Federal Court Cour fédérale

Date: 20100722

Docket: T-1685-09

Citation: 2010 FC 778

Montréal, Quebec, July 22, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

BERNARD GAGNÉ

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present application for judicial review is challenging the legality of the refusal of the representative of the Minister of National Revenue (the Minister) to allow tax relief for five taxation years which are not statute-barred and which are subject to a special tax as explained below.

[2] The applicant, Bernard Gagné, is an individual who made excess contributions to his registered retirement savings plan (RRSP) from 1995 to 2002. In short, at the end of the month of December 2002, he had accumulated an excess amount of $13,583 (the excess amount), while from 2003 to 2007 (the period in question), the excess amount remained more or less the same.

[3] Under subsection 204.1(2.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), a special tax is owed by the applicant. In fact, as long as there remains an excess amount, for each month in question (for a total of sixty (60) months), the applicant must pay a tax equal to 1% of the excess amount to the Canada Revenue Agency (after having first deducted the amount of the annual RRSP deduction limit, as well as an annual amount of $2,000). In addition to this special tax, the applicant is liable for interest and penalties for late filing of the annual returns of RRSP excess contributions required in such cases (the T1-OVP-S returns).

[4] However, tax relief may be granted by the Minister. Subsection 204.1(4), enacted in 1990 at the same time as subsection 204.1(2.1) of the Act, provides that:

> (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.

> (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.

[5] After having been formally advised in 2007 and 2008 that he may have to pay a special tax on the RRSP excess contributions, the applicant, on January 19, 2009, with the help of Canada

Revenue Agency (the Agency) employees, completed and late filed his T1-OVP-S returns for the five-year period in question. At the same time, the applicant sought a ministerial waiver of the special tax that was otherwise owed to the Minister (the request for relief). The applicant submitted that he had been misled by a financial advisor who, from 1995 to 2002, repeatedly overestimated his RRSP contributions, which is what created the excess amount. It was only after he received a letter from the Agency, dated November 6, 2008 (the second notice), that he became aware of the situation. He therefore denied having received, a year and a half earlier, a letter to the same effect, dated March 20, 2007 (the first notice).

[6] On March 10, 2009, the Agency denied the request for relief on the ground that the excess amount was not the result of ''a reasonable error'' on the part of the applicant and that he taken no ''reasonable steps'' to eliminate the excess (the initial decision). The following day, the Agency assessed the applicant. For each year of the period in question, the special tax was about $1,100, to which a penalty in the range of $150 to $185 for late filing was added, as well as interest on arrears varying between $85 and $600; the total amount owing for the period in question was therefore about $8,900 as of March 11, 2009.

[7] On April 27, 2009, after having, over the course of that month, previously withdrawn from his RRSP the amount calculated by the Agency to eliminate the excess amount (namely, the sum of $5,335 after deducting the amount of the annual RRSP deduction limit and an annual amount of $2,000), the applicant requested an administrative review of the initial decision. Nonetheless, the

initial decision was upheld on September 15, 2009 (the final decision), hence this application for judicial review.

[8] Raising the same arguments he previously made, the applicant, representing himself before the Court, insists that he acted with diligence and in good faith as soon as he realized his mistake, namely, in 2008. In this regard, the applicant again denies having received the first formal notice sent by the Agency in March 2007 advising him [TRANSLATION] ‘‘that for the period from 2003 to 2005, [there] may have been excess RRSP contributions made that are subject to a tax of 1% per month…’’. However, as soon as he received the second notice, namely, in November 2008, he took the appropriate measures to rectify the situation. With the help of Agency employees, he completed and filed his T1-OVP-S returns in January 2009, and in April 2009 he withdrew from his RRSP the amount required to eliminate the excess amount. The applicant has explained that he never wanted to abuse the system; moreover, given that his income was quite low for the years 2003 to 2007, it was not in his interest to keep excess amounts in his RRSP. Consequently, the Minister's refusal to grant the request for relief is unreasonable.

[9] For his part, the respondent submits that the applicant's alleged error is not ‘‘reasonable’’. Thus, from 1995 to 2002, namely, for seven consecutive years, the applicant contributed more to his RRSP each year than he was entitled to, which means that since 2003, the applicant had been in a situation of excess contributions. Every notice of assessment sent to the applicant each year featured a printed notice indicating that if the amount of ‘‘unused’’ RRSP contributions ($13,583 since 2003) is greater than the RRSP ‘‘deduction limit’’ ($2,389 for the years 2003 to 2006 and $6,248 for

2007), he could be [TRANSLATION] ‘‘subject to a penalty’’. Alternatively, the respondent argues that, in any event, the applicant had not been diligent enough to withdraw the amounts from his RRSP after the Agency had sent him a first formal notice in March 2007. In this regard, the respondent argues that since the applicant has lived at the same address since at least July 6, 1998, he cannot claim that he never received the first notice.

[10] Today, the issue is whether the final decision contains a reviewable error that would warrant the Court’s intervention. Given the case law and taking into account the usual factors, including the nature of the issue, the applicable standard of review is reasonableness (*Lepiarczyk v. Canada (Revenue Agency)*, 2008 FC 1022 at paragraphs 16 and 17 (*Lepiarczyk*)).

[11] Having considered all of the arguments submitted by the parties, including the supplementary written submissions of the respondent and applicant filed, respectively, on June 25 and on July 6, 2010, I am of the view that the final decision is reasonable and that there is no reason to intervene in this case.

[12] It should be noted that under subsection 204.1(4) of the Act, the power to grant a waiver is discretionary and the onus is on the individual to satisfy the Minister (1) that the excess amount arose as a consequence of a ‘‘reasonable error’’ and (2) that ‘‘reasonable steps’’ had been taken to eliminate the excess. It is a twofold test.

[13] It should also be noted that the terms ‘‘reasonable error’’ and ‘‘reasonable steps’’ are not defined in the Act, and that the English version of the Act differs from the French in that it uses one qualifier: ‘‘reasonable’’, whereas the French version refers to ‘‘erreur acceptable’’ and ‘‘mesures indiquées’’. However, in *Kerr v. Canada (Revenue Agency)*, 2008 FC 1073 at paragraphs 37 and 38, this Court found that the interpretation of ‘‘reasonable error’’ should impose the same requirements as a due diligence defence, as defined by the Federal Court of Appeal in *Corporation de l’École Polytechnique v. Canada*, 2004 FCA 127 at paragraph 30.

[14] From this perspective, a person relying on a reasonable mistake of fact must:

> …establish that he or she was mistaken as to the factual situation: that is the subjective test. Clearly, the defence fails if there is no evidence that the person relying on it was in fact misled and that this mistake led to the act committed. He or she must then establish that the mistake was reasonable in the circumstances: that is the objective test.

[15] Again, and at the risk of repeating myself, the Court must show deference to the administrative decision-maker when assessing the reasonableness of the alleged error and the steps taken by the individual to eliminate the excess amount. The weight to be assigned to each explanation in this regard falls within the expertise of the administrative decision-maker and not this Court. Moreover, even though the administrative policies of the Agency are not legally binding and cannot be construed so as to fetter the Minister’s discretion, they can be of much assistance to the Court when it is assessing the reasonableness of a decision regarding a request for tax relief.

[16] In this case the Agency has not published a policy on the interpretation of subsection 204.1(4), even though it has done so for other relief provisions (see, among others, Income Tax Information Circular No. IC-07, ‘‘Taxpayer Relief Provisions’’, with regard to the application of subsections 220(3.1), 220(3.2), paragraph 164(1.5)(*a*) and subsection 152(4.2) of the Act). However, the Agency did issue its officers Taxation Operations Manual 19(23)0 ‘‘Processing, validation and compliance of registered retirement saving plans and of registered education saving plans’’ 8-2008 (hereinafter the ‘‘Manual’’), which specifies, among other things, the conditions for the application of subsection 224.1(4) of the Act.

[17] Thus, the Manual states 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.
b. An error by the taxpayer’s representative (for example, an accountant) in preparing his or her tax return.

[18] However, the Manual mentions that the following could be considered a ‘‘reasonable error’’:

a. An error in a document prepared by a financial institution or an employer.
b. A situation the taxpayer had never encountered before, for example, if the taxpayer is a public servant and did not know that a lump-sum payment would increase his or her pension adjustment and thereby reduce the amount he or she would be entitled to contribute to an RRSP.
c. The taxpayer had a physical or mental limitation during the period for which relief is sought.
d. The Agency provided incorrect information to the taxpayer.

[19] Finally, the Court notes that the Manual is much more succinct in its definition of ‘‘reasonable steps’’. That said, the Manual indicates that taxpayers normally have ‘‘two months’’ to withdraw the amounts from the date when they receive the Agency’s letter advising them that they are in a situation of excess contributions.

[20] According to *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47:

> … reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[21] The reasons for refusing the applicant’s request for tax relief are set out in the final decision as follows:

> [TRANSLATION]
>
> The information contained in your letter was taken into consideration. We understand your situation and believe that your excess contribution was not done intentionally. However, the facts disclosed are not considered to be a reasonable error and the amount of time taken to withdraw these contributions cannot be considered a reasonable amount of time.
> In spite of the fact that in your Notices of Assessment you were advised that you had been making excess contributions to your RRSP since 1995, you continued to do so every year from 1995 to 2002. Moreover, you took no steps prior to 2009 to completely eliminate your excess contributions to your RRSP.
> ….

[22] As explained in the final decision, Canada’s tax system is based on self-assessment, which means that [TRANSLATION] ‘‘it is up to each individual to make sure he or she does not exceed the

deduction limit when contributing to an RRSP''. Thus, in *Lepiarczyk*, at paragraph 19, the Court stated:

> Having reviewed the Minister's decision and the confirmation of that decision, I am of the opinion that the Minister's decision was reasonable. The decision not to exercise discretion was a plausible and acceptable decision in light of the evidence before him. The Minister provided reasons as to why the error made by the applicant was not reasonable. 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. The Minister reasonably addressed the issue of ''unused RRSP deductions'' and ''unused RRSP contributions''.

[23] In the present case, it was entirely up to the applicant to ensure that he did not make excess contributions to his RRSP. Ignorance of the law is not a reasonable error; moreover, the applicant could have contacted the Department of National Revenue or the Agency at any time to verify whether the amounts he was contributing were reasonable. In this case there is no evidence that the applicant was misled by the Minister or that the Agency provided him with incorrect information, that it was a situation the applicant had never encountered before; or that he had physical or mental limitations during the period in question. Even if one believes the applicant when he states that he relied on a financial advisor or an accountant, objectively, the error is not reasonable.

[24] In fact, from 1995 to 2002, that is, for seven consecutive years, the applicant made excess contributions to his RRSP. During the period under review, namely, from 2003 to 2007, he

maintained an excess amount of $13,583. The applicant cannot now claim that he never received a notice of assessment during this period. All of these notices included a general advisory that the applicant and his accountant or financial advisor could not possibly have overlooked:

> You have (B) of unused RRSP contributions available for . If this amount is more than amount (A) above, you may have to pay a tax on the excess contributions.

[25] Indeed, as Sébastien Tremblay, Client Services Officer at the Agency, explained in paragraphs 7 to 12 of his affidavit, the amount on line (B) was $13,583.00 from 2003 to 2007 and had always exceeded amount (A). That said, even though the notices of assessment use the term ‘‘unused’’ instead of ‘‘excess’’, this in no way alters the fact that the applicant had been notified by the Agency that a special tax is owed when the amount of ‘‘unused contributions’’ (letter B) exceeds the ‘‘deduction limit’’ (letter A), which is the case here, according to the notices of assessment.

[26] Finally, in both his oral submissions at the hearing and his supplementary written submissions, the applicant is adamant about having taken ‘‘reasonable steps’’ to eliminate the excess amount in a reasonable amount of time and insists that employees of the Agency implicitly agreed to grant him an extension to do so until April 2, 2009. However, I do not feel that this is sufficient to render the final decision unreasonable. In fact, subsection 204.1(4) of the Act imposes a twofold test. In the circumstances, it was open to the Minister’s representative to find that the excess amount was not the result of a ‘‘reasonable error’’ because the applicant made this error repeatedly

for seven (7) consecutive years and it was only when his income fell in 2003 that he stopped making excess contributions to his RRSP. Clearly, the first part of the test has not been met in this case.

[27] In conclusion, having considered the legality of the final decision in light of the evidence in the record and the two conjunctive components of subsection 203.1(4) of the Act, I cannot conclude that it was unreasonable in this case. The refusal to grant administrative relief, although it may not be the only possible outcome, nonetheless falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. It should be noted that a ‘‘reasonable’’ decision is not necessarily the one the reviewing judge would have preferred. However, it is not for the Court to propose to the parties what may appear to it to be a more ‘‘equitable’’ solution in the circumstances.

[28] That said, the parties agree that this is a matter in which the Court should not award costs, in any event of the cause. Therefore, the application for judicial review will be dismissed without costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the present application for judicial review be dismissed without costs.

‘‘Luc Martineau’’

Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1685-09
STYLE OF CAUSE:	BERNARD GAGNÉ v. AGC
PLACE OF HEARING:	Montréal, Quebec
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APPEARANCES:

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