Federal Court  Cour fédérale

Date: 20110620

Docket: T-2060-09

Citation: 2011 FC 721

Ottawa, Ontario, June 20, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

KATHY DIMOVSKI

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision by the Canada Revenue Agency (CRA) to deny the applicant's request for relief from the payment of tax owing under the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) as a result of an over-contribution to an Registered Retirement Savings Plan (RRSP). Under the Canadian tax regime, interest and penalties are exigible as a result of this type of over-contribution. The CRA has not yet made a decision on the interest and late-filing penalties. As a result, this application for judicial review concerns only the decision not to waive the tax owing by the applicant.

[2] The applicant is a single, 49-year old woman who lives with her widowed father. Her mother passed away in December 2004. From 1988 to 2004 the applicant was her mother's primary caregiver. The applicant was given $5,945.00 by her father, and in 2003 another $5,818.76 which he withdrew from his Registered Retirement Income Fund (RRIF). The applicant deposited both sums of money her father gave her into an RRSP at a branch of the TD Canada Trust Bank in Scarborough, Ontario. The applicant also made deposits into the RRSP in 2005, 2006, 2007, and 2008. It is the deposit of these funds into the RRSP account that it is at the heart of the application before the Court.

[3] On January 25, 2007 the CRA wrote to the applicant and informed her that she had made contributions to her RRSP in excess of the limits provided for by the *Income Tax Act*. The CRA also informed the applicant that she had not filed the required T1-OVP return to pay tax on the over-contribution. She was also:

- Cautioned that her excess contributions were subject to a tax equal to 1% per month (the Part X.1 Tax);
- Warned that she was liable to pay a late filing penalty in respect of her T1-OVP; and
- Advised as to the choice of either withdrawing the excess contributions from her RRSP or of filing an annual T1-OVP return and paying the applicable tax.

[4] The applicant neither withdrew the excess contributions from her RRSP nor did she file the T1-OVP return and pay the applicable tax. To the contrary, she made further RRSP contributions in 2007 and 2008.

[5] The CRA sent the applicant another letter on December 2, 2008 and cautioned that if she did not file the T1-OVP return she would be arbitrarily assessed. In response, in a January 26, 2009

letter, the applicant wrote to the CRA and requested that she be arbitrarily assessed. The applicant also explained that she would be applying for taxpayer relief and also that she "was totally unaware that there was [an RRSP] limit or restriction."

[6] On March 18, 2009 the CRA assessed the applicant and found that a total of Part X.1 tax in the amount $8,880.00 was owed for taxation years 2003 - 2008. It also found that she owed $1,139.00 in late-filing penalties, and $1,940.00 in arrears interest - for a total of $11,959.00. The applicant subsequently submitted an application for taxpayer relief on March 31, 2009. She declared in that letter that she was not aware of her RRSP contribution limits and the Crown would not have collected any taxes in any event as a result of her investments as her income was too low.

[7] The applicant's request was considered at two levels by the CRA. At the first level, in an August 11, 2009 letter the CRA informed the applicant that it had decided not to waive the $8,880.00 owing in *Income Tax Act* Part X.1 tax. Following the first denial, the applicant then retained counsel who wrote and requested that the decision to deny be reconsidered.

[8] A new CRA officer was designated to conduct the second review. The officer determined that the request to deny relief ought to be affirmed. This recommendation was subsequently accepted by the team leader at the CRA Sudbury Ontario Taxation Office, and the CRA officer who was the ultimate decision-maker in respect of the applicant's request. A November 18, 2009 letter explained the considerations behind the final decision to deny her request for relief. The letter noted that Ms. Dimovski:

- Had an obligation to exercise due diligence in respect of making her RRSP contributions, including being aware of her annual deduction limits;

- Failed to show that the excess RRSP contributions resulted from circumstances beyond her control;
- Made the excess RRSP contributions even though:
  - The CRA advised the Applicant every year of her RRSP deduction limit; and
  - She continued to make excess RRSP contributions even after receiving the letter dated January 25, 2007 warning her of her excess RRPS contributions; and
- Failed to withdraw her excess RRSP contributions.

[9] It is the decision in this November 18, 2009 letter that is the subject of this judicial review. Another letter was sent by CRA to the applicant on December 7, 2009 which confirmed the November 18, 2009 decision.

Statutory Framework

[10] Under subsection 204.1(2.1) of the *Income Tax Act*, a special tax is owed in respect of amounts over-contributed to an RRSP. In this case, for each month in question, now a period of 101 months, the applicant must pay a tax equal to 1 % of the excess amount contributed to an RRSP. In addition, the applicant is liable for interest and penalties for late filing of returns in respect of excess contributions as required in these cases (the T1-OVP-S returns). In consequence, the tax liability of the applicant as a result of her over contributions is as follows:

Taxation Year	Part X.1 Tax	Late Filing Penalty	Arrears Interest (as of Mar.18.09)
2008	$1,844		
2007	$1,898	$266	$152
2006	$1,543	$262	$304
2005	$1,473	$250	$468
2004	$1,120	$190	$477
2003	$1,003	$171	$539
Total:	**$8,880**	**$1,139**	**$1,940**

[11] Under the *Income Tax Act*, the Minister is authorized to grant relief from this special tax. Section 204.1(4) provides that:

> 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
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> (*a*) the excess amount or cumulative excess amount on which the tax is based arose as a consequence of reasonable error, and
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> (*b*) reasonable steps are being taken to eliminate the excess,
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> the Minister may waive the tax.
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> 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.

[12] The discretion is constrained by the clear language of Parliament. The onus is on the taxpayer to satisfy the Minister that each of the two criteria are met; that the excess contribution arose as a consequence of an administrative error and that reasonable steps were being taken to eliminate the excess. In this case, the decision-maker concluded that neither criteria was met and rejected the application for relief.

[13] It is the reasonableness of this decision that is in issue.

[14] The Minister contends that the mistake did not arise as a result of a reasonable error. There was no miscalculation of her contribution limit, nor was there a misplaced reliance on a Notice of

Assessment or advice from the Respondent. In *Gagné v Canada (Attorney General)*, 2010 FC 778, paras 13-14, Justice Luc Martineau analyzed the scope and content of the statutory constraints on the exercise of the Minister's discretion:

> 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.
>
> From this perspective, a person relying on a reasonable mistake of fact must:
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> > …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] There is no doubt the applicant received poor advice throughout. There is some suggestion that her first over-contribution was prompted by a CRA tax preparer who may have assisted the applicant. The evidence on this point is unclear, and in any event would explain only one of the five years during which over-contributions were made. The applicant received poor advice from the bank, which sought and received her funds; from her accountant who said the matter had been resolved when it had not. I accept that there was no intention on her part to over-contribute. Nor did she profit or benefit from the over-contribution as she had no income which was effectively reduced. It is indeed an unfortunate story.

[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 *Income Tax Act*: *R. v McKinlay Transport Ltd.* [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.

[18] The *Income Tax Act* provides an escape route for individuals such as the applicant who over-contribute. Inexplicably, the applicant did not take advantage of the one-year grace period available to her within which to withdraw her contributions. The applicant was advised in a letter dated January 25, 2007 which warned her of the excess contributions and of the need to withdraw. Regrettably, the applicant did not heed this advice, and in fact, compounded her problems by making further contributions in 2007 and 2008. Objectively viewed, the applicant's conduct in ignoring the warning letters, letting the period of withdrawal lapse and then making further over-contributions is not reasonable and falls short of the due-diligence standard.

[19] The standard of by which the Minister's decision is assessed is that of reasonableness, and more particularly, whether the decision falls within a range of acceptable outcomes having regard to the legal and factual context. There is much about this case that is disturbing; the extraordinary

delays on the part of the CRA in replying and communicating to the applicant; requiring the taxpayer to call Manitoba during business hours to obtain further information; and the tone of the correspondence emanating from the respondent is not that which one would expect from a government agency. Perhaps the most disturbing aspect of these facts is that the taxpayer would never have paid tax on this money in the first place as her income was far too low. She did not profit or reduce her taxes in anyway.

[20] These considerations are not germane to the review of the exercise of the discretion under section 204.1(4). Nor is it the role of the Court to comment on CRA's choice of priorities. The conclusion that over-contribution did not arise as a result of a reasonable error and that the taxpayer did not take steps to eliminate the excess once they became aware of it were both reasonably open to the Minister.

[21] This application for judicial review is dismissed.

[22] No order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. There is no order as to costs.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Kathy Dimovski	FOR THE APPLICANT
Laurent Bartleman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT