

Docket: 2010-2022(IT)I

BETWEEN:

KAREN KA YAN HO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 26, 2010, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Agent for the Appellant: Marc Menard
Counsel for the Respondent: Julia Turvey, Acticling Student
Diana Aird

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2008 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of November 2010.

“V.A. Miller”

V.A. Miller J.

Citation: 2010TCC571
Date: 20101104
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BETWEEN:

KAREN KA YAN HO,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issue in this appeal is whether the amount of \$13,854 which the Appellant withdrew from her Registered Retirement Savings Plan (RRSP) in 2008 was an excluded withdrawal under the Home Buyers Plan or a benefit which was properly included in income by the Minister of National Revenue (the Minister).

[2] There was no disagreement between the parties concerning the facts in this appeal. Those facts were: On July 24, 2005, the Appellant entered into an Agreement of Purchase and Sale to acquire a new construction condominium in Toronto, Ontario. At that time, she knew that it would be at least three years before the condominium would be ready for occupancy.

[3] The Agreement of Purchase and Sale required the Appellant to make a series of payments to the developer. In accordance with the schedule of deposits, the amount of \$10,712 was due on July 24, 2006. The Appellant had only \$6,146 in her RRSP with the Royal Bank of Canada and she withdrew it under the Home Buyers Plan (HBP) to fund a portion of the deposit which was due.

[4] The Appellant stated that she made further contributions to her RRSP from July 2006 onward so that by the closing date for the purchase of the condominium, there was \$13,854 in her RRSP. She withdrew this amount to complete the purchase on December 16, 2008. The two withdrawals (\$6,146 and \$13,854) totalled \$20,000 which was the maximum allowed under the HBP.

[5] In addition to the facts above, the Minister has also relied on the following assumptions:

- (h) the appellant did not cancel her participation in the HBP in respect of the First Withdrawal;
- (i) in the 2005, 2006 or 2007 taxation years, or within 60 days after the end of the respective taxation years, the appellant did not pay amounts equal to or greater than the amount of the First Withdrawal to an RRSP under which she is an annuitant in an amount and designate such amounts in prescribed form as repayments under the HBP; and
- (j) the appellant did not include any part of the First Withdrawal or the Second Withdrawal in computing income for the 2005, 2006, 2007 and 2008 taxation years.

The Appellant has admitted these assumptions.

[6] Paragraph 56(1)(h) and subsection 146(8) of the *Income Tax Act* (the “Act”) read:

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. [RRSP or RRIF]** -- 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;

146. (1) Definitions -- In this section,

(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.

[7] An excluded withdrawal and an eligible amount are defined in subsection 146.01(1) of the *Act* as follows:

146.01 (1) Definitions -- In this section,

"**eligible amount**" of an individual is a regular eligible amount or supplemental eligible amount of the individual;

"**excluded withdrawal**" of an individual means

(a) an eligible amount received by the individual,

"**regular eligible amount**" of an individual means an amount received at a particular time by the individual as a benefit out of or under a registered retirement savings plan if

...
(i) the individual's HBP balance at the beginning of the calendar year that includes the particular time is nil.

[8] In accordance with the definition of benefit in 146(8), all withdrawals from an RRSP, except excluded withdrawals, are to be included in the calculation of a taxpayer's income. An excluded withdrawal is an eligible amount if it meets certain criteria, one of which is that the taxpayer's HBP balance is nil at the beginning of the calendar year in which the withdrawal is made.

[9] The Appellant made an excluded withdrawal of \$6,146 in 2006. After this withdrawal, she did not designate, in prescribed form, any amounts which she contributed to a RRSP as a repayment under the HBP. Consequently, the amount of \$13,845 which the Appellant withdrew from her RRSP in 2008 was not an excluded withdrawal and was correctly included in her income as a benefit.

[10] Agent for the Appellant has submitted that the reality of today's world is that new construction will always require a series of deposits over a period of time. The provisions of the legislation with respect to the HBP, as it now exists, is contrary to the underlying spirit of this program which is to financially assist first time home buyers with home ownership. It is illogical that all withdrawals must be made during the same year. In conclusion, he asked that the appeal be allowed and that "the legislation be amended to reflect the most common circumstances encountered when purchasing a home".

[11] The Appellant has been assessed correctly and in accordance with the *Act*. This Court does not have the jurisdiction to amend the legislation; that remedy lies with Parliament.

[12] The appeal is dismissed.

Signed at Ottawa, Canada, this 4th day of November 2010.

“V.A. Miller”

V.A. Miller J.

CITATION: 2010TCC571

COURT FILE NO.: 2010-2022(IT)I

STYLE OF CAUSE: KAREN KA YAN HO AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 26, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: November 4, 2010

APPEARANCES:

Agent for the Appellant: Marc Menard
Counsel for the Respondent: Julia Turvey, Acticling Student
Diana Aird

COUNSEL OF RECORD:

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