Federal Court  Cour fédérale

Date: 20210128

Docket: T-611-19

Citation: 2021 FC 95

Ottawa, Ontario, January 28, 2021

PRESENT: Madam Justice Walker

BETWEEN:

WAYNE PHILLIP MESSENGER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Wayne Messenger, the applicant, requests the Court's review of the refusal by a delegate of the Minister of National Revenue (Minister) to cancel tax imposed for the 2017 taxation year on excess amounts in Mr. Messenger's Tax Free Savings Account (TFSA). The refusal is set forth in a letter to Mr. Messenger dated March 11, 2019 (Decision).

[2] This application is dismissed because the Minister's delegate set out their reasons for refusing Mr. Messenger's request for cancellation of excess TFSA tax logically and succinctly in

the Decision, and the refusal reflects an outcome that is entirely consistent with the record and the legislative constraints imposed on the Minister. The Decision contains an accurate summary of the evidence before the Minister's delegate and Mr. Messenger's submissions in support of his cancellation request. Most importantly, the Decision provides Mr. Messenger with a clear explanation of the determinative condition in the legislation governing the cancellation of tax on excess TFSA amounts and the application of that condition to Mr. Messenger's circumstances.

[3] Very briefly, subsection 207.06(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (*ITA*) sets out two conditions that must be met by a taxpayer in order for the Minister to exercise her discretion to cancel tax imposed due to excess TFSA contributions. The subsection requires that both conditions be met. In this case, the Minister's delegate refused Mr. Messenger's request for cancellation because he had failed to remove the full amount of his 2017 over-contribution within a reasonable time frame, the second required condition in the subsection.

[4] By way of preliminary matter, the style of cause in this matter is amended to reflect the correct respondent, the Attorney General of Canada.

I. Overview

[5] The background to Mr. Messenger's application to the Court is straightforward. At issue is a TFSA contribution made by Mr. Messenger in 2017 that resulted in an excess amount in his TFSA. The Canada Revenue Agency (CRA) imposed a 1% monthly tax on the excess amount pursuant to section 207.02 of the *ITA* in the amount of $1,273.18. Including penalties and interest, the total balance due was $1,340.58 as of July 17, 2018.

[6] The sequence of contributions and withdrawals is important in my consideration of whether the Decision was reasonable. The relevant dates and events are as follows:

February 8, 2017:	Mr. Messenger contributed $17,075.20 to his TFSA. His TFSA contribution room for 2017 was $5,500.85 resulting in an excess contribution amount of $11,574.35, which remained in the account as of December 31, 2017. Consequently, Mr. Messenger had no available contribution room for 2018.
February 2018:	Mr. Messenger contributed an additional $11,000 to his TFSA resulting in an excess contribution amount of $17,075 in the account.
July 17, 2018:	The CRA sent Mr. Messenger a Notice of Assessment informing him of his 2017 excess TFSA amount (2017 Notice of Assessment). The 2017 Notice of Assessment set out the tax imposed in respect of the 2017 taxation year on the monthly excess TFSA amounts ($1,273.18, plus penalties and interest). The Notice advised Mr. Messenger that he should withdraw any current excess amount in his TFSA to limit any future tax.
July 18, 2018:	Mr. Messenger withdrew $4,300 from his TFSA.
July 25, 2018:	Mr. Messenger late-filed his TFSA tax return for the 2017 taxation year.
July 26, 2018:	Mr. Messenger paid the full amount of tax, penalties and interest imposed in respect of his 2017 TFSA over-contribution ($1,340.58).

[7] Also in July 2018, Mr. Messenger submitted his first request for cancellation of the tax imposed in respect of the excess 2017 amount in his TFSA (First Cancellation Request). Mr. Messenger relied on CRA error in the Request, explaining that he spoke with a CRA representative in February 2017 and was informed that his TFSA contribution limit was $17,075 for 2017. He then made the February 8, 2017 contribution of $17,075.20 noted above. Mr. Messenger stated that the same error occurred in February 2018 when he was advised by the CRA that his contribution limit was $11,000, which would have been the case but for the 2017

contribution of $17,075. Mr. Messenger also stated that he was unaware of his over-contribution position until he received the 2017 Notice of Assessment. He took action once he was made aware of his situation and withdrew $4,300 from the cash in the TFSA. Mr. Messenger did not want to sell the shares in his TFSA because they had lost value and were in a loss position.

[8] The First Cancellation Request was refused on October 1, 2018 (First Refusal). A CRA officer reviewed Mr. Messenger's explanation for his 2017 TFSA over-contribution, namely that he did not intend to over contribute and was unaware that the contribution limits the CRA provided to him did not include his prior contributions. The officer stated that the Minister is permitted to cancel all or any part of tax imposed on excess TFSA amount(s) only if the tax arose due to (a) reasonable error by a taxpayer; and (b) the taxpayer acted without delay to withdraw the full amount of over-contribution(s) from their TFSA account. The CRA officer cited Mr. Messenger's statement in the First Cancellation Request that he only withdrew $4,300 from his TFSA because he did not want to be in a loss position and concluded that Mr. Messenger's request for cancellation could not be granted. The officer advised Mr. Messenger that, if at any point he had an excess amount in his TFSA, such amount should be withdrawn immediately to limit any future tax.

[9] On December 3, 2018, Mr. Messenger sent a second cancellation request to the CRA (Second Cancellation Request). Mr. Messenger stated that two paragraphs of the First Refusal were inconsistent as the CRA officer recognized that the room limits the CRA had provided did not include amounts previously contributed to his TFSA, he was notified after December 31, 2017 of his contravention, and yet his cancellation request was denied. Mr. Messenger argued

that the CRA's error, which caused his over-contribution, should be sufficient to ground his cancellation request. He also noted that he was not warned to conduct other research to confirm the CRA's numbers. Mr. Messenger acknowledged that he could not make this argument for the 2018 taxation year as it was his decision not to withdraw the remaining excess contribution but argued that the same rationale did not apply to the 2017 taxation year.

II. Decision under review

[10] The Decision responds to Mr. Messenger's Second Cancellation Request. The Minister's delegate, an individual not involved in the First Refusal, reviewed Mr. Messenger's submissions in support of his second request. The delegate stated that the material in the CRA's file showed that the withdrawal of the 2017 excess TFSA contribution at issue did not occur within a reasonable time frame. On this basis, the Minister's delegate confirmed the First Refusal and denied Mr. Messenger's Second Cancellation Request. The Minister's delegate emphasized that it is a taxpayer's responsibility to keep records of their TFSA transactions and to ensure they remain within their contribution room limit.

III. Issue and standard of review

[10] The sole issue in this application is whether the Decision was reasonable.

[11] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*), the majority of the Supreme Court of Canada (SCC) established reasonableness as the presumptive standard of review of the merits of administrative decisions, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law"

(*Vavilov* at para 10). There is no basis for departing from the presumptive standard of review in this case (*Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27 (*Canada Post*)). A review of the Decision for reasonableness is also consistent with the pre-*Vavilov* jurisprudence (*Bonnybrook Park Industrial Development Co. Ltd. v Canada (National Revenue)*, 2018 FCA 136 at para 22; *Weldegebriel v Canada (Attorney General)*, 2019 FC 1565 at para 5 (*Weldegebriel*)).

[12] The majority in *Vavilov* reviewed in detail the content of reasons a reviewing court may expect in an administrative decision and cautioned that a review for reasonableness must consider the decision maker's reasoning and the outcome of the decision (*Vavilov* at paras 86-87). A reviewing court must determine whether the decision bears the hallmarks of reasonableness - justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision is one based on an internally coherent and rational chain of analysis and justified in relation to the relevant facts and applicable law (*Vavilov* at paras 105-106). In this application, the scheme of the *ITA* and the requirements of subsection 207.06(1) of the *ITA* are central to my review of the Decision (*Vavilov* at para 108; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras 34-35).

IV. Analysis

[13] The sections of the *ITA* under which the Minister's delegate made the Decision are the starting point for understanding the delegate's refusal of Mr. Messenger's cancellation request. The excess TFSA tax in respect of the 2017 taxation year was assessed against Mr. Messenger

pursuant to section 207.02 of the *ITA*. Mr. Messenger's request for a discretionary cancellation of the excess TFSA tax was made under subsection 207.06(1).

[14] Subsection 207.06(1) of the *ITA* provides that the Minister's discretion to cancel tax imposed on over-contributions to a TFSA may be exercised if:

1. The taxpayer establishes to the satisfaction of the Minister's delegate that the tax liability arose as a consequence of a reasonable error; and
2. The excess TFSA amounts are removed from the TFSA by the taxpayer without delay.

[15] The conditions set out in subsection 207.06(1) are conjunctive, meaning a taxpayer must satisfy both of the two requirements before the Minister may exercise her discretion to grant relief (*Kapil* v *Canada (Revenue Agency)*, 2011 FC 1373 at para 28*; Ifi v Canada (Attorney General)*, 2020 FC 1150 at para 16). For ease of reference, the provisions of section 207.02 and subsection 207.06(1) of the *ITA* are set out in full in Annex A to this judgment.

[16] Mr. Messenger's submissions in the Second Cancellation Request and this application focus on the first condition of subsection 207.06(1), that of reasonable error. Mr. Messenger submits that the CRA provided him incorrect information when he called in 2017 and inquired regarding his TFSA contribution limit. He argues that the CRA's misinformation resulted directly in his reasonable error in over contributing in 2017 and that his cancellation request should be allowed on this basis. Mr. Messenger states that the Minister has not given reasons in the Decision for her failure to consider the CRA's error and that this omission leads to questions surrounding the quality of review of his request. With respect to the second subsection 207.06(1) condition, Mr. Messenger submits that he should not be expected to liquidate the shares he

purchased in the TFSA and incur an investment loss because the CRA's error induced his over-contribution.

[17] In responding to a taxpayer's request for cancellation of tax imposed on excess TFSA amounts, the Minister's delegate is required to apply the conditions for relief set out in subsection 207.06(1) to the factual matrix of the particular case (*Vavilov* at paras 125-126). In the decision conveying their assessment and determination of the taxpayer's request, the delegate must meaningfully address the central concerns identified by the taxpayer, in this instance the arguments raised in Mr. Messenger's Second Cancellation Request (*Vavilov* at paras 94, 127).

[18] The critical facts of this case are as follows. First, Mr. Messenger relies on CRA error to establish his request for cancellation. The Minister's delegate did not dispute Mr. Messenger's position that he was given incorrect contribution room information that led to his 2017 over-contribution. The Respondent makes no submissions in this regard in this application. Second, the delegate relied on the fact that the 2017 excess contribution was not removed from the TFSA within a reasonable period of time after Mr. Messenger became aware he was not in compliance with his TFSA limit. Mr. Messenger does not dispute this fact but argues that he should not be required to liquidate his shareholdings in the TFSA to withdraw the remaining excess.

[19] In the Decision, the Minister's delegate referred to Mr. Messenger's Second Cancellation Request, summarizing Mr. Messenger's submissions that: the CRA's failure to update his 2017 contribution room should be considered a reasonable error that resulted in the over-contribution;

he was not notified of the over-contribution until 2018; and, it was his decision not to withdraw the full excess for economic reasons. The determinative paragraph of the Decision then states:

> 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. 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.

[20] I find that the reasons given by the Minister's delegate for the refusal of Mr. Messenger's Second Cancellation Request reflect a reasonable and coherent application of the facts and submissions in the record to the mandatory provisions of subsection 207.06(1) of the *ITA*. The basis for the Decision was Mr. Messenger's failure to withdraw the full amount of his 2017 excess TFSA contribution within a reasonable time. The delegate's refusal of the cancellation request flowed logically from Mr. Messenger's own statements that he has not fully withdrawn the over-contribution. Mr. Messenger makes this fact clear in the First and Second Cancellation Requests and in his submissions in this application. As stated above, the two pre-conditions to the exercise of the Minister's discretion to cancel TFSA tax under subsection 207.06(1) must both be satisfied. Mr. Messenger has not satisfied the second condition and the Minister's delegate relied on Mr. Messenger's non-compliance to refuse his cancellation request. The delegate's reliance was reasonable, if not required, and was intelligibly explained in the Decision.

[21] Mr. Messenger argues that the CRA's role in his 2017 over-contribution should warrant a cancellation of the tax imposed and that the Minister erred in her assessment of this argument in the Decision. However, the Minister's delegate did not question Mr. Messenger's evidence

relating to the CRA's misstatement of his contribution room and made no error in simply noting Mr. Messenger's submissions. The delegate was not required to carry out a full analysis of the first condition of subsection 207.06(1) because the existence of reasonable error was not the determinative issue in the refusal.

[22] Mr. Messenger also argues that, because he was induced by CRA error to make the 2017 over-contribution, he should not be required to bear the economic consequences of liquidating his TFSA investments to complete a full withdrawal of the over-contribution. I do not find this argument persuasive.

[23] In the First and Second Cancellation Requests, Mr. Messenger made clear his intention to leave a sizeable portion of the 2017 over-contribution in the TFSA for economic reasons:

> First Cancellation Request:
>
> I have since withdrawn $4300 from the cash portion of my account to lessen the impact of over contribution for 2018, but am loathe to sell my shares as they would put me in a loss position. […].
>
> I intend to not liquidate but be responsible for reporting the over contribution until the allowable limits mop up the excess, you may say. I trust this is satisfactory.
>
> Second Cancellation Request:
>
> I do not have the same argument [CRA error] for a small part of the taxes that will be due on June 30 2019 for the tax year 2018 as it is my decision to not withdraw the contribution amounts and be prepared to pay a tax for economic reasons in this upcoming case […].

[24] Mr. Messenger was informed of his 2017 over-contribution on July 17, 2018 in the 2017 Notice of Assessment, which stated that "[i]f there is currently an excess amount in your TFSA,

you should withdraw it immediately to limit any future tax". Mr. Messenger withdrew part of the over-contribution but chose not to withdraw the remainder to avoid a loss on the disposition of his shares. At that point, his economic decisions were his own. While I am sympathetic to Mr. Messenger's reluctance to liquidate his TFSA holdings, the CRA is not responsible for the nature of the investments made by Mr. Messenger in his TFSA. He alone bears that risk. Mr. Messenger has decided to avoid economic loss in his TFSA but in so doing cannot then seek discretionary relief from the tax imposed on his excess amount. The refusal of his request, as set forth in the Decision, was justified.

[25] I note that Mr. Messenger stated in his Second Cancellation Request that the CRA did not caution him to research his legal obligations relating to his TFSA. However, the onus was on Mr. Messenger to understand the law and organize his affairs accordingly (*Weldegebriel* at para 10).

[26] Mr. Messenger relies on the CRA's Policy Manual and its guidance to CRA officers that one extenuating circumstance warranting relief is that of CRA error. Again, CRA error is not in issue in this application. I would also point out that the immediately following section of the Manual sets out the situations in which relief will not be granted, including the failure of a taxpayer to withdraw over-contributions within a reasonable period of time.

[27] Finally, Mr. Messenger submits that the CRA failed to inform their counsel in this application that his 2017 and 2018 Notices of Objection had been accepted as valid. The CRA letter Mr. Messenger relies on is dated July 16, 2019. The letter informs Mr. Messenger that an

extension of time had been granted for the filing of his 2017 Notice of Objection and that it would be treated as valid.

[28] The status of the 2017 Notice of Objection is not relevant to this application. My review of the Decision is concerned solely with Mr. Messenger's request for discretionary relief from tax imposed and does not involve any consideration of the accuracy of the 2017 Notice of Assessment. The refusal of a subsection 207.06(1) request for relief and my review of that refusal proceed on facts and law distinct from those relevant to the CRA's assessment of a Notice of Objection.

V. Conclusion

[29] The application for judicial review will be dismissed.

[30] The Respondent has not sought costs in this matter and I will make no order as to costs.

JUDGMENT IN T-611-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The style of cause is amended to reflect the Attorney General of Canada as the Respondent.

3. No costs are awarded.

"Elizabeth Walker"
Judge

Annex A

Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.)	*Loi de l'impôt sur le revenu*, L.R.C. (1985), ch. 1 (5e suppl.)
Tax payable on excess TFSA amount	**Impôt à payer sur l'excédent CÉLI**
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.	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.
Waiver of tax payable	**Renonciation**
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	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) 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).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-611-19
STYLE OF CAUSE:	WAYNE PHILLIP MESSENGER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	IN WRITING AT OTTAWA, ONTARIO PURSUANT TO THE ORDER OF THE COURT DATED JUNE 25, 2020
JUDGMENT AND REASONS:	WALKER J.
DATED:	JANUARY 28, 2021

WRITTEN REPRESENTATIONS BY:

Wayne Phillip Messenger	FOR THE APPLICANT (ON HIS OWN BEHALF)
Lise A. Walsh	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT