the intricacies of the HBP legislation, and again not withstanding that he had also received bad information from CRA in one of its HBP publications. Justice Paris went on to write: "Given the inequity of this result, Mr. Chitalia may wish to consider applying for a remission of tax pursuant to subsection 23(2) of the *Financial Administration Act*, R.S.C. 1985, c. F-11.".

[14] The appeal is dismissed.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated April 18, 2022, in order to correct typographical errors in subparagraph 2 of paragraph 3.

Signed at Ottawa, Canada, this 25th day of April 2022.

"Patrick Boyle"

Boyle J.

CITATION:	2022 TCC 44
COURT FILE NO.:	2020-179(IT)I
STYLE OF CAUSE:	AMANDA DUNN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 8, 2022
AMENDED REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	April 18, 2022
DATE OF AMENDED REASONS FOR JUDGMENT:	April 25, 2022

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Tigra Bailey

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada