Federal Court  Cour fédérale

Date: 20191205

Docket: T-423-19

Citation: 2019 FC 1565

Toronto, Ontario, December 5, 2019

PRESENT: The Honourable Mr. Justice Diner

TEKLE WELDEGEBRIEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] Tekle Weldegebriel, a member of the Canadian Armed Forces [CAF] since 2003, seeks judicial review of a decision of the Minister of National Revenue dated February 21, 2019, refusing to cancel the tax on excess contributions to his Tax Free Savings Account [TFSA] under section 207.06(1) of the *Income Tax Act*, (RSC, 1985, c 1 (5th Supp.)) [*ITA*]. The Canada Revenue Agency [CRA] notified Mr. Weldegebriel of his excess contributions to his TFSA on numerous occasions from 2009 to 2013, and again in 2018. However, according to Mr. Weldegebriel, the first time he received notice from the CRA was by email in 2018.

[2] Mr. Weldegebriel applied for a first request for cancellation of tax and penalties in August 2018, which the CRA refused two months later. Mr. Weldegebriel explained that he was unaware that after having contributed to a TFSA maximum (of $5000), and later withdrawing money from that account for personal needs, he could not replenish that account to replace the amounts taken out, through re-contributions that same year.

[3] The CRA explained to Mr. Weldegebriel that it grants a cancellation only if the excess contribution arises from a reasonable error and the individual acts immediately to remove this excess contribution from the TFSA. Because Mr. Weldegebriel continued to make excess contributions during the 2017 tax year, despite earlier notifications, the CRA refused the request. Mr. Weldegebriel filed for a second-level CRA review, on the basis of lack of receipt of the letters and of knowledge about the over-contributions.

II. Decision Under Review (Second-level refusal)

[4] A Senior Assessment Processing and Resource Officer of the TFSA Processing Unit [Officer] refused the second request [Decision]. The Officer listed the annual written TFSA notifications of assessment sent to Mr. Weldegebriel at the address on file with CRA, for each of the 2009 – 2011 taxation years, as well as assessments for each of those three years. These six notices all detailed the issue. The Officer explained in the Decision that “the CRA sends correspondence to individuals’ current address on file and also take into consideration their delivery preference”, which at the time was physical mail. The Officer further wrote that “there was no indication from Canada Post that correspondence was labeled ‘returned to sender’”.

[5] CRA's discretionary decisions, such as taxpayer relief requests including to reverse TFSA over-contribution penalties and interest, must be reviewed on the standard of reasonableness (*Bonnybrook Park Industrial Development Co. Ltd v Canada (National Revenue)*, 2018 FCA 136 at para 22; *Gekas v Canada (Attorney General)*, 2019 FC 1031, at para 12 [*Gekas*]).

[6] Mr. Weldegebriel argues before this Court that the Decision was unreasonable as it is based on the incorrect assumption that the notices were delivered successfully; after all, CRA acknowledged in February 2019 that a TFSA letter was returned "undeliverable". Given this, along with the fact that CAF members are required to travel frequently and on short notice, as was Mr. Weldegebriel throughout his military career (who still continues to serve different posts), CRA unreasonably failed to ensure he was informed regarding the over-contributions.

[7] Mr. Weldegebriel submits that his conduct demonstrates he was unaware that he could not re-deposit any amounts withdrawn from his TFSA account for the year, until the following year. He thus submits that levying penalties was unfair and undermines both the intent and the spirit of the TFSA, particularly (i) when he took corrective action (in 2018) as soon as he learned what had transpired, and (ii) given his extensive travel for the CAF, both in Canada and abroad, during the years in question.

[8] Despite Mr. Weldegebriel's concerted arguments before this Court, for which I commend his professionalism, I do not find that the Officer rendered an unreasonable Decision. Rather, it was open to the CRA to find that various notices went out without receiving any indication of a

different address, upholding the first-level decision. Both the first and second level reviewers found that Mr. Weldegebriel had not acted quickly in response to the notice of over-contributions for the 2017 taxation year, and given the number of notices sent over the years, I cannot find the conclusion unreasonable. The fact that Mr. Weldegebriel finally corrected the over-contribution in 2018 does not reverse his error, which he admits was done innocently. This Court owes deference to the administrative decision-maker, who has broad discretion under the legislation as to whether or not to provide relief.

[9] Ultimately, assuming that Mr. Weldegebriel did not become aware of the issue until 2018, when it was too late to correct the overpayment for the 2017 tax year, I disagree that the onus somehow fell to the Minister to ensure he received the notices. Indeed, in this case, after each notice of over-contribution arrived with a 30 day correction period, CRA did not issue the assessments (for the years 2010-2012) for various months subsequent. And when CRA received the 2013 letter undelivered, officials contacted Mr. Weldegebriel's bank to obtain an updated address. The CRA certainly did what could be expected of it to contact him (Bowen v Minister of National Revenue, [1991] FCJ No 1054, 1991 CarswellNat 520 at para 8).

[10] Furthermore, as a self-reporting system, the onus was on Mr. Weldegebriel to understand the law (Kapil v Canada Revenue Agency, 2011 FC 1373 at para 24); ignorance of the rules, particularly in a system which relies on the taxpayer, is not an excuse. As Justice O'Keefe held in *Lepiarczyk v Canada Revenue Agency*, 2008 FC 1022 at para 19, "while innocence may be a factor to consider, it is not determinative in the present case."

[11] While the Respondent pointed out that there is scant law on over-contribution to TFSAs, I agree with the Minister that this case parallels this Court's recent decision in *Jiang v Canada (Attorney General)*, 2019 FC 629 [*Jiang*], which also concerned the TFSA relief provision contained in subparagraph 207.06(1) of the *ITA.* In *Jiang*, the CRA wrote several letters to the applicant over the years regarding excess contributions to her TFSA. Although having an additional complication in that she was also non-resident of Canada, thus compounding the TFSA over-contribution issue, the CRA similarly sent notices to her Canadian address on file. Yet she, too, never received the notices.

[12] Similar to Mr. Weldegebriel's situation, CRA traced Ms. Jiang's address through CIBC, her bank. When she eventually received notice, she addressed the over-contribution. CRA refused her first request for relief, which a second officer subsequently upheld. Justice Campbell found that CRA decision to be reasonable, both on the grounds of the taxpayer having failed to update her address, and to inform herself of the law (*Jiang* at paras 11-13).

[13] Certainly, this Court has found in favour of the taxpayer in relief reviews, but the situations were different. In *Gekas*, Justice Boswell held that the taxpayer's excess contributions were not attributable to him, and upon learning of the error the taxpayer took immediate action to correct the situation. He found that the decision-maker had unfairly labelled the taxpayer as "a repeat over-contributor to his TFSA account" (*Gekas* at para 30).

[14] In another recent, unusual TFSA over-contribution case, Justice Spiro of the Tax Court of Canada wrote in an "Afterword" – in other words *obiter* – that should the Minister exercise her

discretion to cancel the tax assessed under subparagraph 207.06(1) to correct an error beyond the applicant's control, such relief "would find ample support on the extraordinary facts of this case" (see *Robitaille v The Queen*, 2019 TCC 200 at paras 29-30). There, the taxpayer intended to deposit a large cheque in his chequing account but inadvertently deposited it into his TFSA.

[15] Unlike in *Gekas* and *Robitaille*, we are not in the situation of a one-time oversight, or misdirected funds, which were corrected by the taxpayers at the first available opportunity. Here, while Mr. Weldegebriel's error may well have been innocent, he was also its author due to his failure to provide his change his change of residence (albeit through military postings) to the CRA. There was also no doubt about his intention to contribute to his TFSA account, unlike in *Gekas* and *Robitaille*. Rather, Mr. Weldegebriel did so innocently, albeit through ignorance of the law, or as he states in his Affidavit, "on a simple misunderstanding of the rules." Innocent mistakes, however, do not absolve ignorance of the law. Justice Annis of this Court recently summarized the principle in *Pouchet v Canada (Attorney General)*, 2018 FC 473 at para 37:

> Honest mistakes and innocence have been deemed by the Federal Court of Canada in *Lepiarczyk v. Canada (Revenue Agency*, 2008 FC 1022 (CanLII), 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 (CanLII) 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 *lncome Tax Act: R. v McKinlay Transport Ltd*. 1990 CanLII 137 (SCC), 1990 CanLll 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.

[16] While Mr. Weldegebriel correctly pointed out that this case refers to a different taxpayer relief section, namely that related to RRSPs under subsection 204.1(4) of the *ITA*, the two sections are similar in that they both require that the taxpayer fulfill a twofold test – namely that the taxpayer bears the onus to satisfy the Minister that the over-contribution arose as a result of both (a) a reasonable error; and (b) steps are taken "without delay" to eliminate the excess contribution (*Gekas* at paras 24-26; see also *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 52).

[17] Ultimately, Mr. Weldegebriel contends that the Decision is unreasonable based on the CRA's assumption that all of its correspondence was delivered, which fails to take into account CAF members frequently travel, often on short notice. To do so would require this Court to step into the shoes of the Minister and overturn her decision. Sympathetic to his plight and recognizing his impressive log of postings and longstanding service to Canada, I can no more stand in the Officer's shoes and reassess the evidence, than I can place the blame in this case at the Minister's feet. To do so would be to reassess or reweigh the evidence, a role not permitted in the context of judicial review.

III. Conclusion

[18] The Decision was justified, transparent and intelligible, falling well within a range of possible and acceptable outcomes, and as a result, this judicial review will be dismissed. No order will be made as to costs. As requested by the Respondent, without objection, the style of cause will be amended to Attorney General of Canada pursuant to R303(2) of the *Federal Court Rules*, SOR/98-106.

JUDGMENT in T-423-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no award as to costs.

3. The style of cause is amended to name the Attorney General of Canada as the Respondent, with immediate effect.

"Alan S. Diner"
Judge

Annex A

Income Tax Act, **RSC, 1985, c 1 (5th Suppl.))**	***Loi de l'impôt sur le revenu,*** **LRC (1985), ch 1(5e suppl.))**
PART X.1	**PARTIE X.1**
Tax in Respect of Over-contributions to Deferred Income Plans	**Impôt frappant les excédents de contribution aux régimes de revenu différé**
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.

PART XI.01

Tax in Respect of Registered Plans

Tax payable on excess TFSA amount

207.02 If, at any time in a calendar month, an individual has an excess TFSA amount, the individual shall, in respect of that month, pay a tax under this Part equal to 1% of the highest such amount in that month.

[…]

Waiver of tax payable

207.06 (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

(a) the individual establishes to the satisfaction of the Minister that the liability arose as a consequence of a reasonable error; and

(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

(i) the amount in respect of which the individual would otherwise be liable to pay the tax, and

(ii) income (including a capital gain) that is reasonably attributable, directly or indirectly, to the amount described in subparagraph (i).

PARTIE XI.01

Impôts relatifs aux régimes enregistrés

Impôt à payer sur l'excédent CÉL

207.02 Le particulier qui a un excédent CÉLI au cours d'un mois civil est tenu de payer pour le mois, en vertu de la présente partie, un impôt égal à 1 % du montant le plus élevé de cet excédent pour le mois.

[…]

Renonciation

207.06 (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) le particulier convainc le ministre que l'obligation de payer l'impôt fait suite à une erreur raisonnable;

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) la somme sur laquelle le particulier serait par ailleurs redevable de l'impôt,

(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).

FEDERAL COURT

SOLICITORS OF RECORD

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