Federal Court  Cour fédérale

Date: 20111129

Docket: T-1197-10

Citation: 2011 FC 1373

Ottawa, Ontario, November 29, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

SANDEEP KAPIL

Applicant

and

CANADA REVENUE AGENCY AND ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Under subsection 204.1 (1) of the *Income Tax Act*, (RSC, 1985, c 1 (5th Supp.)) (*ITA*) a special tax is owed in respect of contributions made to registered retirement savings plans (RRSP) or accounts in excess of limits permitted by the Act. For each month that excess amounts remain in an RRSP (up to a maximum of 60 months) a tax of 1% is levied on the excess amount. A taxpayer is also required to file annual returns in respect of excess contributions (T1-OVP) and is liable for interest and penalties for failing to do so or for late filing.

[2] The *ITA* also provides for relief from the tax. Section 204.1(4) provides that where the excess amount arose "as a consequence of a reasonable error" and "reasonable steps are being taken to eliminate the excess, the Minister may waive the tax." It is in the context of this statutory scheme that this decision arises.

[3] The applicant seeks judicial review of a June 21, 2010 decision by an official of the Canada Revenue Agency (CRA) exercising an authority delegated by the respondent Minister. By that decision, the official refused to waive applicable taxes on the applicant's cumulative excess contributions to his RRSP for taxation years 2008 and 2009. Review is also sought of a June 11, 2010 decision refusing to waive penalties and arrears interest on excess contributions for the 2008 taxation year. For the reasons that follow, the application is dismissed.

Facts

[4] In 2008, the applicant moved to Montreal, Canada from the United States (U.S.) to join the employ of SAP Labs Canada.

[5] Prior to making the contributions that give rise to this application, the applicant sought the advice of both the CRA and the financial advisors responsible for managing his firm's employee retirement investments. In his affidavit evidence he states that he was given inconsistent advice by both entities. When the applicant first spoke with a CRA representative he was told that he was ineligible to make an RRSP contribution for taxation year 2008, but that on the occasion of a second call to a specialist within the CRA, he was told that he was eligible to make an RRSP contribution for his first Canadian taxation year 2008. Similarly, he claims that a financial advisor/representative

from the company that manages his employer's employee retirement plans confirmed the advice he initially received from CRA to the effect that he was ineligible to make an RRSP contribution. He further states that in a further communication he was advised by another financial advisor/representative that he was eligible to make an RRSP contribution for taxation year 2008.

[6] Under the *ITA*, he was not entitled to make RRSP contributions during his first year of employment in Canada.

[7] Notwithstanding the conflicting advice, the applicant proceeded, in March of 2008, to make a contribution of $18,000.00 to his RRSP through Fidelity Investment Services, the administrator of his employer's RRSP plan. In January 2009, the applicant contributed a further $4,500.00 to his RRSP.

[8] On July 30, 2009, the applicant signed a T30121-A form (Tax Deduction Waiver on the Refund of Unused RRSP Contributions) requesting permission to withdraw excess contributions from his 2008 RRSP. He specified that that he wished to withdraw the sum of $2,425.00 from his account in respect of the 2008 taxation year.

[9] By letter dated September 29, 2009, the CRA informed the applicant that he could withdraw $4,425.00 from this RRSP; however, the applicant was actually only entitled to withdraw $2,425.00 from the RRSP, which he did.

[10] In that same letter, the applicant was advised by the CRA that he had to file a T1-OVP tax return for 2008 and that failure to file this document within 90 days of 2008 year end would result in late-filing penalties as well as arrears interest. The applicant was also advised in that letter that a tax on excess RRSP contributions would be levied for each month that the excess contributions remained in the RRSP.

[11] On November 5, 2009 the CRA received a T3012-A form from the applicant requesting the withdrawal of excess contributions from his 2009 RRSP. Three weeks later, on November 24, 2009 the CRA received a T1-OVP tax return for the 2009 taxation year.

[12] In a December 31, 2009 letter, the CRA informed the applicant that he could withdraw $7,875.00 from his 2008 RRSP. In that letter, the applicant was once again informed that he was required to file a T1-OVP income tax return within 90 days of the year end and that failure to do so would mean that he would be subject to late-filing penalties and arrears interest. He was also further advised that a tax continued to be levied on the excess contributions.

[13] On January 19, 2010, the applicant filed a T1-OVP tax return for taxation year 2008.

[14] On February 9, 2010, a 2009 Notice of Assessment (NOA) was issued. In that NOA, the applicant was assessed $831.00, pursuant to Part 10.1 of the *ITA*, in respect of the special tax on excess contributions. No penalties or arrears interest were imposed at that time. The applicant responded by requesting that the $831.00 tax (in respect of 2009 excess contributions) levied against him be waived.

[15] On March 24, 2010, a NOA in respect of the 2008 tax year was issued by the CRA. In that NOA the applicant was assessed $1,600.00, pursuant to Part 10.1 of the *ITA*, a late-filing penalty of $224.00 the T1-OVP and arrears interest at $91.68

[16] On April 7, 2010, the CRA responded to the applicant's February request for a waiver of the tax. It informed the applicant that his waiver of tax request for both 2008 and 2009 had been refused because the excess contributions were not the product of a reasonable error.

[17] On April 21, 2010, the applicant appealed both the decision not to waive the special tax nor the penalties and taxes with respect to the excessive contributions.

[18] His appeal failed. On June 11, 2010 the applicant was informed by CRA that his request for a waiver of tax on the 2008 and 2009 excessive contributions had been refused. In a June 21, 2010 letter, the applicant was informed that his request for a waiver of penalties and arrears interest with respect to his T1-OVP tax returns and *ITA* Part 10.1 tax for taxation years 2008 and 2009 had also been refused. It was CRA's view that the excess contribution was not the consequence of reasonable error, delay or some other factors beyond his control and as a result, he was not entitled to relief.

Issue

[19] The issue in this case is whether the decisions refusing to issue waivers of taxes, and penalties and arrears interest, respectively, are reasonable per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. These are discretionary decisions and as such, are to be accorded

deference: *Gagné v Canada (Attorney General)*, 2010 FC 778 and *Lepiarczyk v Canada (Revenue Agency)*, 2008 FC 1022.

Analysis

[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 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: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339.

[21] In order succeed in this application for judicial review it is necessary for the applicant to demonstrate that the Minister, when exercising his discretion, committed a reviewable error when he refused the applicant's application for a waiver of (a) tax; and (b) late-filing penalties and arrears interest. The applicant advances three arguments in support of setting aside the decisions; first, that he made reasonable errors; second, he acted with due diligence and took steps to remove the excess contributions; and third, that he relied on CRA advice.

First Ground

[22] The applicant contends that he was not aware that he was precluded as a temporary worker from making RRSP contributions in his first year of Canadian employment. This does not advance

the applicant's case, however. In *Dimovski v Canada Revenue Agency*, 2011 FC 721 at para 17, this Court observed:

> 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] 1 S.C.R. 627 (S.C.C.). 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.

[23] Moreover, Justice Luc Martineau, in *Gagné,* accepted as guidance as to the scope and content of the concept of reasonable error the *Taxation Operations Manual 19(23)0 ''Processing, validation and compliance of registered retirement saving plans and of registered education saving plans'' 8-2008* (the Manual), prepared by CRA and noted that:

> …the following facts do not ordinarily constitute a 'reasonable error:' (a) Ignorance of the law and, specifically, ignorance of the fact that an individual cannot contribute more to his or her RRSP than the deduction limit [and] (b) An error by the taxpayer's representative (for example, an accountant) in preparing his or her tax return.

[24] *Dimovski* and *Gagné* are but two applications of a long standing principle found in many decisions of this Court that the onus is on the taxpayer to know the law. As a result, the applicant's argument that he was ignorant of Canadian law fails.

[25] The evidence offers no explanation as to why the applicant made significant RRSP contributions in the face of inconsistent answers given by CRA and Fidelity. There was advice suggesting that he was not entitled to make these contributions. There was advice suggesting that he was entitled to make these contributions. Put otherwise, there is no reasonable explanation on

the record as to why he chose to follow the advice that was favourable to his tax position as opposed to the advice that was unfavourable. Inconsistent advice is not the same as incorrect advice or misleading advice. Accepting all of the applicant's evidence as true, it is, when assessed objectively, an indicia of a potential problem, not a window or lacunae of which a reasonable person would hope to exploit to their advantage.

[26] A reasonable error has two characteristics: the applicant must establish that he was mistaken as to the factual situation (subjective characteristic) and that the mistake was reasonable in the circumstances (objective characteristic). Again, accepting the applicant's affidavit evidence, while the applicant here has met the subjective portion of the test, he has not met the second portion of the test. As Justice James O'Keefe held in *Lepiarczyk* at para. 19:

> I note that the applicant in his submissions was adamant that the error was an honest mistake and that he did not knowingly intend to over contribute to his RRSP. Although this may be so, the test to be met under subsection 204.1(4) of the Act is not the innocence of the applicant, but yet reasonability of the error made. While innocence may be a factor to consider, it is not determinative in the present case. While the applicant urges the Court to reconsider his position and render a different decision, this is not the role of this Court on judicial review.

Reasonable Steps to Remove Excess

[27] With respect to the tax assessed to the applicant, and his request for relief, section 204.1(4) of the *ITA* provides as follows:

(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	(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

(a) the excess amount or cumulative excess amount on which the tax is based arose as a consequence of reasonable error, and	de l'impôt fait suite à une erreur acceptable et que les mesures indiquées pour éliminer l'excédent ont été prises.
(b) reasonable steps are being taken to eliminate the excess,	
the Minister may waive the tax.	

[28] The test in section 204.1(4) is conjunctive, meaning both prongs must be established to the satisfaction of the Minister before a taxpayer will be considered for relief. Even if both prongs are met, the discretion to waive remains with the Minister. In other words, meeting the two prongs does not make a waiver a *fait accompli*. The question is whether the Minister's finding that the applicant had taken reasonable steps to eliminate the excess contributions was reasonable or unreasonable. The applicant contends that he acted in good faith and took reasonable steps to eliminate the excess contributions. The Minister felt he did not, and again, that conclusion falls squarely within the frame of a reasonable decision.

[29] On September 29, 2009 and again, on December 31, 2009, the applicant was informed that he had to file a T1-OVP return for the 2008 tax year and that the failure to do so within 90 days of the end of the tax year (i.e. March 31, 2009) would result in a penalty and interest arrears. It was not until January 19, 2010, that the applicant filed a T1-OVP tax return for the 2008 year. This is some nine months beyond the 90 day period prescribed.

[30] I see no reason to disturb the Minister's findings in respect of the applicant's contention that he took reasonable steps to eliminate the excess contributions.

Penalty and Interest

[31] With respect to the late-filing penalties and arrears interest assessed to the applicant, and his request for relief, section 220 (3.1) of the *ITA* provides as follows:

(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.

[32] The scope of the discretion accorded the Minister was considered in *Jenkins v Canada (Revenue)*, 2007 FC 295, Justice Pierre Blais held at para 13:

> …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.

[33] The penalty and arrears interest were imposed as a matter of law, by operation of the *ITA*. Moreover, the nature of the relief itself is limited to exceptional situations in which the Minister believes is warranted." Thus, even though the Manual states that a reasonable error may be the product of incorrect information provided to the taxpayer; *Gagné*, the Minister is not obligated to make such a finding. In any event, I have not found a reasonable error to have been made.

[34] Furthermore, *Information Circular IC07-1 Taxpayer Relief Provisions* (the Circular) section 23 provides guidance as to how the Minister will exercise the discretion granted to him by Parliament under section 220 (3.1):

23. The Minister may grant relief from the application of penalty and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement at issue: (a) extraordinary circumstances (b) actions of the CRA (c) inability to pay or financial hardship	23. Le ministre peut accorder un allègement de l'application des pénalités et des intérêts lorsque les situations suivantes sont présentes et qu'elles justifient l'incapacité du contribuable à s'acquitter de l'obligation ou de l'exigence fiscale en cause : a. circonstances exceptionnelles; b. actions de l'ARC; c. incapacité de payer ou difficultés financières.

[35] Section 25 of the Circular defines what "extraordinary circumstances" are:

25. Penalties and interest may be waived or cancelled in whole or in part where they result from circumstances beyond a taxpayer's control. Extraordinary circumstances that may have prevented a taxpayer from making a payment when due, filing a return on time, or otherwise complying with an obligation under the Act include, but are not limited to, the	25. Les pénalités et les intérêts peuvent faire l'objet d'une renonciation ou d'une annulation, en tout ou en partie, lorsqu'ils découlent de circonstances indépendantes de la volonté du contribuable. Les circonstances exceptionnelles qui peuvent avoir empêché un contribuable d'effectuer un paiement lorsqu'il était dû, de produire une déclaration à temps ou de

following examples:

(a) natural or man-made disasters such as, flood or fire;
(b) civil disturbances or disruptions in services, such as a postal strike;
(c) a serious illness or accident; or

serious emotional or mental distress, such as death in the immediate family.

s'acquitter de toute autre obligation que lui impose la Loi sont les suivantes, sans être exhaustives :

a. une catastrophe naturelle ou causée par l'homme, telle qu'une inondation ou un incendie;
b. des troubles publics ou l'interruption de services, tels qu'une grève des postes;
c. une maladie grave ou un accident grave;
d. des troubles émotifs sévères ou une souffrance morale grave, tels qu'un décès dans la famille immédiate.

[36] None of these circumstances apply to the applicant and no others have been pleaded, thus section 25 of the Circular is inapplicable and irrelevant in the present case. No explanation was offered as to why the applicant was prevented from filing his T1-OVP as soon as he received notice from CRA, in September of 2009, that he must do so within 90 days of the tax year end.

[37] In sum, the applicant was aware, as of July 30, 2009, the date he signed the request to withdraw his excess contributions, that he had a problem. He did not produce a T1-OVP return for the 2008 year as requested in two letters sent to him in 2009. The T1-OVP was in fact, not filed until January 2010. The applicant has failed to demonstrate as unreasonable the Minister’s finding that his excessive RRSP contributions were not the product of a reasonable error and that he took reasonable steps to eliminate the excess amount.

[38] The application for judicial review is dismissed.

[39] There is no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. There is no order as to costs.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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