Federal Court  Cour fédérale

Date: 20190731

Docket: T-898-18

Citation: 2019 FC 1031

Ottawa, Ontario, July 31, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

GEORGE GEKAS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, George Gekas, has applied pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a decision of the Minister of National Revenue made pursuant to subsection 207.06 (1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), as amended [*ITA*]. In the decision, the Minister's delegate [Delegate] determined not to waive tax payable on excess contributions to a Tax-Free Savings Account [TFSA].

[2] The Applicant requests that the Court: (i) cancel the tax and interest assessed on excess TFSA contributions for the 2016 tax year; (ii) declare that his TFSA over-contributions have not damaged the Canadian treasury and that he has not benefited from the over-contributions; and (iii) set aside the decision and exercise its discretion to alleviate the penalties and interest.

I. Background

[3] In the 2016 taxation year, the Applicant had a TFSA contribution limit of $10,045.18. On January 8, 2016 he contributed $10,000 to his TFSA. He meant to make this contribution.

[4] Ten days later the Applicant telephoned his financial institution to ask if the contribution he had made via telephone on January 8th had been processed. The clerk on the other end of the telephone line neglected to see a colleague already had processed the contribution and proceeded to redo the contribution, resulting in an over-contribution of approximately $10,000.

[5] Several months later, in June 2016, the Applicant communicated with his financial institution about rumors in the news concerning its demise. The Applicant was advised to split his deposits between two separate entities owned by the financial institution to have the benefit of Canada Deposit Insurance Corporation protection. The Applicant followed this advice and gave directions over the phone to his financial institution to split his accounts, but these directions were mistaken for an order to contribute $10,000 to a TFSA. Thus, the Applicant ended up with TFSA contributions in 2016 of $30,000.

[6] The Applicant did not discover the excess contributions until he received an assessment from the Canada Revenue Agency in July 2017. Upon this discovery, the Applicant withdrew $20,000 from his TFSA and deposited this amount back to his bank account. The CRA assessed the Applicant a penalty of $1,784.60 under Part XI.01 of the *ITA* as a result of the over-contributions.

[7] Shortly after discovering the 2016 over-contributions, the Applicant requested discretionary relief from the taxes and penalties caused by the over-contributions. The CRA denied this request in a letter dated September 18, 2017. The Applicant requested a second review of this denial. In a letter dated May 8, 2018, the Delegate declined the Applicant's request, finding that discretion would not be exercised in favour of the Applicant as he was a repeat over-contributor to his TFSA.

[8] This was not the first time there had been an over-contribution in the Applicant's TFSA.

[9] In 2014, the Applicant's TFSA contribution room was $5,500. On January 13, 2014, he contributed $5,500 to a TFSA account. Subsequently, he withdrew $5,500 from the account in June 2016 and personally deposited that amount in another TFSA account with a different financial institution. The CRA assessed this as two separate contributions, determining that an excess contribution had been made and applied a penalty and interest totalling $439.91. The Applicant objected to this assessment and, ultimately, in June 2016 the CRA granted his request for a waiver of the tax imposed on the excess TFSA contribution on the basis that the excess contribution occurred due to a transfer between financial institutions.

II. The Delegate's Decision

[10] The Delegate denied the Applicant's request for relief under subsection 207.06 (1) of the *ITA*. The key part of the decision is contained in the following paragraphs of the May 8th letter:

> In your letter, you stated that the initial review for your 2016 relief request incorrectly noted you had made excess contributions in 2014. You state the CRA determined you were not in excess, and that your reason for over-contributing in 2016 was reasonable and clear. Two contributions were made on both January 8 and January 18 of 2016, to which you state the bank clerk did not check for previous contributions before making the second contribution. The third contribution you explain by noting you were directed by Oaken Financial to split some of your accounts, which resulted in the third erroneous contribution. Your intent was not malicious but rather due to reasonable error, and you state the penalty does not fit the crime. You acted immediately to remove the excess funds, which you state qualifies as an immediate response. You therefore request relief for 2016.
>
> A review of your situation and our records indicate that you received at least four letters or notices informing you of taxes owing related to 2014 excess contributions, which you were provided relief for under Part XI.01 of the Income Tax Act. Relief would not be warranted if there were no taxes owing. Please see letters and notices dated February 5, 2016, March 2, 2016, June 6, 2016, and June 15, 2016. You were therefore previously notified of excess contributions.
>
> …
>
> After a thorough review of the information submitted and the facts of your case, we have determined that you continued to make excess contributions to your TFSA in 2016, after you were notified by the Canada Revenue Agency about TFSA excess contributions made in 2014.

[11] The Delegate's affidavit lists various facts concerning the 2014 and 2016 over-contributions which were considered in making the decision under review. In view of these facts, the Delegate "concluded that the Applicant was a repeat over-contributor to his TFSA account,

which he had been advised of, and that a clerical error at his financial institution was not a reasonable error."

III. Standard of Review

[12] The standard of review for a discretionary decision by the Minister or her delegate is a deferential, reasonableness standard (*Bonnybrook Park Industrial Development Co. Ltd. v Canada (National Revenue)*, 2018 FCA 136 at para 22, and *Kapil v Canada Revenue Agency*, 2011 FC 1373 at para 19 [*Kapil*]).

[13] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[14] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[15] An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal has observed: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. The Parties' Submissions

A. *Applicant*

[16] The Applicant says the Delegate's decision is unreasonable as it lacks justification and intelligibility. In the Applicant's view, the Delegate relied on his own conclusions, despite being offered a full explanation about the TFSA over-contributions. According to the Applicant, the Delegate did not consider the absence of bad faith on his part, that he was not blameworthy, and that he had not been grossly negligent.

[17] The Applicant claims he made a meaningful attempt to address the over-contributions by promptly replying to all CRA correspondence and withdrew the over-contributions the day after he learned of them. According to the Applicant, the assessment was done in a mechanical way, with a purely robotic approach, and no qualitative factors or mitigating circumstances entered into making the decision. In the Applicant's view, the 2014 and 2016 independent reviews were

done 19 months apart by two different assessors, yet they are fundamentally the same as if they were produced in a template.

B. *Respondent*

[18] The Respondent says the Applicant has not identified a specific ground of review but, rather, simply disagrees with the decision and asserts that the Delegate did not take his circumstances into account. In the Respondent's view, the Delegate considered all of the applicable factors and the Applicant's arguments and there is no reviewable error that would justify this Court's intervention with the decision.

[19] According to the Respondent, although subsection 207.06(1) of the *ITA* sets out the criteria that must be met in order for the Minister to consider whether to cancel the tax, the fact that both criteria are met in a particular case does not necessarily mean the tax will be cancelled; that determination is left to the Minister's discretion. The Respondent says the criteria are conjunctive, in that both prongs must be established to the Minister's satisfaction before a taxpayer will be considered for relief, and that even if both prongs are met the discretion to waive the tax remains with the Minister.

[20] The Respondent claims that innocence and lack of intent are not determinative of whether there has been a reasonable error. According to the Respondent, while these subjective factors form part of the considerations the Minister may consider, the issue is the reasonableness of the error, objectively assessed. In the Respondent's view, it was reasonable for the Delegate to

conclude that the Applicant's explanation was not a reasonable error and the discretion not be exercised as this was the second time the Applicant had over-contributed to his TFSA.

V. Analysis

A. *Are the facts alleged by the Applicant in paragraphs 16 to 25 of his memorandum proven?*

[21] In the Respondent's view, the facts alleged by the Applicant in paragraphs 16 to 25 of his memorandum of fact and law are not contained in his affidavit and are not part of the record and, consequently, should not be considered.

[22] The general facts alleged in these paragraphs are, for the most part, found in other parts the record; notably, the Applicant's explanation of how the over-contributions occurred, the amount of penalties and interest owing, and the prompt repayment. The Applicant's explanation for his desire to split his TFSA into two accounts is not proven by his affidavit. The reason for this split, however, is not determinative of the central issue of whether the Delegate's decision was reasonable; and, therefore, nothing turns on whether this fact has or has not been proven.

B. *Is the Delegate's decision reasonable?*

[23] There is limited case law concerning the exercise of the Minister's discretion under subsection 207.06 (1) of the *ITA* to waive a tax liability for TFSA over-contributions. There is, however, case law which addresses over-contributions to a Registered Retirement Savings Plan [RRSP]. The Minister's discretion under subsection 204.1(4) of the *ITA* to waive a tax liability in

respect of RRSP over-contributions is stated in language which is similar (but not identical) to that contained in subsection 207.06 (1).

[24] Subsection 204.1(4) provides:

Waiver of tax	Renonciation
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 **(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.	**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.

[25] Subsection 207.06(1) states that:

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).

[26] Both of these subsections incorporate the notion that the excess contribution arose as a consequence of a "reasonable error".

[27] The Respondent says, in view of *Dimovski v Canada Revenue Agency*, 2011 FC 721 at para 16 [*Dimovski*], that innocence and lack of intent are not determinative of the reasonableness of the error. I agree.

[28] However, *Dimovski* is distinguishable from the circumstances of this case. Ms. Dimovski over-contributed to her RRSP for several years due to bad advice from advisors and, while the CRA had repeatedly notified her of the over-contributions, she did not act promptly to correct the

situation. The Court in *Dimovski* found it was reasonably open to the Minister to determine that the over-contributions did not arise as a result of a reasonable error and that Ms. Dimovski did not take steps to eliminate the excess once she became aware of it.

[29] In this case, the Applicant claims the excess contributions arose out of a reasonable error and he promptly removed $20,000 from his TFSA to account for the over-contributions once he learned of them. (Parenthetically, I note that subsection 207.06 (1) requires that any income acquired from that $20,000 should also have been removed, but the record is silent as to whether the Applicant earned any income from the over-contributions).

[30] The over-contributions arose due to miscommunications between the Applicant and his financial institution and were outside of his control. The fact he had caused over-contributions to his TFSA in 2014 is not connected to the question of whether relief should be granted regarding the over-contributions in 2016. In my view, it was unreasonable for the Delegate to consider the 2014 over-contributions and the notices received by the Applicant in that regard when assessing whether relief should be granted in respect of the 2016 excess contributions. The Delegate's characterization of the Applicant as "a repeat over-contributor to his TFSA account" is unjustified, especially when one considers that the CRA granted his request for a waiver of the tax imposed on the 2014 excess contribution.

[31] Just because the Applicant was notified of a previous excess contribution on four occasions in 2016 does not mean he can control a third party's actions or that this is somehow connected to the question at hand. A person can make a mistake and over-contribute when they

have control but they cannot prevent mistakes by others. In my view, the Delegate's decision is unreasonable because it did not fully assess the extent to which the excess contributions resulted from the mistakes of persons other than the Applicant. The decision will therefore be set aside and the matter returned to the Minister for redetermination by a different delegate.

[32] The Applicant asks the Court to cancel the tax and interest assessed on the excess contributions for the 2016 tax year. He also asks the Court to declare that his over-contributions have not damaged the Canadian treasury and that he has not benefited from them. The Court denies these requests in view of *Kapil*, where the Court observed that:

> [20] As a matter of law, this Court does not have the jurisdiction to order the Minister to waive taxes, penalties, and arrears interest. The jurisdiction of the Court is limited to ordering the Minister to substantively reconsider his decisions not to waive the taxes and related interest and penalties. The applicant must understand, therefore, that even if this Court had found in his favour, he would not automatically be entitled to a waiver and refund of his money. This Court's review is confined to an analysis of whether the Minister's exercise of discretion in refusing the waiver requests was lawful, not to substitute its decision for that of the Minister: [citation omitted].

VI. Conclusion

[33] The Delegate's decision in this case was not reasonable. The decision is, therefore, set aside and the matter returned to the Minister for redetermination by a different delegate.

[34] At the hearing of this matter, the Applicant indicated he was not seeking costs. Accordingly, there will be no order as to costs.

[35] The Applicant did say, however, that he wanted the amount of the penalty he paid returned to him. The Court is without jurisdiction to make an order against the Minister in this regard. Whether the Applicant obtains return of this amount will depend on the outcome of the redetermination.

JUDGMENT in T-898-18

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Minister's delegate dated May 8, 2018, is set aside; the matter is returned to the Minister for redetermination by a different delegate in accordance with the reasons for this judgment; and there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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