Federal Court  Cour fédérale

Date: 20211217

Docket: T-433-20

Citation: 2021 FC 1439

Ottawa, Ontario, December 17, 2021

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

MARTIN FROEHLING

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant over-contributed to his Registered Retirement Savings Plans [RRSPs] for the 2018 taxation year and as a result, he was assessed tax on the excess contribution by the Minister of National Revenue [Minister] pursuant to section 204.1 of Part X.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [*ITA*]. The Applicant requested that the Minister exercise their discretion, pursuant to section 204.1(4), to waive the Part X.1 tax on the RRSP over-contribution,

which request was denied following both a first level and second level review. On this application, the Applicant seeks judicial review of the Minister's refusal to waive the Part X.1 tax.

[2] For the reasons that follow, I find the Minister's decision to be reasonable and accordingly, the application for judicial review shall be dismissed.

II. Background and Decision at Issue

[3] At the relevant time, the Applicant's RRSPs comprised his personal RRSP and a spousal RRSP set up in the name of his spouse, both of which he had been contributing to since 2010.

[4] In the 2018 tax year, the Applicant made total RRSP contributions exceeding his allowable RRSP contribution limit for that tax year.

[5] In March of 2019, the Applicant discovered his over-contribution and his tax preparer submitted a request to the Minister to waive any penalty and/or interest charges resulting from the over-contribution [First Request]. The letter stated:

> The purpose of this letter is to request leniency and a reversal of potential penalties and interest charges.
>
> The taxpayer Martin Froehling was under the impression that **spouses were able to combine and share their RRSP contribution room**. He was unaware of the existence of an over contribution to his RRSP until preparation of his 2018 tax return began. He had no intention of making an over contribution but rather made contributions using his own RRSP added to his spouse's contribution room.
>
> Now that Mr. Froehling has understood the significance of his situation he is taking steps to meet all these obligations. He understands now what it all means, the fact that he has in fact made

> an over contribution, that this needs additional forms (OVP) to be filed, and that he needs to withdraw the excess contribution. He will be withdrawing the excess within the next 5 business days.

[6] In March of 2019, the Applicant also filed a completed Individual Tax Return for RRSP, SPP and PRPP Excess Contribution (known as a T1-OVP return) for the 2018 tax year and submitted a payment of tax in the amount of $1,008.25.

[7] In May of 2019, the Minister issued a Notice of Assessment in relation to the T1-OVP return, assessing the amount of Part X.1 tax owing as $1,040.53. No penalty was assessed and a small amount of arrears interest was assessed, although subsequently retroactively adjusted to nil as the Applicant's tax remittance of $1,008.25 was subsequently credited against the Applicant's T1-OVP account. The balance of the taxes owing ($32.28) was subsequently paid by the Applicant in August 2019.

[8] By way of letter dated September 30, 2019, the Minister denied the First Request, stating:

> Subsection 204.1(4) of the Income Tax Act lets the Minister of National Revenue use discretion to cancel or waive Part X.1 tax. The minister can do this if you made RRSP/PRPP/SPP excess contributions because of a reasonable error and you took or are taking reasonable steps to remove the excess.
>
> Generally, reasonable error means that you did not intend to overcontribute and it does not include:
>
> - Misunderstanding your RRSP limit statement.
> - Misunderstanding or not knowing the rules and regulations about RRSP contributions.
>
> Generally, taking reasonable steps means that you have taken or are taking steps to eliminate excess as quickly as possible.

> Even though your RRSP excess contributions were not intentional, we do not consider your circumstances to be reasonable error. Under our self-assessment system of taxation, individuals are responsible to keep track of their RRSP contributions made, and to make the contributions within the allowable limits and RRSP legislation, to review their notices of assessment or reassessment to verify the information we provide, and to request information from the CRA when needed.
>
> After carefully reviewing the available information, we conclude that cancelling the Part X.1 tax would not be justified for the year(s) 2018.

[9] On October 9, 2019, the Applicant submitted a request for an impartial second review of the request for waiver of the Part X.1 tax [Second Request], in which he provided additional information. Specifically, his letter stated:

> In December of 2018 I over contributed to my personal and wife's spousal RRSP in error. I made a mistake in estimating the amount of room we had combined. This was not in any way meant to take advantage of the RRSP contribution program; it was an honest error.
>
> My wife's inheritance, from the passing of her grandmother, was more money than we previously ever had on hand and we thought it prudent to fill up both of our RRSP contributions to their limit. I am asking for leniency or cancelling the tax imposed on the following basis:
>
> 1. We took immediate steps to report it in writing and verbally to CRA.
>
> 2. We took immediate steps to remove the excess funds.
>
> 3. We set up an RRSP in my wife's name (non-spousal) and allocated the correct amount to it instead.
>
> 4. The period in error was very brief (Dec 18 –Mar 19).
>
> 5. The total interest earned by both of us in Dec of 2018 in these two accounts was actually negative to the tune of $13,779 (snips of Manulife summaries included).
>
> In summary, I understand my mistake and will not repeat it. I believe I made an honest error, reported and corrected it as promptly as

> possible. Additionally, we were penalized significantly by the negative interest rate. I would be very grateful if you would weigh all of these factors and hopefully reverse the previous decision.

[10] By way of letter dated March 4, 2020, the Minister denied the Second Request, stating:

> Our records show that you have been making and claiming both personal and spousal RRSP contributions for deduction from income since 2010. You completed your income tax and benefit returns for those years and received your notices of assessment, each of which include an RRSP deduction limit statement. Therefore, you should have been aware that all RRSP contributions you made (i.e. both personal and spousal) had to be made within your personal allowable RRSP deduction limit, as stated on your notices of assessment.
>
> You stated that the funds were received from an inheritance and this was the first time you "had more money than ever on hand" so your intention was "to fill up your contribution limits". You are responsible for making sure that you make contributions within the guidelines set out in the legislation for RRSP contributions.
>
> You need to pay tax on your excess contributions because you contributed to an RRSP when your RRSP deduction limit was not high enough. This tax applies even if you did not receive a tax benefit from the excess contributions or your investment did not gain any value. We do not consider this to be a reasonable error.
>
> Even though you made an "honest" and unintentional error and disclosed it to us as soon as possible, no circumstances warrant cancelling of the tax on your excess RRSP contributions as reasonable error has not been established.
>
> Furthermore, you have not submitted documentation to show that the excess funds have been removed from your RRSP account. However, please be advised this does not change our decision, as reasonable steps are only looked at if reasonable error has been met. As indicated above, it has not.

III. Preliminary Issues

[11] The Respondent has raised a number of preliminary issues arising from the Applicant's affidavit and his memorandum of fact and law. The Court canvassed these issues with the parties at the hearing and received the Applicant's submissions in relation thereto.

[12] The first issue is whether the Court should strike paragraph 6 and exhibit C to the Applicant's affidavit, which evidence addresses the removal of the over-contribution from the Applicant's RRSP. The Respondent asserts that this evidence should be struck as it was not before the decision-maker.

[13] As a general rule, only evidence that was before the decision-maker is admissible on an application for judicial review [see *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 86]. While there are exceptions to this general rule, I find that the Applicant has not demonstrated that any of the exceptions would apply in relation to this evidence. Accordingly, paragraph 6 and exhibit C to the Applicant's affidavit are hereby struck and will not be considered in reaching my decision. That said, the contested evidence relates to the second branch of the section 204.1(4) inquiry (whether reasonable steps were taken by the Applicant to eliminate the excess contribution) and the Minister's decision expressly made no determination in relation to the second branch given that the first branch of the test had not been met. Accordingly, the contested evidence is, in any event, not relevant to the Court's determination as to the reasonableness of the Minister's decision.

[14] The second issue is whether the Applicant should be permitted to raise a new ground of review in his memorandum of fact and law that was not pleaded in his Notice of Application. In

his memorandum of fact and law, the Applicant asserts that at no time did CRA provide him with a definition of what is deemed a "reasonable error" for the purpose of section 204.1(4) of the *ITA*. The Respondent submits that this is a new ground of review, as the Notice of Application asserts that the sole ground of review is whether the Minister's decision was reasonable. The Respondent relies on the Federal Court of Appeal's decision in *Tl'azt'en Nation v Sam*, 2013 FCA 226, in support of its assertion that the Applicant was obligated to plead this ground of review in his Notice of Application and as he failed to do so, he should not be permitted to raise it for the first time in his memorandum of fact and law. While the Federal Court of Appeal has noted that there is some room for discretion in certain circumstances, the Respondent asserts that none of those circumstances are present in this matter. At the hearing, the Applicant asserted that this ground of review is related to his assertion that the decision itself is unreasonable and thus should be considered by the Court.

[15] Having considered the Federal Court of Appeal's guidance on the exercise of discretion to consider this ground of review as set out in *Tl'azt'en Nation,* I will not exercise my discretion in the Applicant's favour. The new ground of review is, on the most generous construction, only tangentially related to the overall reasonableness of the decision. However, I find that the new ground of review has no merit, as the Minister did in fact provide the Applicant with guidance as to the meaning of "reasonable error" in the Minister's decision on the First Request. Moreover, the Minister was under no duty to provide the Applicant with advice as to what constitutes a reasonable error [see *Perinpanayagam v TFSA Processing Unit*, 2020 FC 1111 at para 41].

[16] The third issue relates to the Applicant's request that the Court waive the cost order issued by Prothonotary Ring in relation to the Applicant's unsuccessful Rule 312 motion. The Applicant asserts that if he is successful on the application, the previous cost order should be waived as he would never have had to bring the motion if the Minister had properly waived the taxes following his First or Second Request.

[17] As I have determined that the application for judicial review should be dismissed, the Court need not consider whether the cost order should be waived. That said, it is not open to the Applicant to request a "waiver" of the cost order on this application. If the Applicant disagreed with the cost order, the proper procedure would have been to commence an appeal of Prothonotary Ring's order pursuant to Rule 51 of the *Federal Courts Rules* within the time prescribed by that Rule, which he did not do.

IV. Remaining Issue and Standard of Review

[18] The sole remaining issue is whether the decision of the Minister to refuse to waive the Part X.1 tax 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 [*Canada (MCI) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 23, 25].

> 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).

V. Analysis

[20] Subsection 204.1(4) of the *ITA* provides for discretionary relief against any Part X.1 tax payable on over-contributions to an RRSP. Section 204.1(4) of the *ITA* provides:

Waiver of tax	**Renonciation**
(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.	(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.

[21] Accordingly, a tax payer seeking a waiver of Part X.1 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) reasonable steps are being taken to eliminate the excess.

[22] In *Connolly v Canada (Minister of National Revenue)*, 2019 FCA 161, the Federal Court of Appeal considered the test to be applied under subsection 204.1(4) of the *ITA*. The Federal Court of Appeal noted at paragraph 66 that the purpose of subsection 204.1(4) is "to provide relief against the harshness that might result from applying the heavy tax on over-contributions to a taxpayer who can demonstrate that her or his over-contribution resulted from a reasonable mistake and who is taking or has taken reasonable steps to correct the mistake".

[23] In applying subsection 204.1(4), the Federal Court of Appeal held, at paragraph 69, that:

> … in each case, as noted by Rennie J. (as he then was) in Dimovski at para. 16 and Kapil at para. 26, reasonableness will turn on an objective assessment of all the relevant evidence. However, it is important to underscore that, because the Canadian tax system is based on self-assessment, it is incumbent on tax payers to take reasonable steps to comply with the *ITA*, including by seeking advice where necessary: see *R. v. McKinlay Transport Ltd.*, 1990 CanLII 137 (SCC), [1990] 1 S.C.R. 627 at p. 636, 106 N.R. 385; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 at para. 54; see also Dimovski at para. 17 (making this point in the RRSP context). Given this obligation, it is difficult to see how a taxpayer's ignorance about the fact that RRSP contributions are subject to a limit could be considered reasonable. By contrast, being misinformed about the contribution limit after making reasonable inquiries might well constitute a reasonable error. Likewise, the mere fact that a taxpayer has relied on an expert third party for advice is not determinative. Rather, the circumstances of such reliance need to be analyzed to determine if it was reasonable. Thus, reliance on a third party, such as an accountant, in and of itself, neither entitles nor disentitles a taxpayer to relief under subsection 204.1(4) of the ITA.

[24] In *Connolly*, the Federal Court of Appeal ultimately held that the Minister's decision was reasonable in light of the facts that the applicant had put before the Minister. In particular, the Federal Court of Appeal noted that the applicant had provided little detail as to why he made the mistake that resulted in his over-contribution and did not appear to have made any inquiries, whether with his accountant, his bank or his employer, to confirm his RRSP contribution room. As a result, the Federal Court of Appeal concluded that his error likely could not be said to have been a reasonable one.

[25] The Applicant asserts that he did not understand how spousal RRSPs worked, believing that contributions made in his wife's spousal RRSP were calculated against her personal RRSP limit. As a result of this mistake, the Applicant asserts that he over-contributed to his RRSP.

[26] While the Applicant asserts that his error was an honest mistake and that he did not knowingly intend to over-contribute, the test to be met under section 204.1(4) is the reasonability of the error made, not the innocence of the Applicant [*Lepiarczyk v Canada (Revenue Agency)*, 2008 FC 1022 at para 19]. As noted in the decision on the Second Request, the Canadian tax system is based on self-assessment, which means that it is up to individual taxpayers to ensure that they conduct their financial affairs in accordance with the *ITA*. The onus was on the Applicant to ensure that he did not over-contribute to his RRSP and if there was any lack of clarity or understanding as the contribution room available to him, the Applicant was expected to seek advice [see *Connolly, supra* at para 69; *Dimovski v Canada (Revenue Agency)*, 2011 FC 721 at paras 16-17; *Perinpanayagam, supra* at para 38].

[27] I find that the Applicant's evidence before the Minister as to the reasonableness of his error was not unlike the evidence available in *Connolly*. The Applicant did not put before the Minister any evidence as to how the Applicant came to be mistaken in assessing the available contribution room or of any attempt on his part to seek advice as to the available contribution room from a third party, such as his tax preparer, his bank, his employer or the CRA.

[28] Given the evidence before it and in light of the applicable legal principles, I find that it was reasonable for the Minister to reach the conclusion that the Applicant had not established that the excess contribution on which tax was based arose as a consequence of reasonable error. The Minister provided reasons as to why the error made by the Applicant was not reasonable, which reasons demonstrate a rational chain of analysis. It follows that the Minister's decision to refuse

to exercise the Minister's discretion to waive the Part X.1 tax was therefore reasonable in the circumstances.

VI. Conclusion

[29] I find that the Minister's decision was justified, transparent and intelligible, falling well within the range of possible and acceptable outcomes. As a result, this application for judicial review shall be dismissed.

[30] The Respondent seeks their costs of the application. I see no basis to depart from the general principle that as the successful party, the Respondent should recover their costs of the application. With respect to the quantum of costs, the Respondent did not provide the Court with a specific amount but rather asked for costs in accordance with Tariff B. Having considered the Tariff and the circumstances of this application, I am satisfied that costs in the amount of $1,000.00 is reasonable.

JUDGMENT in T-433-20

THIS COURT'S JUDGMENT is that:

1. Paragraph 6 and exhibit C of the Applicant's affidavit are hereby struck.

2. The application for judicial review is dismissed.

3. The Applicant shall pay to the Respondent costs of this application in the amount of $1,000.00, inclusive of disbursements and taxes.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-433-20
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DATE OF HEARING:	DECEMBER 15, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	AYLEN J.
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APPEARANCES:

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Anna Walsh	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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