Federal Court  Cour fédérale

Date: 20210419

Docket: T-373-20

Citation: 2021 FC 337

Ottawa, Ontario, April 19, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

PETER REMPEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a negative decision by the Canada Revenue Agency [“CRA”]. The decision refuses the second request by the Applicant for waiver of a penalty imposed due because of over-contribution to the Applicant’s Tax Free Savings Account [“TFSA”] for the 2017 and 2018 tax years.

[2] The Applicant represented himself before the court.

II. Background

[3] The facts are generally not in dispute in this matter. The self-represented Applicant ["Mr. Rempel"] admits that he over-contributed to his TFSA during 2017 and 2018. The CRA assessed his penalty at $1,164.69.

[4] In 2015, Mr. Rempel's CRA account preferences were changed to allow for any legible correspondence to be by email. In a letter dated May 17, 2018, the CRA sent, via email, a notification to Mr. Rempel outlining that he had over-contributed to his TFSA by $9,465.44, that he should remove the amount "right away", and that he would be charged 1% tax per month for any excess which stayed in his account.

[5] Mr. Rempel claims he did not receive this "education letter". There is no evidence that the email was returned or of any other emails sent by CRA as not being acknowledged by Mr. Rempel.

[6] Mr. Rempel received paper notice of a penalty on his TFSA notice of assessment, issued on July 16, 2019, and mailed to his home address. It outlined the excess TFSA amounts and his penalty (at the time) at $1,099.97.

[7] Between receiving the notice of assessment in July and October 25, 2019, Mr. Rempel withdrew the over contribution.

[8] The TSFA has suffered losses which neither party alleges is in question and nor does it enter into the legal discussion other than that information was put before the decision-maker when Mr. Rempel sought relief from the interest penalty.

[9] In an undated letter stamped “received” by the CRA on September 11, 2019, Mr. Rempel asked for the cancellation of the penalty because he was not made aware that he over-contributed. He suggests that any emails might have gone to his junk mail folder, and that he would have acted to correct the mistake had he received the notice, and that he is accustom to working with “paper letters”.

[10] In a letter dated November 13, 2019, the CRA rejected his request. They stated that he was notified of his over-contribution and continued to make excess contributions in 2018. The letter notified Mr. Rempel that he was able to ask for a second independent review of the decision.

[11] In an undated letter stamped “received” by the CRA on December 23, 2019, Mr. Rempel wrote asking for the independent review of the decision, echoing his previous arguments. He included proof of his losses in the letter.

[12] Correspondence dated February 14, 2020, from the Senior Assessment Processing and Resource Officer of the TFSA Processing Unit responded by notifying Mr. Rempel that a second CRA official, who was not involved with the first decision, came to the same conclusion and denied relief. The letter noted that an “educational letter” notifying him of his over-contribution

was sent on May 17, 2018 by email, and that **he had signed up to receive online mail from the CRA in April of 2015.** The letter states that it was Mr. Rempel's responsibility to ensure that his email was correct, and to provide updates if there were changes. The letter further states that the CRA is not liable if he is unable to access the emails, or for any inability or delay in the receipt of notifications. The letter states that the reason for the refusal was that he did not, in the view of the CRA, withdraw the excess in a timely manner. Further, that losses are not considered withdrawals.

[13] It is this decision that is being judicially reviewed.

III. Issue

[14] The issue is whether the decision of was CRA reasonable.

IV. Standard of Review

[15] The presumptive standard of review of administrative decisions is one of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]). There is no reason to depart from that presumption in this situation.

[16] A reasonable decision must be based on reasoning that is rational and logical, and be based on internally coherent reasoning (*Vavilov*, at paras 85, 102). The decision must bear the hallmarks of reasonableness—justification, transparency and intelligibility (*Vavilov*, at 99). The

party alleging the unreasonableness of the decision bears the onus of demonstrating it is unreasonable (*Vavilov*, at 100).

V. Analysis

A. *Was the decision of the CRA reasonable?*

[17] Section 207.06(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] allows:

> 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).

[18] Mr. Rempel argued that because of ambiguity that bore out in several ways he should not have to pay the penalty for the over contribution to his TSFA. He alleges that the change in TFSA limits from $10,000 to $5,000 in a single year created ambiguity. This ambiguity continued because the CRA no longer stated the contribution allowance on one's notice of assessment. His submission were that he was not "properly notified" of his over-contribution

until “years later”. In oral argument, he noted that providing something important like the education letter alerting him to the over payment should not have been by email given that when CRA “wanted their money” (assessed the penalty), they then provided him the letter in writing. He continued, noting that as soon as he received that letter he withdrew the money, and had he received the “educational letter” warning him of his over-contribution, he would certainly have withdrawn the money then and not been subject to the penalty.

[19] Further, he argues that he has not in any way damaged the Canadian Treasury, and that he has not benefitted from the over-contribution as he has suffered a $13,000 loss on the account. The nature of the TFSA is stated as an instrument to aid an assist Canadians to save money, and that this penalty does not forward that stated goal. He argues that this suggests he acted in a timely manner based on the communication he received. In support of his arguments, he cites *Gekas v Canada*, 2019 FC 1031 [*Gekas*].

[20] Mr. Rempel brings up *Gekas* in order to show that the decision was unreasonable. The cases are similar, where the applicant in *Gekas* also did not remove the excess money from his TFSA until his notice of assessment. However, in that case, the applicant was given bad advice from a financial institution which he then relied on, and there was a further mistake was made by the financial institution where extra funds were deposited by the mistake of the financial institution and beyond the applicant’s instructions (*Gekas* at paras 3-9). This clearly distinguishes that decision from the instant case, where there was no reliance on a third party error. In contrast with *Gekas*, here Mr. Rempel, he made the mistake himself.

[21] The Respondent submits that section 207.06(1) of the *ITA* confers a discretionary power to waive or cancel all or part of the tax liability on excess contributions. They submit that the statute requires the Minister to be satisfied that the error was reasonable and that steps were taken to remove the excess. They also argue that even if both prongs are met, the discretion to waive remains with the Minister.

[22] The Respondent relies on *Weldegebriel v Canada*, 2019 FC 1565 [*Weldegebriel*] to show that honest mistakes do not absolve ignorance of the law. *Weldegebriel* is a case about a Canadian Forces member who did not receive correspondence from CRA regarding an over contribution and was assessed a penalty. Because of the nature of his job involved being located at different places, he missed correspondence from the CRA. There were notifications mailed to him, but they were allegedly not received by the applicant, who eventually received an email from the CRA notifying him. One letter was returned "undeliverable" to the CRA. In that case the decision not to waive the penalty was reasonable given that it is the taxpayer's responsibility to update their preferences or address, and that ignorance of their particular situation is not a valid reason for over contribution. Further, *Weldegebriel* distinguishes *Gekas* on the basis that it was not a "one-time oversight, or misdirected funds, which were corrected by the taxpayer at the first available opportunity" (*Weldegebriel*, at para 15).

[23] The Respondent argued that the onus is on the taxpayer to know their contributions and limits, and the *ITA* does not put the onus on CRA. In 2017, Mr. Rempel contributed $18,762.50, resulting in an excess of $9,465.44 of contributions. This then reduced his contribution room in the 2018 year to $3,944.44. Throughout 2018, his running excess in the TFSA ranged from

$5,671.44 to $13.342.17 in various months, given his deposits and withdrawals. Given that he contributed the large sums of money throughout 2017 and 2018, he should have been diligent in insuring his limits were within the legal limit.

[24] Because Mr. Rempel signed up for online mail, it was his responsibility to ensure he was checking his correspondences, and that it is irrelevant that the CRA stopped putting limits on notices of assessment. The fact that Mr. Rempel's wife made the change to his notification preferences is believable, but keeping track of changes to his CRA account and TSFA contribution levels given how much he was contributing annually must be seen as his responsibility, and not that of the CRA. Further, this information was not before the decision-maker.

[25] There is nothing in the record to suggest that an unreasonable decision was made. Mr. Rempel claims that there was ambiguity in the fact that the contribution limit was changed from $10,000 to $5,000 in the subsequent year. However, that point was not in the record before the decision-makers, and cannot be considered in this judicial review. Further, I do not think it would make any difference, as the change was widely publicised, and ignorance of the law is not an excuse.

[26] Our Canadian system of taxation is on a self-reporting basis. For this reason, the onus is on the taxpayer to declare and be aware of all their taxation limits and assessments. This includes Mr. Rempel.

[27] The situation of Mr. Rempel is very unfortunate, and most individuals would not be pleased with the initial assessment of the penalty, and certainly would not be happy when the Minister was not prepared to waive the penalty. I believe that Mr. Rempel is being honest, and that there was a genuine mistake here. However, an honest mistake does not mean that a decision to waive a penalty was not reasonable. As the Respondent notes, Justice Diner, in *Weldegebriel*, says that honest mistakes are irrelevant, and that ignorance of the law is not a reasonable error or mistake (*Weldegebriel*, at para 15). On these facts, the Respondent did exercise their discretion within the spectrum of reasonableness.

[28] While unfortunate for Mr. Rempel, his mistake, both in over-contributing to his TFSA and then in not monitoring his communications, should not be transferred to the CRA.

[29] The outcome might not be what I would have decided, but in this judicial review it is not for me to make a determination on the merits; it is only to decide whether the decision under review was reasonable, justified, transparent and intelligible. I find that the decision of the CRA was reasonable and dismiss this application.

VI. Costs

[30] The Respondent sought costs in the amount of lump sum of $250.00. The Applicant did not seek costs. I will not award costs.

JUDGMENT IN T-373-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed without costs.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-373-20
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