

Federal Court



Cour fédérale

Date: 20230322

Docket: T-655-22

Citation: 2023 FC 393

Ottawa, Ontario, March 22, 2023

PRESENT: Associate Chief Justice Gagné

BETWEEN:

DAVID L. MALCOLM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] Mr. David L. Malcolm represents himself in this Application for judicial review. He is asking the Court to quash the Canada Revenue Agency's [CRA] decision to dismiss his second request for a waiver of the penalty imposed on his over-contributions to a Tax Free Savings Account [TFSA] in the 2020 tax year.

[2] It is undisputed that Mr. Malcolm significantly over-contributed to his TFSA during the 2020 taxation year. Between January 2020 and December 2020, he made a withdrawal from his line of credit and invested these borrowed funds into stocks he purchased within his TFSA.

[3] On July 20, 2021, Mr. Malcolm received a Notice of Reassessment from the CRA. This Reassessment taxes him a total of \$6,393.08 (not including penalties & interest) as a result of his over-contributions to his TFSA, which totalled \$639,307.68.

[4] Mr. Malcolm contacted the CRA shortly after receiving the Notice. He explained that it was his first time using a TFSA and that he was unaware of how it worked. When he was told by a CRA agent to immediately withdraw all the excess funds from the TFSA, Mr. Malcolm replied that his investments were down 35% and that he would withdraw the money as soon as the market improved.

[5] In his first letter sent to the CRA in August 2021, Mr. Malcolm requested that the tax be annulled, stating he was unaware of how TFSAs work, and that his financial institution did not inform him of the applicable rules. He states he is in a bad position because he invested the funds in the stock market and his investments are now down about 50%. He also describes his difficult financial situation, noting he is providing for his family and paying a mortgage all while on disability due to a workplace accident.

[6] In a second letter sent to the CRA in October 2021, Mr. Malcolm appears to respond to a request for additional information. He states that his portfolio is now down about 45% and that

he is not in a position to repay; however, he promises to do so as soon as things get better with his investments.

[7] On October 20, 2021 the CRA responded to Mr. Malcolm's request in a detailed two-page letter. The most relevant parts are excerpted below [emphasis mine]:

The *Income Tax Act* gives us discretion to cancel all or part of any tax on excess TFSA situations. For such a cancellation to be granted, the tax must have arisen because of a reasonable error **and the individual must have acted right away to remove the excess contributions of their TFSA.**

[...]

A review of your situation and our records show that the removal of all excess contributions did not occur.

[...]

Although you incurred losses in your TFSA, **losses are not considered as withdrawals.**

[...]

We carefully considered the circumstances and facts of your case in relation to the legislation that applies. We determined that we cannot grant a request of cancellation of the tax in your particular situation.

[8] The CRA's letter included instructions on whom to address a request for a second independent review, which Mr. Malcolm followed in his subsequent letter.

[9] In a third and final letter sent to the CRA in December 2021, Mr. Malcolm states:

I have withdrawn the full excess of my TFSA, attach is a receipt of my withdrawal. I have no other funds or savings to help with the negative excess TFSA room.

[10] He also describes the troubling toll the situation has taken on him in deeply personal terms. The letter triggered the CRA's second review, which is the decision now before the Court.

II. Decision under review

[11] The decision under review was communicated to Mr. Malcolm on March 3, 2022. As the letter explained, the review was conducted by a separate CRA official not involved with the initial decision.

[12] The letter summarizes Mr. Malcolm's request and repeats some of the points the initial CRA letter made, including that they do not consider the Applicant's circumstances to be a reasonable error. Most importantly, the letter notes that:

A review of your situation and our records show that you did not remove all your excess contributions within a timely manner.

[...]

Please be advised that our records indicate that you are still in excess as of January 1, 2022 by \$2,233.21. Our records also indicate that there are still funds in your TFSA account as of December 31, 2021, therefore we are unable to adjust your TFSA room limit as you can still withdraw funds to reduce your excess.

[13] The letter states that the request cannot be granted:

We have to confirm that, after reviewing the documents you sent us and the information we have, no circumstances support cancellation of the tax on your excess TFSA contributions.

III. Issues and standard of review

[14] The sole issue to be determined is whether the CRA official erred in refusing to exercise her discretion and by denying Mr. Malcolm's second request for relief from tax liability with respect to excess TFSA contributions.

[15] When assessing a decision such as this one, the Court must first determine the standard of review. Essentially, this determines the legal approach the Court will take in reviewing the decision.

[16] The standard of review applicable to the CRA official's decision is that of reasonableness. The Supreme Court has held that this is the standard that is presumed to apply to administrative decisions. While the Supreme Court has outlined some exceptions to this, they do not apply here (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 16-17 & 25).

[17] As held by the Supreme Court, a reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para 85). An important part of how courts assess the reasonableness of a decision is by closely considering the reasons by which that decision was justified and explained (*Vavilov*, at para 86).

IV. Analysis

[18] Section 207.02 of the *Income Tax Act*, RSC 1985, c. 1 (5th suppl.) imposes a tax payable on excess TFSA amounts equal to 1% of the highest excess amount in that month.

[19] However, subsection 207.06 (1) of the same Act gives the Minister a certain discretion to waive or cancel such a tax, provided that a) she is satisfied that the liability arose as a consequence of a reasonable error, and b) that a distribution is made without delay to correct the error and withdraw the excess.

[20] The discretionary power of the Minister is limited to providing exceptional relief where both requirements a) and b) of subsection 207.06(1) are met; unfortunately for the Applicant, they are not met in this case.

[21] First, it is questionable whether the Applicant's over-contribution is the result of a reasonable error. The Applicant made no enquiries as to how TFSAs worked before making a very significant over-contribution.

[22] Second, even if it was a reasonable error, it is undisputed that the Applicant chose not to withdraw his over-contribution when notified of it by the CRA, thus failing to meet the second requirement of the Act. The CRA's enquiries even suggested that the Applicant remained in excess of his TFSA limits on January 1, 2022, and the Applicant provided no evidence to the contrary.

[23] Justice Elizabeth Walker's statements in *Messenger v Canada (Attorney General)*, 2021 FC 95, a case involving similar facts to this one, apply here:

[24] ... While I am sympathetic to Mr. Messenger's reluctance to liquidate his TFSA holdings, the CRA is not responsible for the nature of the investments made by Mr. Messenger in his TFSA. He alone bears that risk. Mr. Messenger has decided to avoid economic loss in his TFSA but in doing so cannot then seek discretionary relief from the tax imposed on his excess amount. The refusal of his request, as set forth in the Decision, was justified.

[24] In *Zazula v Canada (Attorney General)*, 2022 FC 1156, Justice Glennys McVeigh also addresses a similar situation:

[32] Though I can understand that it can seem unfair to the Applicant that when he put money into his TFSA and then the investment loses value that the full amount put in is what the limit is calculated on. These economic decisions were his own and in hindsight not prudent. That is all part of high-risk investments (in this case, stocks) and the legislators would have accounted for that when drafting the legislation.

[25] I, likewise, am very sympathetic to the situation the Applicant finds himself in and to the negative consequences these bad choices have on him and his family.

[26] However, I am of the view that the CRA's decision is responsive to the Applicant's submissions, just as it is detailed in its explanation and justification of why the request cannot be granted based on the requirements of the *Income Tax Act*. As difficult as it may be for the Applicant, it is a reasonable decision and the Court's intervention is not warranted.

V. Conclusion

[27] For these reasons, this Application for judicial review will be dismissed and costs in the amount of \$500 will be granted to the Respondent.

JUDGMENT in T-655-22

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed;
2. Costs in the amount of \$500 are granted to the Respondent.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-655-22

STYLE OF CAUSE: DAVID L. MALCOLM v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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APPEARANCES:

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FOR THE APPLICANT
(ON HIS OWN BEHALF)

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FOR THE RESPONDENT