Federal Court  Cour fédérale

Date: 20221205

Docket: T-179-22

Citation: 2022 FC 1673

Ottawa, Ontario, December 5, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

PAULINE HOWARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Ms. Howard found herself afoul of the contribution limits applicable to her Tax Free Savings Account [TFSA] for the taxation years 2020 and 2021. As a result, on July 20, 2021, Ms. Howard was assessed tax on the excess TFSA amounts of $1,800.00, a penalty of $90.00, and arrears of interest of $5.18.

[2] These sums were paid by Ms. Howard. She applied to the Minister for relief from the tax, penalty, and interest.

[3] Subsection 207.06(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), provides that the Minister may waive all or part of the tax liability assessed on excess TFSA contributions if the tax arose because of a "reasonable error" and the individual acted without delay to remove the excess contribution.

[4] Ms. Howard's request for relief was denied, as was her request for an independent second review of that decision.

[5] Throughout that process as well as this application for review, Ms. Howard has represented herself without the assistance of legal counsel. I commend her for the able way she researched the law, and presented her written and oral submissions to the Court.

[6] Ms. Howard does not dispute that she made contributions to her TFSA in excess of the maximum allowed. The Minister does not dispute the facts giving rise to the excess contributions nor to the steps Ms. Howard took when she learned of the excess contributions.

[7] In December 2019, Ms. Howard had a Guaranteed Investment Certificate [GIC] coming due. A financial advisor at Scotiabank advised her to use the proceeds to purchase another GIC and deposit it into a TFSA. She followed that advice and contributed $63,500 to a TFSA and a further $6,000 in January 2020, when the contribution limit came available. She says that this represented her total savings at Scotiabank. It is not disputed that she did not know that this represented an over contribution to the TFSA.

[8] On January 31, 2020, Ms. Howard flew to the Dominican Republic expecting to be there for three months; however, the global pandemic changed that. From March 2020, there were no flights between the Dominican Republic and Canada. Thereafter, travel was very restricted and Ms. Howard was unable to return to Canada until June 25, 2021. She was required to undertake a 14-day quarantine and returned to her Prince Edward Island home mid July 2021.

[9] During her absence, Ms. Howard had a friend collecting her mail and taking a picture of the envelopes which were then sent to Ms. Howard so she could ask that those unknown to her be opened.

[10] Canada Revenue Agency [CRA] sent Ms. Howard a letter dated June 4, 2020 [the Educational Letter] some four months after she left for the Dominican Republic. It informed her that she had over contributed to her TFSA by $15,000, set out the action she was required to take, and outlined possible future consequences:

> Your TFSA contribution room is the most you can contribute to your TFSA in a year. Any time you contribute more than your TFSA room available, you should withdraw the excess amount right away. If you already removed the excess amount, you don't need to do anything else. If you haven't removed it, please do so immediately. Once you withdraw your excess, you are not required to provide us with any proof of the withdrawal.
>
> In the future, if you continue to contribute more than your available room, the CRA can charge you a 1% tax for each month the excess stays in your account. Also, gains attributed to excess contributions may be considered a benefit, which can result in other taxes and penalties, such as the advantage tax.

[11] Ms. Howard's friend failed to send her a picture of the envelope containing the letter from CRA informing her of the over contribution. Ms. Howard was unaware of it and the fact of over contribution until she returned to Prince Edward Island.

[12] Upon receipt of the Educational Letter in July 2021, Ms. Howard immediately contacted Scotiabank to understand what had occurred. A different financial advisor explained that the first person who advised Ms. Howard to contribute to the TFSA erred in calculating the contribution room as she included three years (2009-2011) when Ms. Howard was not a resident of Canada. Ms. Howard immediately withdrew the over contribution.

[13] By letter dated August 1, 2021, Ms. Howard requested relief from the taxes, interest, and penalties. She explained that she had not received the Educational Letter earlier and had relied on the advice of her financial advisor:

> Following the advice of my financial adviser at the Scotia Bank I contributed the full amount she told me I was allowed in December 2019 to my TFSA and a further amount she told me I was allowed in January 2020 when additional TSFA allocation became available. My financial advisor gave me incorrect information because she included 2009 - 2011 when I was not living in Canada. I was ignorant of the rules around TFSA and relied on the advice of a financial expert. It was only after seeing another financial advisor at Scotia Bank that we were able to understand why the other financial advisor (no longer employed there) told me the incorrect contribution limit. I was completely unaware of the over contribution until I opened my mail mid July 2021.

[14] Ms. Howard also explained her circumstances as a single woman living below the poverty line:

> I am a 62 year old living on a small pension. You can check my NOA [Notice of Assessment] and see that I live (and have lived)

> far below the poverty line. My relatively small investment portfolio has to be enough for the rest of my life whenever I need funds to supplement my pension income. The penalty and interest assessed as per the notice dated Jul 20, 2021 [*sic*] for 2020 is $1895.18 - almost 20% of my income in 2020. This amount is a hardship for me trying to survive on approximately $10,000 a year.

[15] The initial request for relief was refused. The basis of that refusal was that Ms. Howard did not remove the excess contribution until some time passed after the Educational Letter was sent to her:

> After a thorough review of the information submitted and the facts of your case, we have determined that based on the information you provided, excess contributions remained in your TFSA account when you were advised by means of a Educational Letter dated June 4, 2020. As such, you are considered to have not withdrawn the excess within a reasonable timeframe. Upon notice, it is the taxpayer's responsibility to immediately remove any excess contributions present in their TFSA and keep accurate records going forward to ensure they remain within their contribution room limit.

[16] That decision did not address whether the tax arose as a result of a reasonable error.

[17] After her request for relief was refused, Ms. Howard made a request for a second independent review, which was also refused. That is the decision under review.

[18] In that decision, both aspects of the requirement for relief under subsection 207.06(1) of the Act were addressed.

[19] First, it was found that Ms. Howard failed the requirement that she “must have acted right away to remove the excess contributions” although the letter noted her explanation that she had

not received the Educational Letter until July 2021 as she was out of the country and unable to return. This decision noted that the Educational Letter was dated June 4, 2021, and that the excess was not withdrawn until July 2021. It then concluded: "As such, you are considered to have not withdrawn the excess within a reasonable timeframe."

[20] Second, it was found that the over contribution was not made because of a "reasonable error." In this regard, the decision states:

> We consider the counsel you received from your financial advisor to be a matter between you and your bank. Your financial institution has the responsibility to accurately advise you based on the information available to them at the time. If you feel they have not fulfilled their obligation to you, you should consider pursuing the matter through their internal complaints processes. If your complaint can't be resolved after going through the internal steps, you can escalate it to the financial institutions External Complaints Body (ECB).

[21] The question before the Court is whether the decision under review is reasonable as described by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 86:

> …In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational

> reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[22] Ms. Howard advances four bases that she says points to the decision not being reasonable. First, it fails to address her central concern – the impact of the global pandemic – and its impact on her not receiving the Educational Letter until she was able to return to Canada. Second, the decision fails to address or justify why the over contribution was not a reasonable error. Third, the rationale is not transparent as it lacks analysis and justification. Fourth, the decision affects Ms. Howard's personal circumstances, yet it fails to provide complete and thorough reasons.

[23] The Minister submits that the decision is reasonable. First, the Minister says that "being unaware of contribution limits, regardless of third party advice, is not a reasonable error that justifies over contributions nor the failure to withdraw excess TFSA contributions in a reasonable timeframe." It is submitted that "[t]his is a reasonable chain of analysis based on the factual and legal constraints." Second, the Minister says that the delay between the date of the Educational Letter and the withdrawal of the excess contributions being outside a reasonable timeframe is consistent with the relevant case law.

[24] Based on the unique set of facts before the Court, I find the decision to be unreasonable.

[25] First, the decision that the over contribution is not a reasonable error because it was based on the advice of a third party is a conclusion made without reasons. Second, the decision that Ms. Howard failed to withdraw the over contribution "within a reasonable timeframe" was

reached without any consideration of the impact the pandemic and her absence from Canada had and without any consideration given to the fact that she did withdraw the excess immediately upon becoming aware of it.

[26] The decision-maker accepted that the excess contribution arose because of the advice Ms. Howard received from Scotiabank; however it was found that this was not a "reasonable error" as used in the *Income Tax Act*: "We consider the counsel you received from your financial advisor to be a matter between you and your bank." This amounts to saying that an error made because of erroneous advice given by an advisor can never be a reasonable error. That is contrary to the view of the Federal Court of Appeal in *Connolly v Canada (National Revenue*), 2019 FCA 161 [*Connolly*].

[27] *Connolly* involved an over contribution to the taxpayer's Registered Retirement Savings Plan. The relevant provision of the Act providing for relief in such circumstances is subsection 204.1(4), which parallels the operative provision here, subsection 207.06(1).

[28] In *Connolly* at paragraph 27, the Court of Appeal noted the internal CRA guideline that describes what a reasonable error is intended to cover:

> What is reasonable error?
>
> Reasonable error means that the taxpayer did not intend to over contribute to their RRSP/PRPP and that it happened because of extraordinary circumstances beyond their control.
>
> Reasonable error means that the excess arose because of a mistake and that the taxpayer did not intentionally over-contribute. For the mistake to be reasonable, it has to be one that an impartial person would consider more likely to occur rather than less likely to occur based on circumstances.

> An impartial person is someone who is not biased about how an issue or situation arose and how it is resolved as well as does not have a personal interest in the case's resolution.
>
> It will depend on the facts of each case.

[29] The decision-maker in *Connolly* relied on this guideline in finding that the taxpayer had not established that he was entitled to relief. Specifically, it was held that "reasonable error" means that the taxpayer did not intend to over-contribute and that it happened because of extraordinary circumstances beyond the taxpayer's control. It was said that a taxpayer obtains relief only if "the penalties and interest are as a result of circumstances beyond the individual's control such as illness, an accident, serious emotional distress, a natural disaster, or an action of the CRA".

[30] The Federal Court of Appeal found this to be far too restrictive an interpretation of the term "reasonable error" stating at paragraph 67:

> The delegate's interpretation of subsection 204.1(4) of the *ITA* (as well as the interpretation set out in the internal CRA guideline, on which the delegate relied) thwarts the subsection's remedial purpose as it virtually extinguishes the Minister's discretion, which inescapably leads to the conclusion that the interpretation is unreasonable. Nearly every error a taxpayer might make in over-contributing to his or her RRSP (other than a simple arithmetical error) will be caused by a misunderstanding of the applicable limits – an error of law. If these sorts of errors are read out of the reach of subsection 204.1(4) of the *ITA*, it will have virtually no scope. Similarly, the fact that the error might have been made by a third party advisor or as a result of erroneous advice given by such advisor does not automatically mean that the error cannot be reasonable. [emphasis added]

[31] As noted, in the decision under review, there is no analysis of why, in the circumstances, Ms. Howard acting on the erroneous advice of her financial advisor had not made a reasonable error. Ms. Howard brought the Court's attention to the decision in *Ifi v Canada (Attorney General)*, 2020 FC 1150, where the Court allowed an application for judicial review and wherein the taxpayer had relied on erroneous advice. While the facts of that case distinguish it from that before this Court, I agree wholeheartedly with the following statement of Justice Pallotta at paragraph 21, which has equal application to the decision here under review:

> …While the written reasons given by an administrative body must not be assessed against a standard of perfection, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic: *Vavilov* at paras 91 and 102. I am unable to do so here. In my view, there is no line of analysis within the given reasons that could reasonably lead from the evidence to the decision maker's final determination: *Vavilov* at para 102.

[32] Here, there is quite simply no chain of analysis at all. All the Court has to assess reasonableness is the conclusion that Ms. Howard's reliance on the advice of a financial advisor does not make the error a reasonable one. As *Vavilov* instructs, it is both the result and the reasoning that must be assessed for reasonableness. When that cannot be done, the decision is not reasonable and cannot stand.

[33] I also find the decision that Ms. Howard did not withdraw the excess contributions in a timely manner to be unreasonable. At paragraph 127 of *Vavilov* the Supreme Court observed the importance of a decision maker actually addressing the principal concerns advanced:

> The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should

> have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[34] One of the central issues raised by Ms. Howard was that she had no knowledge of the over contribution as she did not receive the Educational Letter because she was unable to return to Canada due to the Covid pandemic. But for the pandemic, she would have been at home and received the Educational Letter when it was delivered. Moreover, she points out that immediately upon learning of this state of affairs she did withdraw the excess.

[35] The Minister says the decision under review is consistent with decisions of this Court, citing *Rempel v Canada (Attorney General)*, 2021 FC 337 [*Rempel*]; *Jiang v Canada (Attorney General)*, 2019 FC 629 [*Jiang*]; and *Weldegebriel v Canada (Attorney General)*, 2019 FC 1565 [*Weldegebriel*]. I find those decisions distinguishable from that now before this Court.

[36] In *Rempel* the taxpayer received the Educational Letter by email, which he had indicated to CRA to be his preferred manner of communication. He was not checking his email messages and it was only when he received the written Notice of Assessment in the mail that he became aware of the over contribution. The Court observed at paragraph 28 that it was the taxpayer's responsibility to check his correspondence and that the mistake in "not monitoring his communications, should not be transferred to the CRA." Here, Ms. Howard had put a mechanism in place to monitor her communications when the pandemic prevented her from

personally receiving her mail. The failure was on the monitoring not her failure to put in place a plan to monitor her mail.

[37] In *Jiang* the taxpayer was no longer able to receive mail at the address she had provided CRA and she failed to update that address. Again, the cause of the lack of communication was the taxpayer failing to update her records. No such fault lay here with Ms. Howard.

[38] *Weldegebriel* was a similar situation where the taxpayer, a member of the armed forces who travelled frequently, failed to provide a change of address and although the Court found that the failure to receive the letter was an innocent one; nonetheless, it was found to be caused by the taxpayer.

[39] Unlike those decisions, Ms. Howard was not the cause of the Educational Letter failing to come to her attention. There were arguably two proximate causes – the person monitoring the mail failing to send the photo of the envelope for this particular piece of mail, and the pandemic which prevented her from receiving and opening her own mail.

[40] It may be that a decision maker may find neither explanation sufficient to overcome the delay in removing the excess contributions; however, having been specifically raised by Ms. Howard, it had to be addressed. It was not. As Ms. Howard says "had I been home and received the 'educational' letter and not been caught up in a global pandemic I would have been made aware of the overcontribution and I could have avoided the assessment by withdrawing these contributions without delay and during the grace period." The Court accepts, based on her

conduct, that but for the pandemic she would have received the Educational Letter and taken immediate steps to withdraw the over contribution.

[41] For these reasons, this application will be allowed, the decision set aside and the independent review is to be conducted anew by a different decision maker.

[42] It may be that the result of the new review will be the same. If so, the Court would urge Ms. Howard to follow the recommendation of CRA and seek redress for her losses from Scotiabank. Based on the record before the Court, it is quite incomprehensible how anyone could advise a client whose income is so low that no income tax is payable to invest in a TFSA. It is unnecessary, as a TFSA is a mechanism to shelter income from tax.

[43] The Minister, appropriately, sought no costs if successful. Ms. Howard asked the Court to reimburse her for the costs she incurred in bringing this application. In the exercise of my discretion, I will award her costs of $200.00.

JUDGMENT in T-179-22

THIS COURT'S JUDGMENT is that this application is allowed, the second review decision on Ms. Howard's request to the Minister to waive the tax, penalty, and interest assessed because of over contribution to her Tax Free Savings Account is to be determined anew by a different decision maker, and Ms. Howard is awarded her costs fixed at $200.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-179-22
STYLE OF CAUSE:	PAULINE HOWARD v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CHARLOTTETOWN, PRINCE EDWARD ISLAND
DATE OF HEARING:	NOVEMBER 1, 2022
JUDGMENT AND REASONS:	ZINN J.
DATED:	DECEMBER 5, 2022

APPEARANCES:

Pauline Howard	FOR THE APPLICANT (ON HER OWN BEHALF)
Caitlin Ward	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT