

Federal Court



Cour fédérale

Date: 20180502

Docket: T-353-17

Citation: 2018 FC 473

Ottawa, Ontario, May 2, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

TONIE POUCHET

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of the Minister's decision dated February 9, 2017 refusing to conduct a third review of her request to cancel taxes due by virtue of her excess contribution to her Registered retirement savings plan [RRSP] for the 2007 to 2015 taxation years.

II. Background

[2] On February 15, 2007, the Applicant transferred her RRSP, as well as \$17,000 from her bank account at the Bank of Montreal [BMO] to her Tangerine (formerly known as ING) bank account.

[3] The amount of \$17,000 was transferred into a RRSP at Tangerine but that amount exceeded the RRSP deduction limit by \$15,486, since her unused limit was set at \$1,514 at the time of the transfer.

[4] On September 2, 2014, a representative for the Canada Revenue Agency [CRA], F. Tousignant, wrote to the Applicant to notify her that:

- a. she may have had excess RRSP contributions during the 2007 and subsequent taxation years that are subject to a tax of 1% per month and;
- b. she had not filed a T1-OVP return (Individual Tax Return for RRSP, SSP and PRPP Excess Contributions) to report and pay this tax;
- c. if she had RRSP excess contributions, CRA will charge a late-filing penalty and interest on any return filed late.

[5] The Applicant never answered the CRA letter dated September 2, 2014 and failed to file her T1-OVP (Individual Tax Return for RRSP Excess Contributions) returns for the 2007 and subsequent taxation years, as requested.

[6] On April 2, 2015, CRA issued notices of assessment for the 2007 to 2013 taxation years (T1- OVP returns) regarding the Applicant's excess contributions to her RRSP.

[7] On April 22, 2015, the Applicant withdrew her RRSP to eliminate her excess contribution.

[8] On May 14, 2015, the CRA received a Request for Taxpayer Relief from the Applicant (request for a first review), regarding the 2007 to 2015 taxation years, as well as supporting documents along with her unsigned T1-OVP return for 2014 with the mention “DRAFT” across it.

[9] On March 16, 2016, the CRA issued a notice of assessment for the 2014 taxation year (T1-OVP return) regarding the Applicant’s excess contributions to her RRSP.

[10] On August 19, 2016, a representative for the CRA, V. Massicotte, wrote to the Applicant to notify her that:

- a. she may have had excess RRSP contributions during the 2015 taxation year that are subject to a tax of 1% per month and;
- b. she had not filed a T1-OVP return (Individual Tax Return for RRSP, SSP and PRPP Excess Contributions) for the 2015 taxation year to report and pay this tax;
- c. if she had RRSP excess contributions, CRA will charge a late-filing penalty and interest on any return filed late.

[11] On September 26, 2016, the Applicant sent CRA a T1-OVP return for the 2015 taxation year. Contrary to the first one mentioned above in paragraph 8, this one was signed. The Applicant reported all amounts with a “0”.

[12] On November 24, 2016, the CRA issued a notice of assessment for the 2015 taxation year (T1-OVP return) regarding the Applicant's excess contributions to her RRSP.

A. *The Minister's first refusal of the Applicant's request for relief*

[13] On February 8, 2016, Jonathan Pilon rendered the Minister's first decision regarding the Applicant's May 14, 2015 request for relief and refused the cancellation of the tax arising from the Applicant's excess contributions to her RRSP in 2007.

[14] The reasons for the Minister's decision not to grant relief include the following:

- (a) Subsection 204.1(4) of the ITA allows the Minister to exercise discretion to cancel the Part X.1 tax where the RRSP/PRPP excess contributions arose due to a reasonable error and reasonable steps were or will be taken to eliminate the excess;
- (b) "Reasonable error" means that it happened because of extraordinary circumstances beyond your control and "reasonable steps taken" means that a taxpayer took steps to eliminate the excess after receiving notice from the CRA mentioning such over contribution by withdrawing the excess contributions from your RRSP as quickly as possible;
- (c) Each year, CRA provided the Applicant with a notice of assessment, which notably mentioned that if her amount B (unused contributions) is higher than amount A (maximum for the following taxation year), she can be subject to a tax liability regarding her excess contributions;
- (d) It is an individual responsibility to ensure that his or her accountant prepared correctly his or her income tax returns;
- (e) Steps can be taken to try and resolve the matter with a financial institution, as they are responsible to provide adequate services to their clients, but it is also an individual responsibility to ensure that Memorandum of fact and law

117 Statement of Fact his or her financial institution is processing investments in a correct manner;

- (f) The applicant did not present relevant information proving her inability to file the TI-OVP returns and pay the balance owed at the due date.

B. *The Minister's second review of the Applicant's request for relief*

[15] In two separate letters dated March 25, 2016, the Applicant requested a second review of her file, this time asking not only for the waiver of the Part X.1 tax arising from the excess contributions to her RRSP in 2007, but also for the late-filing penalties and arrears interests that were levied for the 2007 to 2014 taxation years.

[16] On November 9, 2016, Gino Poulin rendered the Minister's second decision regarding the Applicant's request for relief and refused the cancellation of the tax arising from the Applicant's excess contributions to her RRSP in 2007.

[17] The reasons for the Minister's decision not to grant relief include the following:

- (a) Subsection 204.1(4) of the ITA allows the Minister to exercise discretion to cancel the Part X.1 tax where the RRSP/PRPP excess contributions arose due to a reasonable error and reasonable steps were or will be taken to eliminate the excess;
- (b) "Reasonable error" means that it happened because of extraordinary circumstances beyond your control and "reasonable steps taken" means that a taxpayer took steps to eliminate the excess after receiving notice from the CRA mentioning such over contribution by withdrawing the excess contributions from your RRSP as quickly as possible;

- (c) Since the Applicant did not bring new elements to the Minister's attention, there were no circumstances that would warrant the cancellation of tax on her RRSP excess contributions;
- (d) Further explanation can be found in the Minister's first negative decision letter dated February 8, 2016.

[18] The November 9, 2016 decision letter also indicates that the CRA is taking into account that the withdrawal of \$17,000 was made in April 2015, thus eliminating the excess contributions, but that no changes would be made to the previous taxation years (2007 to 2014).

C. *The Minister's refusal to conduct a third review of the Applicant's*

[19] On December 9, 2016, the CRA received an undated letter from the Applicant, in which she stated that she was unable to obtain any information from the BMO regarding the request made by the CRA in a letter dated November 28, 2016. In the same letter, the Applicant states that she has a "request pending with taxpayer relief".

[20] Following that letter, Pascal Grenier reviewed the Applicant's file materials, as well as all the relevant facts brought to the CRA's attention, notably, but not exclusively, all the documents pertaining to the Applicant's first two requests for a review of the Minister's decision to determine if the Minister could exceptionally conduct a third review of the matter.

[21] On February 9, 2017, Mr. Grenier signed a decision letter informing the Applicant of his decision not to conduct a third review of the Minister's decision in her case.

[22] The reasons for the Minister's decision not to conduct a third review include the following:

- (a) The Minister's decision to conduct a third review of such a case is discretionary;
- (b) A third review is only conducted when a taxpayer provides new relevant information to the CRA;
- (c) In the Applicant's case, no new relevant information was provided;
- (d) The 2015 Individual Tax Return for RRSP, SSP and PRPP Excess Contributions (the "TI-OVP return") submitted by the Applicant on September 26th, 2016 would have been identical, after corrections, to what the CRA already assessed, leaving the assessed amount of the Part X.1 tax unchanged (the Applicant incorrectly filled up her 2015 T1 OVP Return, by putting a zero (0) on every line and not taking into account her unused contributions nor the \$17,000 withdrawal in 2015;
- (e) The Minister already accepted the Applicant's relief request for late-filing penalties and arrears interests for the 2007 to 2015 taxation years in a letter dated January 13th, 2017. A copy of the CRA's letter dated January 13th, 2017 is attached and marked as Exhibit "2" to this affidavit.

D. *Aftermath of the Applicant's requests for relief*

[23] On January 13, 2017, the Minister accepted to waive the late-filing penalties and arrears interests levied for the 2007 to 2015 taxation years, up to January 13, 2017, as a result of the Applicant's excess contribution to her RRSP, pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C., 1985, c. 1 [*Income Tax Act* or the Act].

[24] As a result of the waiver, CRA issued notices of reassessment on May 26, 2017, bringing the balance owed by the Applicant for her excess contributions to her RRSP to \$10,798.71, down from \$17,406.86.

[25] The aforementioned notices of reassessment were mailed to the Applicant by the CRA at the time of their issuance, as well as emailed to her by the Respondent on June 6, 2017.

[26] The amount of \$10,798.71 represents the Part X.1 tax portion owed for the Applicant's excess contribution to her RRSP, as well as the arrears interests accrued after January 13, 2017 decision letter.

[27] As indicated in her amended affidavit, the Applicant paid this amount in full on June 15, 2017.

III. Issues

1. Whether the Minister's decision not to conduct a third review of the Applicant's request for the cancellation of her Part X.1 taxes was reasonable.
2. Whether the final decision contains a reviewable error that would warrant the Court's intervention.

IV. The standard of review is the reasonable decision

[28] The power to conduct a third review and to waive the tax for excess contribution to an RRSP under paragraph 204.1(4) of the *Income Tax Act* is discretionary. The standard of review for both decisions at issue is reasonableness. The Court must show deference to the decision

made by the Minister in such cases. The judicial review must be based on the facts that were presented to the decision-maker: *Dunsmuir V. New Brunswick*, 2008 CSC 9, 120081 1 R.C.S. 190 [Dunsmuir], *Gagné v Canada (Attorney General)*, 2010 FC 778, *Kapil v Canada Revenue Agency*, 2011 FC 1373 [Kapil]:.

[29] The Court's powers in this matter are limited as described in *Kapil* at para 20:

[20] As a matter of law, this Court does not have the jurisdiction to order the Minister to waive taxes, penalties, and arrears interest. The jurisdiction of the Court is limited to ordering the Minister to substantively reconsider his decisions not to waive the taxes and related interest and penalties. The applicant must understand, therefore, that even if this Court had found in his favor, he would not automatically be entitled to a waiver and refund of his money. This Court's review is confined to an analysis of whether the Minister's exercise of discretion in refusing the waiver requests was lawful, not to substitute its decision for that of the *Minister: Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 (CanLII), [2009] 1 SCR 339.

V. Analysis

A. *The Minister was justified in refusing to conduct a third review of the Applicant's request*

[30] In her letter received by the CRA on December 9, 2017, the Applicant does not provide any new information.

[31] In this context the Minister's delegate was justified in refusing to conduct a third review of her request.

B. *The Minister's decision not to waive taxes on the Applicant's excess contributions to her RRSP was reasonable*

(1) The rules applicable to the waiver of taxes owed

[32] Under subsection 204.1(2.1) of the Act, a taxpayer must pay a special tax of 1% per month and every month going forward on any excess amount in her RRSP [the Special Tax].

[33] Second, to this Special Tax, the taxpayer is required to file a TI-OVP tax return declaring the overpayment within three months of the beginning of the year following the taxation year in which the taxpayer had excess contributions to his RRSP.

[34] Third, the taxpayer will be liable to pay interest and penalties for late-filing of the annual returns of RRSP excess contribution required in such cases. It should be noted however, that contrary to the Applicant's submissions, the Minister accepted to waive the late-filing penalties and arrears interests levied for the 2007 to 2015 taxation years, up to January 13, 2017, as a result of the Applicant's excess contribution to her RRSP.

(2) Relief from the Special Tax

[35] Tax relief may be granted by the Minister under subsection 204.1 (4) of the Act for the Special Tax. It requires that the taxpayer fulfill a twofold test and the onus is on her to satisfy the Minister that the excess amount arose as a consequence of both;

a. a reasonable error;

and

b. that reasonable steps were taken to eliminate the excess contributions.

a) *Reasonable error*

[36] The Applicant argues that there was no intention on her part to over-contribute, that she did not benefit from it and that she was misled by third parties like the bank at the time of the transfer.

[37] Honest mistakes and innocence have been deemed by the Federal Court of Canada in *Lepiarczyk v. Canada (Revenue Agency)*, 2008 FC 1022, to be irrelevant. Ignorance of the law is not a reasonable error or mistake. As Justice Brown wrote in *Levenson v. Canada (Attorney General)*, 2016 FC 10 at paras 16-17:

[16] Innocence and lack of intent are not determinative, however, of reasonableness. While these subjective factors form part of the considerations that the Minister may take into account, at issue is the reasonableness of the error, objectively assessed, where the applicant's case falters.

[17] The Canadian tax system is based on self-assessment, which means that it is up to each individual to ensure that they conduct their financial affairs in accordance with the *Income Tax Act*: *R. v McKinlay Transport Ltd.* 1990 CanLII 137 (SCC), [1990] 1 SCR 627. It was up to the applicant to ensure that she did not make excessive contributions to her RRSP and her lack of understanding of the law is not a reasonable error. The tax system is admittedly complex and when taxpayers are faced with complexity they are expected to seek advice.

[38] Similarly, the Court has consistently refused to acknowledge any concept of waiver of taxes, penalties or interest based on the conduct of third parties: *Fleet v Canada (Attorney General)*, 2010 FC 609 (CanLII) at para 29 as follows:

[29] It is apparent to me that at least part of the reason why Mr. Fleet did not take any of these steps is that he relied on his advisors and became an unfortunate victim of their errors or omissions. However, the law is well established that taxpayers are “directly responsible for the actions of those persons appointed to take care of [their] financial matters” (*Babin v. Canada (Customs & Revenue Agency)*, 2005 FC 972 (CanLII), at para. 19; *Northview Apartments Ltd. v. Canada (Attorney General)*, 2009 FC 74

(CanLII), at paras. 8 and 11; *PPSC Enterprises Ltd. v. Minister of National Revenue*, 2007 FC 784 (CanLII), at para. 23; and *Jones Estate v. Canada (Attorney General)*, 2009 FC 646 (CanLII), at para. 59) and that they “are expected to inform themselves of the applicable filing requirements” (*Sandler v. Attorney General of Canada*, 2010 FC 459 (CanLII), at para. 12).

b) *Reasonable Steps to eliminate excess contributions*

[39] The Applicant must also establish that she took the appropriate steps to eliminate the excess contributions to her RRSP. Again this criterion is reviewed against a reasonability standard. The same principle of the taxpayer being responsible for the actions of those persons appointed to take care of [their] financial matters applies in this regard. Accordingly, the Applicant cannot rely upon the alleged failure of her accountant in thinking that her income tax returns were filed properly. Similarly, the alleged representation by an officer of the CRA advising her that if the matter was pursued relief would be provided is not a matter that would affect the Applicant’s legal obligation to comply with the taxation laws of the country.

[40] The Applicant also argues that the CRA contributed to the delay in withdrawing her over contributions. She contends that the references to a “possibility” of excess contributions should have been obvious from her returns, despite annually approving her returns. She claims that the fact that the tax review on her RRSP was only conducted in 2014 for a 2006 contribution, made her liable for back taxes for the years 2007-2015 returns.

[41] As admitted by the Applicant in paragraph 3 of her affidavit, in every notice of assessment issued by CRA for the 2007 to 2014 taxation years, there was a mention that the

Applicant could possibly be in violation of the RRSP contribution rules which was accompanied by a formula for evaluating her situation as follows:

Your _____ RRSP/PRPP Deduction Limit Statement

- 1) You have \$15,486 (B) of unused RRSP/PPRP contributions available for __. If this amount is more than amount (A) above, you may have to pay a tax on the excess contributions.

Explanation of changes and other important information

- 2) You may have to pay a tax of 1% per month on your RRSP/PRPP excess contributions as your unused RRSP/PRPP contributions (amount B) exceed your RRSP/PRPP deduction limit for _____(amount A), as noted on your _____ "RRSP/PRPP Deduction Limit Statement. For more information, see Guide T4040, "RRSPs and Other Registered Plans for Retirement.

[42] However, the Applicant never contacted the CRA to verify whether the amounts she was contributing were reasonable.

[43] Moreover, respecting the clarity of the language used in notices of assessment regarding excess contributions to RRSPs, this Court in *Gagné v. Canada (Attorney General)*, 2010 CF 778 at paras 23-25 has recognized that even though the notices of assessment use the term “unused” instead of “excess”, this in no way alters the fact that the Applicant had been notified by the CRA that a Special Tax is owed when the amount of “unused contributions” exceeds the “deduction limit”.

[44] Furthermore, on September 2, 2014, the CRA advised the Applicant that she may have had excess contribution to her RRSP during the 2007 taxation year, that she had not filed a T1-OVP return to report and pay this tax and that if she had RRSP excess contributions, the CRA

will charge a late-filing penalty and interest on any return filed late. Despite this letter, the Applicant did not respond to the CRA's letter dated September 2, 2014 and failed to file her T1-OVP returns for the 2007 and subsequent taxation years, as requested. On April 2nd, 2015, the CRA issued notices of assessment for the 2007 to 2013 taxation years (T1-OVP returns) regarding the Applicant's excess contributions to her RRSP.

[45] The Court agrees with the Respondent that these actions by the Applicant do not constitute reasonable steps and exceeds a reasonable delay in the circumstances.

[46] This said, the Court agrees that the consequences visited on the Applicant are harsh and out of proportion with any error in over contributing to her RRSP. The Applicant points out that even with the approval of her request for tax relief waiving most of the interest and late-filing fees, she still ended up paying a total amount of \$18,618.71 for a contribution that afforded her no benefit and for someone whose annual income never exceeded \$6,242 for the years of 2007-14.

[47] In such circumstances, the Court repeats its concerns stated in *Connolly v. Canada (National Revenue)*, 2017 FC 1006 in concluding that contributions to RRSPs can represent a hidden trap for many unsuspecting taxpayers such as the Applicant. It urges the Minister to take steps to find the appropriate means to provide conspicuous warnings to taxpayers not to make any contributions to their RRSP plans unless aware of their contribution limits because of the harsh penalties that may accrue from over contributions.

[48] Unfortunately, this suggestion will not benefit the Applicant, whose application regrettably must be dismissed for the reasons provided without costs.

VI. Conclusion

[49] The application for judicial review is dismissed without costs.

JUDGMENT in T-353-17

THIS COURT'S JUDGMENT is that the application is dismissed without costs.

"Peter Annis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-353-17

STYLE OF CAUSE: TONIE POUCHET v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: MONTRÉAL, QUÉBEC

DATE OF HEARING: MARCH 19, 2018

JUDGMENT AND REASONS: ANNIS J.

DATED: MAY 2, 2018

APPEARANCES:

Toni C. Pouchet

FOR THE APPLICANT
(ON HER OWN BEHALF)

Mathieu Tanguay

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada

FOR THE RESPONDENT