Federal Court  Cour fédérale

Date: 20110421

Docket: T-1822-10

Citation: 2011 FC 481

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 21, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

JACQUES FERRON

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review filed by Jacques Ferron (the applicant) under subsection 18(1) of the *Federal Courts Act*, R.S., 1985, c. F-7, of two decisions of the Canada Revenue Agency (the CRA) denying the request for a waiver of the Part X.1 tax under subsection 204.1(4) of the *Income Tax Act*, R.S., 1985, c. 1 (the ITA), in relation to the applicant's excess registered retirement savings plan (RRSP) contributions for the 2003 to 2007 taxation years, and the

applicant's request for tax relief under subsection 220 (3.1) of the ITA in relation to the same excess contributions. The applicant is representing himself.

[2] For the following reasons and in spite of the sympathy I feel for the applicant's situation, I cannot allow the application for judicial review.

I. Factual background

[3] The applicant is a farmer. Starting in 1998, he acted on an initiative of Agropur that allowed him to transfer reported dividends, which would paid seven or nine years later, to his RRSP.

[4] On March 5, 2007, the CRA sent the applicant a letter informing him that he had made excess contributions to his RRSP for the 2003 to 2005 taxation years and that these excess contributions were taxable. The letter set out the following courses of action he could take in order to rectify the situation:

- He would need to file a T1-OVP return if he decided not to withdraw his excess contributions no later than 90 days after the end of the taxation year for each year his contributions exceeded the allowable limit and pay tax on those contributions;

- He could also withdraw his excess contributions, in which case he would have to declare them as income on his return, but would benefit from a deduction equal to the amount withdrawn.

[5] At the hearing, the applicant submitted that he had either never received the letter or did not recall having received it. This statement does not appear in the applicant's affidavit and the letter was sent to the correct address. I therefore have no reason to believe that this letter was not sent to the applicant.

[6] The applicant did not reply to this letter.

[7] On November 6, 2008, the CRA sent him another letter informing him that it was granting him an additional 30 days to file his T1-OVP returns, failing which it would establish its own tax assessments based on the information it had at its disposal. At the hearing, the applicant indicated that he had in fact received this letter and that he had forwarded it to his accountant. This information did not appear in the applicant's affidavit, but I will interpret this as an admission that he did indeed receive this letter. Thus, even if the applicant did not receive or was unaware of the letter dated March 5**,** 2007, informing him of his excess contribution, the letter dated November 6, 2008, clearly referred to the letter dated March 5, 2007. It would therefore have been easy for the applicant or his accountant to contact the CRA and request a copy of the letter dated March 5, 2007. However, the applicant never replied to this second letter form the CRA nor does the evidence show that his accountant replied on his behalf.

[8] On March 9, 2009, the CRA issued the applicant Notices of Assessment of taxes payable on excess RRSP contributions for the years 2003 to 2007 based on the information it had at its disposal.

[9] On June 2, 2009, the applicant's accountant sent Notices of Objection for each Notice of Assessment. On November 24, 2009, the CRA dismissed the objections for the years 2003 to 2006, but allowed the objection to the assessment for the 2007 taxation year in order to take into account a withdrawal of $5,000. On January 11, 2010, the CRA conducted a reassessment of the 2007 taxation year.

[10] On or about June 1, 2010, the applicant sent the CRA a letter explaining his situation:

> [TRANSLATION]
>
> Hello, I am writing you today about a Notice of Assessment of RRSP contributions for 2007-2006-2005-2004-2003.
> I transferred some reported dividends by Agropur which will only be paid out 7 or 8 years from now into my RRSP.
> I filled out the form in Dec. when the financial statements had not been completed. Agropur asked us, if we wanted to transfer these into our RRSPs, to indicate this with a check mark and return the form by December 15 of each year.
> In 2008 I received a Notice of Assessment of RRSP over-contribution with penalties, taxes and interest in the amount of $8,957.17.
> I made the contribution with no wrongful intent. I gained no tax benefit through this RRSP contribution.
> I made the transfer to set aside a little money for my retirement.
> I cannot de-register my remaining RRSPs without paying taxes.
> I cannot even withdraw my (shares/RRSPs) because they have not been paid out by Agropur.
> Thank you for your understanding.

[11] While the applicant's letter did not include any specific request or rely on any particular statutory provision, the CRA interpreted it as a request for a waiver of tax under subsection 204.1(4)

of the ITA and a request for relief from payment of penalties and interest under subsection 220 (3.1) of the same Act.

[12] Under subsection 204.1 (4) of the ITA, the CRA may waive the tax on the excess RRSP contribution if the excess amount on which the tax is based arose as a consequence of reasonable error on the part of the taxpayer and reasonable steps are being taken to eliminate the excess:

Waiver of tax	Renonciation
204.1 (4) Where an individual would, but for this subsection, be required to pay a tax under subsection 204.1(1) or 204.1(2.1) in respect of a month and the individual establishes to the satisfaction of the Minister that (a) the excess amount or cumulative excess amount on which the tax is based arose as a consequence of reasonable error, and (b) reasonable steps are being taken to eliminate the excess, the Minister may waive the tax.	204.1 (4) Le ministre peut renoncer à l'impôt dont un particulier serait, compte non tenu du présent paragraphe, redevable pour un mois selon le paragraphe (1) ou (2.1), si celui-ci établit à la satisfaction du ministre que l'excédent ou l'excédent cumulatif qui est frappé de l'impôt fait suite à une erreur acceptable et que les mesures indiquées pour éliminer l'excédent ont été prises.

[13] On September 23, 2010, Luc Tremblay, the Minister's delegate, denied the applicant's request for a waiver of tax on the following grounds:

- The CRA considers an error to be acceptable when it is involuntary and exceptional and it considers a reasonable amount of time to be that which allows the taxpayer to take the necessary steps towards withdrawing the excess amount from his or her RRSP following a

notice from the CRA. The applicant did not allege any circumstances that were exceptional or beyond his control to justify his request.

- Each year the applicant received a Notice of Assessment which included a "RRSP Deduction Limit Statement" for the following year.
- The applicant did not file the required T1-OVP returns for the years 2003 to 2007.
- Given that the applicant failed to respond to the letters the CRA sent to him on March 5, 2007, and November 6, 2008, in which he was advised of his excess contributions and of the fact that he was required to file T1-OVP returns, and that he failed to file his T1-OVP returns on time, the CRA conducted an arbitrary assessment on March 9, 2009, pursuant to subsection 152(7) of the ITA.
- The assessments were upheld by the CRA's appeals division, which dismissed the applicant's objections.
- The applicant has not paid any of the sums owed by him for his RRSP over-contributions.

[14] The letter of refusal specified that the applicant could request an impartial review of the decision by contacting the taxation centre if he was of the view that discretion had not been exercised in fair and reasonable manner. The applicant did not avail himself of this procedure. The letter also indicated that the applicant could choose to apply for a judicial review of the decision.

[15] Under subsection 220 (3.1) of the ITA, the CRA has the discretion to provide relief to a taxpayer by waiving penalties and interest owed to it:

Waiver of penalty or interest	Renonciation aux pénalités et aux intérêts

(3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	(3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[16] The applicant's request for tax relief was denied on September 23, 2010, by the Minister's delegate, Hélène Desgagné, on the following grounds:

- The CRA generally exercises its discretion to waive or cancel all or any portion of any penalty or interest assessed when failure to comply with the Act results from circumstances beyond the taxpayer's control (flood, fire, postal strike, serious illness or accident, serious mental distress such as a death in the immediate family, etc.).
- The applicant's situation did not correspond to the criteria with regard to extraordinary circumstances provided in the legislation.

[17] The letter of refusal indicated that the applicant could have requested that a director of a taxation centre or tax services office conduct an independent review of the decision if he was of the view that discretion had not been exercised in a fair and reasonable manner. The applicant did not avail himself of this procedure.

[18] In support of his application for judicial review, the applicant is claiming that the CRA did not exercise its discretion in a fair and reasonable manner. He claims that he withdrew the excess contributions as quickly as possible and that several extraordinary circumstances befell him during the periods in question. These circumstances prevented him from resolving the situation.

II. Issues

[19] The following issues are raised in this application for judicial review:

Preliminary issues:

a. Is the applicant's application admissible?
b. Should the new evidence adduced by the applicant in support of his application for judicial review be taken into consideration?

Main issues:

c. Is the CRA's decision to deny the request for a waiver of the Part X.1 tax under the ITA unreasonable?
d. Is the CRA's decision to refuse the request for tax relief unreasonable?

A. *Preliminary issues*

1) Is the applicant's application admissible?

[20] The application for judicial review filed in the registry of the Court by the applicant on January 28, 2011, contains a number of irregularities. His memorandum of fact and law does not conform to Rule 70 of the *Federal Courts Rules* SOR/98-106 (Rules) and the affidavit is not sworn as required.

[21] The application also challenges two decisions of the CRA and therefore does not conform to Rule 302 of the Rules. It is worthwhile to note that is was the CRA which decided to process the applicant's request using two different statutory provisions and that this is what led to the two decisions. In that context, I find that the application for judicial review can address the two decisions rendered by the CRA.

[22] Under paragraph 72(2)(*b*) of the Rules, the Court may accept the filing of documents even if they are irregular. In the present case, the applicant is representing himself and obviously has neither legal expertise nor much knowledge of computers. He did not have access to the necessary information to file a record in accordance with the Rules. Furthermore, in its record, the respondent did not object to the filing of these documents. Given the circumstances and in the interest of fairness, I will, in this case, exercise my discretion to accept the applicant's irregular documents and declare the application to be admissible.

2) Should the new evidence adduced by the applicant be taken into consideration?

[23] The respondent argues that the information in paragraphs 2 to 8, 14, 15 and 17 of the applicant's affidavit, which relates to circumstances that befell the applicant as well as his correspondence with CRA representatives, and the exhibits filed in support of this information, are inadmissible because they were not before the CRA when it rendered its decisions. As a general rule, the judicial review of an impugned decision must be based on an analysis of the record that was before the administrative decision-maker.

[24] This Court has held that evidence that was not before the administrative decision-maker at the time of rendering a decision cannot be used to review that decision. This case law rule is well known in immigration matters (*Zheng v. Canada (Minister of Citizenship and Immigration*, 103 A.C.W.S. (3d) 163 at para. 18, 13 Imm. L.R. (3d) 226). This was also the approach that was taken in a tax law matter in which there was a judicial review of a CRA decision regarding a request for tax relief, as is the case here (*McLean v. Canada (Revenue Agency*) 2007 FC 1072 at para. 21, 164 ACWS (3d) 539 [*McLean*]:

> The law is equally clear that I cannot consider evidence that was not before the decisionmaker. By way of example, Mr. McLean has included with his affidavit medical evidence and the particulars of his family law litigation that were not shared with the department. These I cannot consider. To the extent that they may support Mr. McLean's claim, they could have been provided to the department along with his request for relief.

[25] Paragraphs 2 to 8 of the affidavit and the exhibits in support relate to personal and family incidents experienced by the applicant. Paragraphs 14, 15, and 17 relate to discussions and meetings between the applicant and CRA employees after the decisions that are the subject of this review were rendered.

[26] At the hearing, the applicant submitted that he had informed Ms. Desgagné of the circumstances that had befallen him, but without going into great detail. However, I cannot help but note that the applicant's letter to the CRA did not contain this information and that in his affidavit he does not mention having told Ms. Desgagné or Mr. Tremblay about these particular circumstances. Furthermore, in her affidavit, Ms. Desgagné states that the circumstances alleged by the applicant in his affidavit were not cited by him in support of his request on June 1, 2010. I therefore find, on a balance of probabilities, that the CRA did not, when it rendered its decisions, have before it the information relating to the applicant's personal circumstances on which he is now relying. Consequently, this information will not be taken into consideration in determining the reasonableness of the CRA's decision in this judicial review.

III. Main Issues

B. *Standard of review*

[27] The decision of whether to waive taxes payable on RRSP over-contributions is a matter within the discretion of the CRA and is also reviewable on a standard of reasonableness. (*Gagné v. Canada (Attorney General)*, 2010 FC 778, at paras. 10 to 15, 371 FTR 150 [*Gagné*]; *Lepiarczyk v. Canada (Revenue Agency)*, 2008 FC 1022, at paras. 16 and 17, 334 FTR 291).

[28] The decision of whether to grant general tax relief is also a matter within the discretion of the CRA and is also reviewable on a standard of reasonableness (*Slau Ltd v. Canada (Revenue Agency)*, 2009 FCA 270 at paras. 26 and 27, 3 Admin L.R. (5th) 251; *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 at paras 24 and 25 (available on CanLII)).

3) Did the CRA err by not granting the applicant's request for a waiver of tax?

[29] According to the case law, the two parts of the test imposed by subsection 204.1 (4) of the ITA, namely, that the excess amount arose as a consequence of a reasonable error and that steps were taken to eliminate the excess amount, must both be successfully met because the test is conjunctive (*Gagné*, above, at para. 23).

[30] A reasonable error is similar to a due diligence defence (*Kerr v. Canada (Revenue Agency)*, 2008 FC 1073 at para. 37, 172 ACWS (3d) 243). The applicant must establish that he was mistaken and that this mistake led him to over-contribute. He must then establish that the mistake was reasonable in the circumstances (*Corporation de l'École Polytechnique v. Canada*, 2004 FCA 127 at para. 30, 132 ACWS (3d) 689). As for the steps taken to eliminate the overpayment, they too must have been reasonable. Reasonableness is assessed on a case-by-case basis.

[31] In this case, it appears from the record that the applicant failed to respond to the CRA's letters informing him about his over-contributions to his RRSP and how to rectify the situation. He also failed to take steps to withdraw the over-contributions within a reasonable amount of time. The applicant has not successfully met the test established by the case law.

[32] In the circumstances, the CRA's decision to deny the request for a waiver of tax payable on excess RRSP contributions was reasonable. It is also in accordance with the legislation and applicable case law. The intervention of the Court is not warranted.

4) Did the CRA err when it denied the applicant's request for tax relief?

[33] The CRA exercises its power by relying on, among other things, the *Guidelines for the Cancellation and Waiver of Interest and Penalties*. These do not, however, have the force of law and are not binding on the CRA. The case law clearly establishes that the CRA's power in this regard is discretionary and is to be exercised only in exceptional circumstances (*Jenkins v. Canada (Revenue Agency)*, 2007 FC 295, at para. 13, 350 FTR 1):

> In reviewing the decision in this case, it is important to keep in mind that the power of the Minister, as set out in subsection 220(3.1) of the Act, is a discretionary power and as such, there is no obligation on the part of the Minister to reach any given conclusion. Furthermore, the liability of a taxpayer to pay penalties and interests for the late filing of income tax returns results from the application of the Act itself, not from any discretionary decision of the Minister to impose such penalties and interests. Therefore, the discretionary power of the Minister is limited to providing exceptional relief from the operation of the Act, where the Minister believes such relief to be warranted.

[34] The Court shall only intervene only if the CRA overlooked important evidence, considered evidence that was not relevant or made a decision that clearly cannot be rationally supported (*McLean*, above, at para. 18):

> The Court cannot substitute its own view for that of the Minister or his delegates simply because the Court might have reached a different conclusion on the same facts. By way of example, I must be satisfied that the decisionmaker overlooked important evidence, considered evidence that ought not to have been considered, made material errors of fact, or made a decision that cannot be rationally supported by the reasons given for it.

[35] In this case, the CRA denied tax general relief on the ground that this type of relief is normally justified by exceptional circumstances or events that were beyond the taxpayer's control

and that the applicant had not demonstrated that either of these situations existed in his request. In fact, it appears from the evidence that the applicant in his request did not cite any exceptional circumstances that would have led the CRA to grant him relief.

[36] In his letter sent on or about June 1, 2010, the applicant was content to argue that he had not over-contributed with any wrongful intent, that he had only set aside some money for his retirement, that he had gained no tax benefit from these over-contributions, that he was unable to withdraw his dividends because they had not yet been paid out by Agropur and that he could not withdraw these contributions without having to pay taxes on them. The personal and family circumstances he is now citing were not mentioned in this letter. This information was therefore not before the CRA when it made its decision and it cannot be faulted for not having considered this information.

[37] Thus, the CRA did not overlook or fail to consider important evidence when it made its decision. Its decision not to grant general tax relief is completely reasonable. It falls within the range of acceptable outcomes in respect of the facts and law.

[38] For these reasons, the Court’s intervention is therefore not warranted.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed without costs.

"Marie-Josée Bédard"
Judge

Certified true translation

Sebastian Desbarats, Translator

SOLICITORS OF RECORD

DOCKET:	T-1822-10
STYLE OF CAUSE:	JACQUES FERRON v. CANADA REVENUE AGENCY
PLACE OF HEARING:	Montréal, Quebec
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APPEARANCES:

Jacques Ferron	FOR THE APPLICANT
Ian Demers	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jacques Ferron Saint-Léon, Quebec	FOR THE APPLICANT
Myles J. Kirvan Montréal, Quebec	FOR THE RESPONDENT