Federal Court  Cour fédérale

Date: 20201214

Docket: T-1732-19

Citation: 2020 FC 1150

Ottawa, Ontario, December 14, 2020

PRESENT: Madam Justice Pallotta

BETWEEN:

NICOLE M. IFI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Ifi, challenges a decision by a delegate (Delegate) of the Minister of National Revenue (Minister) refusing her request to exercise discretion to waive tax, penalties and interest assessed on her excess and non-resident contributions to a tax-free savings account (TFSA).

[2] The Delegate denied Ms. Ifi's request on the basis that Ms. Ifi continued to make excess and non-resident contributions to her TFSA after she was notified that she had over-contributed in 2009. Ms. Ifi submits the Delegate's decision was unreasonable because she was a Canadian resident in 2009, and she did not repeat the same mistake when she contributed to her TFSA as a non-resident after 2009. Therefore, Ms. Ifi submits the Delegate's decision was not justified by the reasons.

[3] For the reasons below, I find that the Delegate's decision was unreasonable. Accordingly, this application for judicial review is allowed.

II. **Facts**

[4] In 2009, Ms. Ifi contributed to her TFSA as a Canadian resident. By letter dated June 1, 2010, the Canada Revenue Agency (CRA) notified Ms. Ifi that she had made an excess contribution (CRA's 2010 Letter). The CRA assessed tax of $33.81 on the excess contribution, which Ms. Ifi paid without delay.

[5] Ms. Ifi left Canada in 2010 and lived in a number of countries before moving to New York, where she currently works as school teacher. Unaware that she was ineligible to contribute to her TFSA as a non-resident, Ms. Ifi contributed small amounts to her TFSA each year between 2010 and 2018, except in 2014 when she contributed just over $30,000 in order to save for her retirement. Before making the 2014 contribution, Ms. Ifi consulted her Canadian bank representative to ensure that she was eligible to contribute. Ms. Ifi informed the bank

representative that she was no longer a Canadian resident and the representative—after consulting his bank manager—advised Ms. Ifi that she could contribute to her TFSA.

[6] In July 2018, Ms. Ifi learned that the bank representative had given her incorrect advice. Ms. Ifi promptly emptied and closed her TFSA account. She called the CRA and was advised to submit a letter requesting a waiver.

[7] Ms. Ifi sent a letter to the TFSA Processing Centre of the CRA in Winnipeg, requesting that the Minister waive liability on her excess and non-resident TFSA contributions for the 2010 to 2018 taxation years on the basis that the liability arose as a consequence of a reasonable error (Initial Request). The Initial Request explained that Ms. Ifi had been unaware that she could not contribute to her TFSA as a non-resident, and that she had been incorrectly advised by her bank representative that she could contribute as a non-resident.

[8] Ms. Ifi's Initial Request was denied (First Decision). The First Decision explained that Ms. Ifi had continued to make excess TFSA contributions along with contributions as a non-resident from 2010 through 2017, after the CRA notified her about TFSA excess contributions made in 2009. The CRA assessed $27,640.74 in tax, penalties and interest for Ms. Ifi's excess and non-resident TFSA contributions, effectively wiping out her retirement savings.

[9] Ms. Ifi requested a second, independent review of her request for a waiver (Second Request). The Second Request focused on the 2014 to 2017 taxation years since almost all of Ms. Ifi's liability related to those years. She submitted that her liability for the 2014 to 2017

taxation years arose as a consequence of a reasonable error. She also argued that the basis for the First Decision was flawed, since the CRA's 2010 Letter addressed a matter that was unrelated to her liability for TFSA contributions as a non-resident, she had promptly paid the amount indicated as owing by the CRA, and that matter was closed.

[10] Ms. Ifi's Second Request was denied (Second Decision). The Second Decision is the subject of this application for judicial review.

[11] The key paragraphs of the Second Decision are as follows:

> … We determined that we cannot grant a request to cancel the tax in your particular situation.
>
> In your letter, you stated that your financial institution did not notify you that you could not contribute to a TFSA as a non-resident.
>
> After a thorough review of the information submitted and the facts of your case, we have determined that you continued to make excess and non-resident contributions to your TFSA from 2010 – 2018, after you were notified by the Canada Revenue Agency about TFSA excess made in 2009 by letter that was issued to you June 1, 2010. We have to confirm that, after reviewing the documentation submitted and information available, there are no circumstances that would support the cancellation of the tax on excess and non-resident TFSA contributions.
>
> It is the individual's responsibility to educate themselves about the TFSA rules after being notified.
>
> The initial assessment is correct; therefore, we will not be changing your 2010 – 2018 Form RC243, Tax-Free Savings Account (TFSA) Return.

III. **Issue and Standard of Review**

[12] Discretionary decisions by the Minister or her delegate refusing to waive taxes and penalties are to be reviewed on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Gekas v Canada (Attorney General)*, 2019 FC 1031 [*Gekas*] at para 12; *Kapil v Canada (Revenue Agency)*, 2011 FC 1373 [*Kapil*] at para 19; *Bonnybrook Park Industrial Development Co. Ltd. v Canada (National Revenue)*, 2018 FCA 136 at para 22.

[13] The issue for determination on this application for judicial review is whether the Second Decision denying Ms. Ifi's request for relief was reasonable.

[14] Reasonableness review is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The focus is on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome: *Vavilov* at paras 83, 86 and 99. A reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

IV. **Analysis**

[15] The *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] limits the contributions that a taxpayer may make to a TFSA. A taxpayer who exceeds their TFSA contribution limit is liable for tax on the excess amount: s. 207.02 of the *ITA*. In addition, a non-resident is liable for tax on contributions to a TFSA, subject to certain exceptions that are not applicable in this case: s. 207.03 of the *ITA*. The Minister has the discretion to waive or cancel all or part of a taxpayer's liability arising from excess or non-resident TFSA contributions, if the taxpayer: (i) establishes to the satisfaction of the Minister that the liability arose as a consequence of a reasonable error; and (ii) promptly withdraws the amount in respect of which the individual would otherwise be liable to pay the tax, together with the income reasonably attributable to that amount: s. 207.06(1) of the *ITA*.

[16] A taxpayer's liability arising from excess or non-resident TFSA contributions is imposed by operation of the *ITA* as a matter of law, and does not arise from any discretionary decision of the Minister. The discretionary power of the Minister is limited to providing exceptional relief where the Minister believes that such relief is warranted: *Jenkins v Canada (Revenue)*, 2007 FC 295 at para 13. Both parts of the test under section 207.06(1) must be met before the taxpayer will be considered for relief, but the discretion to waive all or part of the taxpayer's liability remains with the Minister: *Kapil* at para 28.

[17] Ms. Ifi submits that the Delegate's refusal to waive liability arising from Ms. Ifi's excess and non-resident TFSA contributions was unreasonable. Ms. Ifi argues the Delegate

unreasonably relied on the CRA's 2010 Letter—notifying her of the excess contribution made in 2009 as a Canadian resident—as the basis for determining that Ms. Ifi's excess and non-resident TFSA contributions between 2010 and 2018 did not arise from a reasonable error. According to Ms. Ifi, there is no rational connection between the excess contribution made in 2009 and the excess and non-resident contributions made after 2009. Contrary to the Delegate's findings, Ms. Ifi submits her liability for excess and non-resident contributions between 2010 and 2018 arose due to her non-resident status, and she did not "continue" to make excess and non-resident contributions to her TFSA after receiving the CRA's 2010 Letter. Furthermore, Ms. Ifi submits that the Second Decision simply repeats the same basis for refusal as the First Decision, and fails to address her argument that the reasoning in the First Decision was flawed. Therefore, Ms. Ifi submits the Second Decision was not transparent, intelligible or justified: *Vavilov* at para 15.

[18] Ms. Ifi relies on *Gekas*, *Jiang v Canada* (Attorney General), 2019 FC 629 [*Jiang*] and *Weldegebriel v Canada (Attorney General)*, 2019 FC 1565 [*Weldegebriel*] to support her position. In *Gekas*, the Court found it was unreasonable for the Minister to consider the applicant's over-contributions in 2014 when assessing relief in respect of over-contributions in 2016 because the two were not connected. In contrast, the Court upheld the Minister's decision to deny relief in *Jiang* and in *Weldegebriel*, where past CRA warnings were connected to the relief sought. In *Jiang*, the applicant had continuously made non-resident contributions after the CRA sent several notices about excess and non-resident contributions. Similarly in *Weldegebriel*, the CRA sent six notices to the applicant to inform him of his over-contributions, and the Court found the Minister's decision to be reasonable despite the applicant's allegation that he did not receive the notices. Ms. Ifi submits her case is distinguishable from *Jiang* and

Weldegebriel because the CRA sent only one letter, and that letter did not warn her about non-resident TFSA contributions.

[19] Ms. Ifi also relies on *Sangha v Canada (Attorney General)*, 2020 FC 712 [*Sangha*]. She argues that *Sangha*, a post-*Vavilov* decision concerning the Minister's refusal to waive liability for excess TFSA contributions, is particularly relevant to her case. The Court in *Sangha* determined that the Minister's decision did not reflect a coherent assessment of the relevant law and significant facts and submissions from the record, and consequently, the refusal to exercise discretion to waive liability was not intelligible or justified. Ms. Ifi relies on the following passage at paragraph 2:

> The application for judicial review is allowed because the Decision lacks analysis and justification. The Minister's delegate failed to reasonably assess the evidence in the record and the submissions made by Mr. Sangha in his waiver request against the conditions set out in the *Income Tax Act*, RSC 1985, c 1 (5th Supp.) (*ITA*) for the exercise of the Minister's discretion. The delegate's substantive consideration of the request was limited to a perfunctory statement that Mr. Sangha made a series of over-contributions despite receiving a warning regarding the status of his TFSA. The statement unduly simplified the events that led to the imposition of the excess contribution tax and alone is an inadequate explanation for the Minister's refusal.
>
> (Emphasis added.)

[20] Ms. Ifi submits that the facts in *Sangha* closely resemble the facts of her case, and she points out that the operative paragraphs of the delegate's decision in *Sangha* are almost identical to the operative paragraphs of the Second Decision.

[21] I agree with Ms. Ifi that the Delegate's decision to deny her request for relief was unreasonable. 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.

[22] The basis underlying the Delegate's decision to deny Ms. Ifi's request was that Ms. Ifi continued to make excess and non-resident contributions to her TFSA from 2010 to 2018, after the CRA's 2010 Letter notified her about excess TFSA contributions made in 2009. I note that Ms. Ifi could not have "continued" to make non-resident TFSA contributions since she was a Canadian resident in 2009. The Second Decision, reviewed in light of the history and context of the proceedings in which they were rendered, suggests that the Delegate's decision was based on Ms. Ifi's "continued" excess contributions (*Vavilov* at para 94). However, while I am prepared to accept that the Delegate's reference to continued non-resident contributions may have been an oversight or grammatical error, the basis for the Second Decision is nevertheless flawed, as Ms. Ifi did not "continue" to make excess contributions, for two reasons.

[23] First, the Delegate's statement that Ms. Ifi continued to make excess contributions from 2010 to 2018 is a mischaracterization that appears to suggest Ms. Ifi was a repeat over-contributor who continuously made excess contributions every year between 2010 and 2018. In fact, Ms. Ifi made no excess contributions in 2010, 2011, 2012 or 2013, and was first assessed

tax liability for excess contributions in 2014, after she made the contribution of $30,075. On the Second Request, Ms. Ifi asked the Minister to waive her liability for the 2014 to 2017 taxation years since the majority of the tax, penalties and interest assessed against her related to those years (see table below):

Year	**Ms. Ifi's contribution**	**Tax on excess TFSA contributions**	**Tax on non-resident contributions**	**Penalties**	**Arrears interest**	**Total**
2010	192.00	0	2.85	0	0	**2.85**
2011	28.50	0	8.09	0	3.29	**11.38**
2012	91.50	0	14.75	2.51	5.86	**23.12**
2013	58.50	0	23.85	4.05	7.51	**35.41**
2014	30,075.00	1,222.65	1,832.70	519.41	742.17	**4,316.93**
2015	533.11	2,502.62	3,693.26	1,053.30	1,077.54	**8,326.72**
2016	66.00	2,513.91	3,704.55	1,057.14	674.45	**7,950.05**
2017	16.50	2,518.84	3,709.48	498.27	247.69	**6,974.28**
Total	**31,061.11**	**8,758.02**	**12,989.53**	**3,134.68**	**2,758.51**	**27,640.74**

[24] Second, it was unreasonable for the Delegate to suggest that Ms. Ifi continued to make excess contributions after being warned. The Delegate failed to recognize that Ms. Ifi's excess contribution in 2009 and her subsequent excess contributions resulted from different errors. Ms. Ifi did not repeat a previous mistake—the one the CRA warned her about—when she made an excess contribution in 2014. The excess contribution in 2014 arose due to the fact that Ms. Ifi had not accrued any TFSA contribution room as a non-resident, and as such, the 2014 excess contribution error was tied to Ms. Ifi's status as a non-resident. If Ms. Ifi had remained a Canadian resident, her 2014 contribution would not have exceeded her cumulative contribution room accrued between 2010 and 2014, and Ms. Ifi would not have been assessed any liability for the 2014 to 2017 taxation years. In my view, this is similar to the situation in *Sangha*, where Justice Walker found that the delegate's failure to distinguish between Mr. Sangha's excess

contributions made and withdrawn before June 2017, which were the subject of a previous notification letter, and his subsequent September 2017 contribution was unreasonable.

[25] Furthermore, I agree with Ms. Ifi that the Second Decision was to be a second, independent determination. Ms. Ifi specifically argued that the basis for the First Decision was flawed, yet the Second Decision refused the request to waive tax liability on the same basis as the First Decision, without acknowledging or addressing Ms. Ifi's argument. The Delegate's failure to consider Ms. Ifi's submissions regarding the impact of the CRA's 2010 Letter rendered the decision unreasonable: *Vavilov* at paras 127-128; *Sangha* at para 27.

[26] The respondent argues that, contrary to Ms. Ifi's argument, the Delegate did not base her decision solely on Ms. Ifi's previous over-contribution to her TFSA and that other factors supported the Second Decision.

[27] The respondent submits the Delegate relied on the fact that the CRA's 2010 Letter directed Ms. Ifi to the CRA website and Guide RC4466 for more information on TFSAs, which included information on the rules for non-resident contributions. I am not persuaded that the Delegate relied on this as a factor. The Second Decision states, "you were notified by the Canada Revenue Agency <u>about TFSA excess</u> made in 2009," and it concludes that "[i]t is the individual's responsibility to educate themselves about the TFSA rules <u>after being notified</u>," (emphasis added). Thus, it is clear from the Second Decision that the Delegate relied on the CRA's previous notice to Ms. Ifi about an excess contribution, not the rules for non-resident contributions. Moreover, Ms. Ifi had argued that the subject of the CRA's 2010 Letter, i.e.

excess contributions, was unrelated to her TFSA contributions as a non-resident; however, the Second Decision does not address this argument. If the Delegate disagreed with Ms. Ifi's submissions, the Second Decision should have stated so and explained the rationale. Nothing in the Second Decision indicates that Ms. Ifi was put on notice of the TFSA rules for non-resident contributions via the CRA's 2010 Letter, or that the Delegate considered this letter to be related to anything other than Ms. Ifi's excess contribution as a Canadian resident.

[28] The respondent also submits Ms. Ifi was aware that her residency was a relevant factor, as she made a specific inquiry with her bank. The respondent argues the fact that Ms. Ifi received inaccurate advice in response to her specific inquiry was "inconsequential" according to *Fleet v Canada (Attorney General)*, 2010 FC 609 [*Fleet*]. I question the respondent's reliance on *Fleet* as a complete answer to the inaccurate advice, but more importantly, I disagree with the respondent's submission that the Delegate imputed an awareness of TFSA residency requirements from the mere fact Ms. Ifi sought advice from her bank. The Second Decision simply notes that Ms. Ifi's "financial institution did not notify [her] that [she] could not contribute to a TFSA as a non-resident". The Second Decision does not indicate this was a basis for the Delegate's refusal to grant relief from tax liability.

[29] It is not enough for an administrative decision to be justifiable—it must also be justified by way of the reasons: *Vavilov* at para 86. In my view, the sole basis supporting the Second Decision was that Ms. Ifi repeated a previous mistake after being warned by the CRA. This is apparent both from the statement in the Second Decision that Ms. Ifi "continued to make excess and non-resident contributions" to her TFSA after the CRA's 2010 Letter, and from the

statement that it is the individual's responsibility to educate themselves about the TFSA rules "after being notified". For the reasons above, the Second Decision did not reasonably justify the refusal to waive Ms. Ifi's tax liabilities.

[30] The respondent further submits that the Minister considered Ms. Ifi's circumstances alongside the guidance that is set out in the *Taxation Operations Manual for Relief Procedures* [*Relief Guidelines*]. While the *Relief Guidelines* are included in the record, they are not mentioned in the First Decision or the Second Decision, and in my view, it is not apparent that the Second Decision reflects the principles outlined in the guidelines. The *Relief Guidelines* indicate that an individual will only be granted relief once as a general rule, but the delegate has discretion to deviate from the general rule and grant relief multiple times where the previous relief was granted five or more years ago. In this case, there is no evidence that Ms. Ifi was previously granted relief. In 2009, when Ms. Ifi made excess contributions to her TFSA as a Canadian resident, she paid the assessed tax. In addition, the CRA never notified Ms. Ifi about her ineligibility to make non-resident contributions, and although she was notified about her 2009 excess contribution (which resulted from a different error), she did not make excess contributions again until 2014—that is, five years later.

[31] Finally, the respondent submits that if this Court should find the Second Decision is unreasonable with respect to Ms. Ifi's non-resident contributions but reasonable with respect to her excess contributions, an appropriate remedy would be to set aside the Second Decision in part. Since I find the Second Decision to be unreasonable with respect to both, the entire decision shall be set aside.

V. **Conclusion**

[32] For the above reasons, the Delegate's decision to deny relief from tax liability arising from Ms. Ifi's excess and non-resident TFSA contributions was unreasonable, as it lacked the requisite transparency, intelligibility and justification. This application for judicial review is allowed.

[33] Neither party seeks costs, and no costs are awarded.

JUDGMENT in T-1732-19

THIS COURT'S JUDGMENT is that:

1. The Second Decision is set aside and the matter returned for redetermination by a different delegate of the Minister.

2. No costs are awarded.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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