Federal Court Cour fédérale

Date: 20230307

Docket: T-1783-22

Citation: 2023 FC 313

Calgary, Alberta, March 7, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

ENWELIKU CALVIN OSSAI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Canada Revenue Agency [CRA] determined that the Applicant had over-contributed to his Tax Free Savings Account [TFSA] during the 2020 and 2021 tax years and assessed taxes on the excess contributions. The Applicant request that that the CRA waive the taxes on the excess contributions, which request was denied on first and second review. On this application, the Applicant seeks judicial review of the CRA's second review decision dated August 2, 2022 and requests: (a) cancellation of $1,956.52 in tax assessed on his excess contribution for the 2021 tax

year, together with interest accrued on that amount; (b) reimbursement of $1,294.26 paid for taxes assessed on his excess contribution for the 2020 tax year; (c) inclusion of his TFSA contribution limit in his “tax filing” notice of assessment; and (d) compensatory damages of $5,000.00 for mental, physical, emotional and financial distress.

[2] For the reasons that follow, the application for judicial review shall be granted, as I am satisfied that the reasons for decision are unintelligible and lack justification and transparency in relation to both the 2020 and 2021 tax years. The matters shall be remitted to a different CRA officer for re-determination.

II. Background and Decision at Issue

[3] The Applicant became a permanent resident of Canada in 2013 and as a result, became eligible to contribute to a TFSA. However, despite not being a Canadian resident from 2009 to 2012, the CRA mistakenly provided information to the Applicant indicating that he had accrued a TFSA contribution room for those years. The total contribution room advised in error amounted to $20,000.00.

[4] The Applicant relied on this mistaken information provided by the CRA and contributed significant sums to his TFSA in 2020. This inadvertently resulted in an over-contribution to his TFSA or “excess TFSA” amounts as of March 2020.

[5] On December 2, 2020, the CRA corrected their error regarding the Applicant's residency date and reduced his TFSA contribution room by $20,000. The Applicant alleges that he did not receive timely notification of this change and I find that there is nothing in the certified tribunal record to suggest that the CRA advised the Applicant of the rationale for this reduction in his TFSA contribution room until August 2, 2022.

[6] That said, at some point in April of 2021, the Applicant learned, through his own efforts, that his TFSA contribution room had been decreased and as a result, he had inadvertently over-contributed to his TFSA. On April 26, 2021, the Applicant transferred $29,000.00 out of his TFSA (notwithstanding that his excess contribution was only $20,000.00).

[7] Between May 31 and July 13, 2021, the Applicant contributed a total of $6,133.12 to his TFSA.

[8] On July 20, 2021, the Applicant received a TFSA notice of assessment for $1,273.87 tax on excess TFSA amounts for the 2020 tax year. The notice of assessment also indicated that his unused TFSA contribution room at the end of 2020 was ($19,978.85) and that his TFSA contribution room on January 1, 2021, after taking into account the 2021 TFSA dollar limit of $6,000, was ($13,978.85), with the numbers in brackets indicating that the Applicant was in an over-contribution position. According to the notice of assessment, as of July 20, 2021, the Applicant had not remedied the over-contribution.

[9] On November 30, 2021, the Applicant withdrew $3,854.34 from his TFSA. It was subsequently only on this date that the CRA ultimately found the Applicant had removed all excess TFSA contributions.

[10] The Applicant registered an objection with the Appeals Division regarding his 2020 notice of assessment and on September 17, 2021, an Appeals Officer confirmed the assessment.

[11] On November 13, 2021, the Applicant paid the over-contribution tax for 2020, with interest. However, the Applicant continued to pursue the tax cancellation process, asking the CRA to waive the tax on the excess TFSA contributions.

[12] On January 18, 2022, the Applicant received a denial letter from the CRA regarding his request for waiver of the taxes owing on his 2020 excess TFSA contributions. The CRA determined that the Applicant did not withdraw all remaining excess in a reasonable time and as a result, the CRA could not grant a request for cancellation of tax in the Applicant's situation.

[13] On March 30, 2022, the Applicant received a denial letter from the CRA regarding the waiver of the tax for excess TFSA contributions for the 2021 tax year. Again, the CRA determined that the Applicant did not withdraw all remaining excess in a reasonable time and as a result, the CRA could not grant a request for waiver of the taxes owing.

[14] On April 5, 2022, the Applicant received a TFSA notice of assessment for $1,956.52 tax on excess TFSA amounts for the 2021 tax year. The notice of assessment also indicated that his

unused TFSA contribution room at the end of 2021 was ($24,311.97), acknowledging total withdrawals from his TFSA in 2021 of $32,385.34, adding $6,000 to his contribution room for the 2022 dollar limit, resulting in total TFSA contribution room as of January 1, 2022 of $14,451.37. On this date, the Applicant opened a second formal dispute with the CRA.

[15] On May 4, 2022, the Applicant made a second request under the relief provisions regarding a cancellation of tax assessed on excess TFSA contributions for the 2020 and 2021 tax years.

[16] By way of letter dated August 2, 2022, the CRA (acting on behalf of the Minister) denied the Applicant's second review request, stating:

> We are writing in response to your request of May 4, 2022, asking for a second review under the relief provisions regarding a cancellation of tax assessed on excess TFSA contributions for the 2020 and 2021 tax year(s).
>
> The Income Tax Act gives us the discretion to cancel all or part of any tax on excess TFSA contributions. For such a cancellation to be granted, the tax must have arisen because of a reasonable error and the individual must have acted right away to remove the excess contributions from their TFSA.
>
> A separate CRA official, not involved with the initial decision, has carefully considered the circumstances and facts of your case in relation to the Income Tax Act. We determined that we cannot grant a request to cancel the tax in your particular situation.
>
> In your letter, you stated that as of April 2020, when you [filed] your taxes, you had planned on contributing the maximum allowable amount to your TFSA. You indicated that the following contribution rooms were listed for your TFSA:
>
> - 2020 contribution room $24,521.15
> - 2019 contribution room $45,321.15
> - 2018 contribution room $52,500.00
> - 2017 contribution room $52,000.00

- 2016 contribution room $46,500.00
- 2015 contribution room $41,000.00
- 2014 contribution room $31,000.00
- 2013 contribution room $25,500.00
- 2012 contribution room $20,000.00
- 2011 contribution room $15,000.00
- 2010 contribution room $10,000.00
- 2009 contribution room $5,000.00

You stated that when you [filed] your taxes for the 2021 tax year, you noticed that your contribution room total had been adjusted to remove the contribution room for the 2009-2012 tax years. You explained that you came to Canada in 2013 and that you were mistakenly awarded contribution room for those years when you were not in Canada. You stated that the assessments for the 2020 and 2021 tax years are unfair as you should not have to pay taxes on a mistake made by the CRA. You explained that you were given a contribution room of $20,000.00 for the 2009-2012 tax years when you were not in Canada and made your financial decisions based on this information.

If you become a non-resident of Canada, or are considered to be a non-resident for income tax purposes:

- You will be allowed to keep your TFSA and you will not be taxed in Canada on any earnings in the account or on withdrawals from it

- No TFSA contribution room will accrue for any year throughout which you are a non-resident of Canada

- Any withdrawals made during the period that you were a non-resident will be added back to your TFSA contribution room in the following year, but will only be available if you re-establish your Canadian residency status for tax purposes.

You can contribute to a TFSA up to the date that you become a non-resident of Canada. The annual TFSA dollar limit is not pro-rated in the year of emigration or immigration.

If you make a contribution, except for a qualifying transfer or an exempt contribution, while you are a non-resident, you will be subject to a 1% tax for each month that the contribution stays in the account. You may also be liable for other taxes.

A review of your situation and our records show that the removal of excess TFSA contribution(s) did not occur within a reasonable time

> frame. The CRA sent you a Notice of Assessment dated July 20, 2021 regarding excess contributions made in your account in 2020. Excess contributions were only withdrawn from your account on November 30, 2021.
>
> Your residency status was updated on December 2, 2020 to include an immigration date of December 30, 2013.
>
> We have to confirm that, after reviewing the documents you sent us and the information we have, no circumstances support cancellation of the tax on your excess TFSA contributions.
>
> The initial assessments are correct; therefore, we will not be changing your 2020 or 2021 Form RC243, Tax-Free Savings Account (TFSA) Returns.
>
> [Emphasis added.]

[17] On September 1, 2022, the Applicant commenced this application for judicial review

III. Issue and Standard of Review

[18] The sole issue raised on this application is whether the decision of the CRA to refuse to cancel/waive the tax on the excess TFSA contributions for each of the 2020 and 2021 tax years was unreasonable.

[19] The Respondent submits, and I agree, that when a court reviews the merits of an administrative decision, the presumptive standard of review is reasonableness. No exceptions to that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25].

[20] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, Justice Rowe explained what is required for a reasonable decision and what is required of a Court reviewing on the reasonableness standard. He stated:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "…what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

IV. Analysis

[21] Subsection 207.06(1) of the *Income Tax Act* [*ITA*] provides for discretionary relief against any Part XI.01 tax payable on over-contributions to a TFSA. Section 207.06(1) of the *ITA* provides:

Waiver of tax payable	**Renonciation**
(1) If an individual would otherwise be liable to pay a tax under this Part because of section 207.02 or 207.03, the Minister may waive or cancel all or part of the liability if	(1) Le ministre peut renoncer à tout ou partie de l'impôt dont un particulier serait redevable par ailleurs en vertu de la présente partie par l'effet des articles 207.02 ou 207.03, ou l'annuler en tout ou en partie, si, à la fois :
(a) the individual establishes to the satisfaction of the Minister that the liability arose as a consequence of a reasonable error; and	a) le particulier convainc le ministre que l'obligation de payer l'impôt fait suite à une erreur raisonnable;
(b) one or more distributions are made without delay under a TFSA of which the individual is the holder, the total amount of which is not less than the total of	b) sont effectuées sans délai sur un compte d'épargne libre d'impôt dont le particulier est titulaire une ou plusieurs distributions dont le total est au moins égal au total des sommes suivantes :
(i) the amount in respect of which the individual would otherwise be liable to pay the tax, and	(i) la somme sur laquelle le particulier serait par ailleurs redevable de l'impôt,
(ii) income (including a capital gain) that is reasonably attributable, directly or indirectly, to the amount described in subparagraph (i).	(ii) le revenu, y compris le gain en capital, qu'il est raisonnable d'attribuer, directement ou indirectement, à la somme visée au sous-alinéa (i).

[22] Accordingly, a tax payer seeking a waiver of Part XI.01 tax must establish to the satisfaction of the Minister that: (a) the excess amount or cumulative excess amount on which tax

is based arose as a consequence of reasonable error; and (b) steps were taken to remove the excess TFSA contributions without delay.

[23] As is evident from a review of the CRA's decision, the CRA only took issue with the period of time that it took the Applicant to remove the 2020 and 2021 excess TFSA contributions, thus accepting that the excess contributions arose as a result of a reasonable error.

[24] In considering what constitutes "without delay" for the purpose of subsection 207.06(1)(b), this Court has accepted that the Minister has applied his discretion to define "without delay" as within 30 days of being aware of the over-contribution [see *Posmyk v Canada (Attorney General)*, 2021 FC 393 at para 4].

[25] In relation to the 2020 excess contribution, the Applicant stated in his affidavit that in April of 2021 he discovered (based on his Statement of Account from Simplii Financial) that the CRA had adjusted his TFSA room by decreasing it by $20,000.00. He then withdrew $29,000.00 from his TFSA the same month, which is within 30 days of becoming aware (solely through his own efforts) of the over-contribution.

[26] The Respondent takes the position that the Applicant became aware of the 2020 TFSA excess contribution by July of 2021 when he received his notice of assessment and did not completely remedy the excess contribution until November 30, 2021. The Respondent asserts that for the purpose of determining excess contributions, subsection 207.01(1) of the *ITA* defines "unused contribution room" with reference to the "end of a calendar year" and as such, available

contribution room is only calculated at the end of a calendar year. As a result, the Respondent states that the CRA determined that the Applicant continued to over-contribute when he made additional contributions in May and July of 2021 totalling $6,133.12. The Respondent asserts that, as a result, the Applicant maintained excess amounts in his TFSA for all months up until November 2021, notwithstanding the significant withdrawal in April 2021. As the final amounts were only withdrawn by November 30, 2021, the Respondent asserts that the Applicant did not act "without delay".

[27] Put differently, the Respondent's position is essentially that, notwithstanding that the Applicant remedied the $20,000.00 over-contribution in April of 2021 by withdrawing $29,000.00 from his TFSA, the correction to his over-contribution position was effectively "vitiated" by his additional contributions in May and July of 2021, as he was not entitled to make any further contributions to his TFSA in 2021, as unused contribution room is only calculated at the end of 2021 as per subsection 207.01(1) of the *ITA*.

[28] The difficulty that I have with the Respondent's submission is that, as rightly conceded by the Respondent, subsection 207.06(1) (which provides for the taxpayer relief at issue) does not incorporate the definition of "unused TFSA contribution room" from subsection 207.01(1). The Respondent has pointed the Court to no authority or any documentation, such as internal CRA manuals or documents, in support of the Respondent's submission that the definition applies to the taxpayer relief provision.

[29] Moreover and more importantly, this rationale for not "crediting" the Applicant for the $29,000.00 withdrawal (which amount was more than the excess contribution) in April of 2021 (which was within the 30-day window) appears nowhere in the decision. The decision provides no explanation whatsoever as to how the CRA determined that the excess contribution was only remedied on November 30, 2021 and why the April 2021 withdrawal did not impact the CRA's decision regarding the timeliness of the correction.

[30] It is particularly troubling to reconcile the CRA's position that the Applicant did not remedy his over-contribution in a timely manner when he removed the entirety of the over-contribution from his TFSA before the CRA had even told him that the CRA had corrected their mistake and as a result, determined that he had made an over-contribution.

[31] In relation to the 2021 tax year, while the Respondent now advances an explanation as to why the contributions to the Applicant's TFSA in May and July of 2021 constituted further over-contributions (namely, because unused contribution room for 2021 is only calculated at year end), this explanation is found nowhere in the reasons for decision.

[32] In such circumstances, I find that the decision regarding both the 2020 and 2021 taxation years is unintelligible and lacks justification and transparency. As a result, the application for judicial review shall be granted.

[33] In terms of relief, as noted above, the Applicant seeks: (a) cancellation of $1,956.52 in tax assessed on his excess contribution for the 2021 tax year, together with interest accrued on that

amount; (b) reimbursement of $1,294.26 paid for taxes assessed on his excess contribution for the 2020 tax year; (c) inclusion of his TFSA contribution limit in his “tax filing” notice of assessment; and (d) compensatory damages of $5,000.00 for mental, physical, emotional and financial distress. However, such relief is not available from this Court on this application. As stated by this Court in *Kapil v Canada Revenue Agency*, 2011 FC 1373 at para 20 and affirmed in *Gekas v Canada (Attorney General)*, 2019 FC 1031 at para 32:

> 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 favour, 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: [citation omitted].

[34] Accordingly, the decision shall be set aside and the matters remitted for re-determination by a different CRA officer.

[35] As the Applicant has not sought his costs of this application, none shall be awarded.

JUDGMENT in T-1783-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Attorney General of Canada as respondent.

2. The application for judicial review is granted.

3. The Canada Revenue Agency's second review decision of the Applicant's request for waiver of the taxes on the excess contributions to his Tax Free Savings Account for the 2020 and 2021 tax years is set aside and the matter is remitted for re-determination by a different Canada Revenue Agency officer.

4. There shall be no costs of this application.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1783-22
STYLE OF CAUSE:	ENWELIKU CALVIN OSSAI v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MARCH 6, 2023
REASONS FOR JUDGMENT AND JUDGMENT:	AYLEN J.
DATED:	MARCH 7, 2023

APPEARANCES:

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