Federal Court  Cour fédérale

Date: 20160107

Docket: T-24-15

Citation: 2016 FC 10

Ottawa, Ontario, January 7, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

REID LEVENSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application by Reid Levenson [the Applicant] under section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 as amended, for judicial review of a decision dated October 27, 2014, made by a delegate of the Minister of National Revenue [Minister's delegate or delegate] under subsections 204.1(4) and 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1(5th Supp.), as amended [ITA]. The decision denied the Applicant's request to cancel over-

contribution tax and related penalties and interest on excess contributions [over-contributions] the Applicant made to his spousal registered retirement savings plan [RRSP].

A. *Procedural Notes*

[2] As one of several procedural notes, the Applicant asked for leave to file CRA Notices of Assessment for 2010 RRSP Limit dated December 19, 2011, August 12, 2011, and July 14, 2011, related to his 2008 taxation year which he had omitted from his affidavit on judicial review. The Respondent objected but subsequently withdrew the objection. The documents were admitted.

[3] The hearing took place in Ottawa on September 14, 2015. Shortly before the hearing, on September 10, 2015, the Respondent filed a letter advising that the Minister consented to judicial review of the interest and penalty waiver determinations, i.e., those made under subsection 220(3.1) of the ITA. However the Respondent maintained its objection to judicial review with respect to the over-contribution tax [OCT] imposed on the Applicant's over-contributions. In the circumstances, I will order judicial review in respect of the interest and penalty waiver determinations made under subsection 220(3.1) of the ITA.

[4] On September 16, 2015, I issued a direction accepting the Respondent's offer to make post-hearing written submissions on whether the Applicant was late in his ITA filings, i.e., whether he was under an obligation to file his annual income tax returns by a particular date pursuant to subsection 150(1) of the ITA in the taxation years in question because "tax is payable" pursuant to subparagraph 150(1.1)(b)(i). At that time, I asked the Respondent's counsel

to expand on certain objections she had made at the hearing to some of the Applicant's filings. I also asked if the parties wished to have the hearing reconvened to deal with these issues; the Respondent said no and the Applicant said yes. On this last point, it is unnecessary to reconvene the hearing because the written submissions of both parties allow me to arrive at a decision in this matter.

[5] By letter dated September 26, 2015, the Applicant wrote the Court asking permission to file new evidence. He neither filed a motion nor any new evidence with his letter. I ruled against his letter request by direction dated September 28, 2015, because: "such request should have been brought before the hearing on proper notice and with proper material in support."

[6] On September 30, 2015, the Respondent made its submission on the record and on whether "tax is payable" for the years in question. On October 14, 2015, the Applicant filed responding submissions.

B. *Rulings on New Evidence*

[7] Along with his responding submissions of October 14, the Applicant filed a Supplementary Affidavit. The Respondent objected to the Supplementary Affidavit, based on my direction of September 28, 2015. I will not allow the Supplementary Affidavit except in respect of the Applicant's Notices of Assessment for 2009 and 2010 which are referred to both in the Applicant's letter of January 15, 2014, and in the notes to the decision of the Minister's delegate dated October 16, 2014: see *Bird v Canada Revenue Agency*, 2014 FC 843 at para 41.

[8] I reject the balance of the Applicant's request to admit new evidence. For the most part, the Applicant's Affidavit of October 14, 2015, contains commentary or "spin" which is not allowed as new evidence: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-22; and *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45. It will be disregarded. Proposed new evidence concerning the Applicant's historic reliance on Intuit Turbotax commercial tax software should have been filed earlier so it could have been tested; his evidence regarding advice from his financial advisor at RBC should have been filed earlier for the same reason; and the proposed new information regarding interest and penalties may be filed with the re-determination in that regard to which the Respondent consented and which is ordered by this Judgment: it is not admissible in this proceeding.

C. *Additional Issues with the Applicant's Record*

[9] For completeness, the Respondent asked me to ignore other additional facts added by the Applicant to the record after the delegate made her decision. I will rule on these objections now. Before doing so, I want to say that taxpayers have a duty to put their best case to a delegate when seeking relief under subsection 204.1(4) of the ITA. They must provide salient facts in their favour. They cannot expect material they fail to file will be accepted later by this Court on judicial review. Judicial review takes place on what was before the decision-maker, and does not generally consider additional filings made afterwards. With this in mind, evidence of conversations between the Applicant and various officers of CRA should have been put before the delegate and is inadmissible, as is evidence of the Applicant's difficulty in filling out the T1-OVP form. I will allow the conversations referred to in paragraph 15, items P and Q because

they are background. The Applicant also referred to the death of his father. The Court offers its condolences to the Applicant but is unable to accept this as new evidence; this also should have been placed before the delegate.

D. *Summary of Disposition*

[10] The Minister's decision is subject to judicial review on a standard of reasonableness. While the Applicant is successful on the issue of his having taken "reasonable steps" to repay his over-contribution, he has failed to meet the test of "reasonable error". Because his application did not meet both parts of the two-part test set out in subparagraphs 204.1(4)(1)(a) and (b) of the ITA, it must be dismissed.

[11] On consent, judicial review will be granted in respect of the interest and penalty waiver determinations, i.e., those under subsection 220(3.1) of the ITA.

[12] Otherwise, this application is dismissed but without costs for the following reasons.

II. Facts

[13] The Applicant is 63 years old. He worked as an architect and manager in the federal public service. He retired in June 2010. Throughout his career, he regularly over-paid his income tax through payroll deductions. Therefore, the Applicant often filed his tax returns after April 30 of the following year, without incurring any penalties or interests because tax refunds were owed

to him. Subparagraph 150(1.1)(b)(i) of the ITA excuses the filing of annual income tax returns by individuals for whom no "tax is payable", a point to which I will return later.

[14] The following is a chronological summary of key events in this case:

A. The Applicant purchased an RRSP contribution of $1,435 in 2007;

B. The Applicant filed his tax return for the 2006 taxation year on July 8, 2008. By Notice of Assessment dated July 31, 2008, CRA stated the Applicant had $20,234 in unused RRSP contribution room for 2008;

C. The Applicant applied for a pension buyback with his employer in 2008 which had the effect of reducing his RRSP contribution limit by a further $4,469. The Applicant did not report this contribution to CRA until he filed his 2007 tax return on July 30, 2009;

D. On February 20, 2009, the Applicant made a $20,000 contribution to his spousal RRSP. He made this purchase based on contribution room of $20, 234 dated July 31, 2008, referred to in B above. The Applicant did not report this $20,000 contribution to CRA until on or before November 4, 2011, when he filed a T1 adjustment form. The Applicant did not take into account the reduction in RRSP room created by the contributions made described in A and C;

E. On July 30, 2009, the Applicant filed his tax return for the 2007 taxation year. The Applicant declared the contributions referred to in A and C above. By Notice of Assessment dated August 27, 2009 for the 2007 taxation year, CRA reported that the Applicant had $15,226 in unused RRSP contribution room for 2009. CRA

did not know the Applicant had made the $20,000 contribution referred to in D when it issued the 2007 tax year Notice of Assessment;

F. The Applicant made a $15,000 contribution to his spousal RRSP on February 23, 2010. He made this contribution mistakenly relying on the advice re: contribution room referred to in E above. The Applicant did not take into account the further reduction in his RRSP contribution room created by the $20,000 purchase referred to in D;

G. Sometime in 2010, the Applicant made an eligible retiring allowance or pension transfer to his RRSP of $33,500. This contribution had no impact on his RRSP contribution room;

H. The Applicant filed his 2008 tax return on June 15, 2011. The Applicant reported an RRSP contribution of $876. CRA sent several notices respecting his 2011 filings:

i a Notice of Reassessment dated July 14, 2011 in which CRA advised that the RRSP deduction limit for 2011 was $14,350, and that the Applicant had $0 of unused RRSP contributions, which stated that if the $0 amount is more than the $14,350 (which it was not), "you may have to pay a tax on the excess contributions",

ii a Notice of Reassessment dated August 12, 2011 in which CRA advised that his RRSP deduction limit for 2011 was $14,350, and that the Applicant had $0 of unused RRSP contributions, noting that if the $0 amount is more than the $14,350 (which it was not), "you may have to pay a tax on the excess contributions", and

iii a further Notice of Reassessment dated December 19, 2011, showing a RRSP deduction limit for 2011 of $14,350 and $19,124 unused RRSP contributions, noting that if the $19,124 amount is more than the $14,350 (which it was), "you may have to pay on the excess contributions". This document took into account the $20,000 contribution referred to in D above, which it appears the Applicant reported by way of a T1 adjustment dated November 4, 2011;

I. The Applicant filed his 2009 return on November 22, 2011. No RRSP purchases were reported. The Applicant did not report the $15,000 contribution referred to in F above; he considered it could have been reported in respect of either his 2009 or 2010 taxation year tax returns;

J. The Applicant filed his 2010 return on January 3, 2012. On this return he reported a) his $15,000 contribution to his spousal RRSP (purchased in February 2010, see F above), and b) his eligible pension transfer of $33,500. The CRA issued him a Notice of Assessment dated July 19, 2012. CRA did not advise the Applicant of the additional over-contribution created by his $15,000 contribution in item F;

K. The Applicant filed his 2011 return on September 28, 2012. No RRSP contributions were reported. The CRA mailed a Notice of Assessment on October 16, 2012, which again made no reference to additional over-contribution caused by his $15,000 contribution in item F;

L. On or about October 19, 2012, the Applicant withdrew $34,971 from his spousal RRSP;

M. On July 8, 2013, the Applicant wrote the CRA to request that the $15,000 spousal RRSP purchased in February 2010 (as outlined in items F and J above) be transferred from the 2010 tax year to the 2009 tax year;

N. On October 1, 2013, the Applicant withdrew $15,000 from his RRSP;

O. On November 18, 2013, the CRA responded to the Applicant's July 8, 2013 letter denying the request on the basis the RRSP limits for both 2009 and 2010 were $0;

P. On December 4, 2013, the CRA informed the Applicant he may have excess RRSP contributions and requested that the Applicant either file a T1-OVP form or provide additional records;

Q. The Applicant called CRA to inquire about the RRSP over-contributions, at which point the Applicant received confirmation that he had over-contributed;

R. On January 15, 2014, the Applicant sent a letter request to the CRA asking for tax, interest and penalties to be waived on the excess amounts, because the error was due to misinformation by the CRA. This was denied on May 23, 2014;

S. On June 16, 2014, the Applicant requested an independent second review of the CRA decision not to waive tax, penalties and interest. He submitted T1-OVP forms on which he calculated tax on excess contributions for 2010, 2011 and 2012, and he paid $5,050.55 to facilitate a refund. This review was denied by way of a letter dated October 27, 2014 but received by the Applicant on November 21, 2014;

T. On November 28, 2014, the Applicant received CRA Notices of Assessment for 2010, 2011 and 2012 with penalties and interest totaling $1,640.11. The Applicant paid this amount on December 17, 2014.

[15] Although the legislation and the parties use the terms penalties and interest to include the RRSP over-contribution tax, in law the excess or over-contribution tax is treated as a separate tax and will henceforth be referred to as "OCT". The OCT accrues at a rate of 1% of the over-contribution amount for every month there is an over-contribution. In this case, the OCT totalled $5,050.65 according to the T1-OVP filed by the Applicant.

[16] It appears common ground that the over-contributions amounted to a maximum of $15,305.

III. Decision Under Review

[17] The Minister's delegate decided that no circumstances warranted the waiver of tax on excess RRSP contributions (or on the penalties and interest which are no longer in issue). The material part of the delegate's reasons states:

> Our records indicate that a Schedule 7, "RRSP unused Contributions, Transfers, and HBP or LLP Activities," was not correctly completed for tax years 2008 to 2012. Moreover, your tax return of 2007 was filed in August 2009, your tax return of 2008 in July 2011, your tax return of 2009 in January 2012, your tax return of 2010 in July 2012, your tax return of 2011 in October 2012 and your tax return of 2012 in August 2013.
>
> Your tax return 2008 was also reassessed in December 2011 and January 2012. Your tax returns 2009 and 2010 was (*sic*) reassessed in November 2013.
>
> It is every individual's responsibility to ensure that the information provided on his or her return is complete, accurate and filed on time.
>
> Since 1994, Schedule 7 has been available to report your RRSP contributions, transfers, deductions and carryforwards. When Schedule 7 is not completed, your carryforward of unused RRSP contributions may be in error and not reflected on your Notice of

> Assessment. It is your responsibility to ensure that all contributions are made within the guidelines set out in the legislation that governs RRSPs.

[18] The delegate's reasons are supplemented by her notes which discuss the Applicant's alleged lateness in filing. Her notes under the heading "Recommendation" state in part the following (taken directly from the notes):

> I recommend to refuse the waiver. t/p never filed his t1 return on time. He was 1 year and more late on each t1 from 2003 to 2010.
> …
>
> CRA cannot be responsible for giving wrong information when the t/p send wrong and late information. It's t/p responsibility to filed t1-return accurately and in time.

IV. Issues

[19] Because of the consent to judicial review respecting the penalties and interest, the only issue is whether the delegate acted unreasonably in failing to exercise her discretion under subsection 204.1(4) of the ITA to grant taxpayer relief against the Applicant's over-contribution. In my view, while the Applicant and Respondent put it differently, this turns on the over-all assessment of the reasonableness of the delegate's decision. This case is to be considered on the basis of the reasonableness of the answers given to the following two questions that were before the delegate:

1. Was the delegate's decision unreasonable to the extent it found that the Applicant's over-contribution did not arise "as a consequence of reasonable error" per paragraph 204.1(4)(a) of the ITA?

2. Was the delegate's decision unreasonable to the extent it found that "reasonable steps" had not been taken to eliminate the excess per paragraph 204.1(4)(b) of the ITA?

V. Framework for Reviewing Decision Under Subsection 204.1(4) of the ITA

[20] The approach and governing principles in this case are set out by Justice Rennie (as he then was) in *Dimovski v Canada Revenue Agency*, 2011 FC 721 [*Dimovski*] upon which I rely:

> [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 | 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. |
> | (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. | |

[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:

> …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] … 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.

[21] Justice Rennie provides the following additional guidance in *Kapil v Canada Revenue Agency*, 2011 FC 1373 [*Kapil*], which and again with respect, I adopt:

> [19] The issue in this case is whether the decisions refusing to issue waivers of taxes, and penalties and arrears interest, respectively, are reasonable per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. These are discretionary decisions and as such, are to be accorded deference: *Gagné v Canada (Attorney General)*, 2010 FC 778 and *Lepiarczyk v Canada (Revenue Agency)*, 2008 FC 1022. …
>
> [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: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339.

[22] Judicial review requires that the decision below be assessed on the standard of reasonableness. What is reasonable is described by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, 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.

VI. Discussion and Analysis

A. *"Reasonable Error" per Paragraph 204.1(4)(a) of the ITA*

(1) The Applicant's Reliance on CRA Notices to Determine Contribution Room on Years of Contribution

[23] The main argument of the Applicant is that he was entitled to rely on CRA's RRSP contribution room assessment when making what turned out to be RRSP over-contributions. The first Notice of Assessment stated he had contribution room of $20,234 (see item B, para 14); this led him to believe he could make the $20,000 contribution he made referred to in item D above. The Applicant's second contribution was based on the Notice of Assessment showing he had contribution room of $15,226 (item E); this led him to believe he could make the further contribution of $15,000 (item F). This is the essence of his case.

[24] The Applicant says he is entitled to rely on these two Notices of Assessment because of CRA's Guide respecting RRSPs, and because of a decision of this Court. He says if he over-

contributed it was because the two Notices of Assessment were wrong. He attributes that error entirely to CRA. He accepts no responsibility for the fact that both Notices of Assessment were incorrect only because he did not keep CRA up-to-date regarding his RRSP contributions. In response, the Respondent says that both Notices of Assessment were correct at the time they were issued because each was based on what the Applicant himself reported to CRA. The Respondent says that if the Respondent wanted to rely on the CRA notices, he should have kept CRA up- to-date on his contributions. The Respondent says the Applicant could and should have known what his contribution room was, that he authored his own misfortune by not telling CRA in a timely way, and that the Applicant may not blame CRA for failing to recalculate the Notices of Assessment when the Applicant gave CRA no reasons for doing any such recalculation.

[25] On judicial review, the Court is charged with assessing the reasonableness of the decision of the delegate. In my view, the delegate's decision in this respect is reasonable. The taxpayer's position that he bears no responsibility for the accuracy of contribution room notices generated by CRA is untenable. That part of a taxpayer's Notice of Assessment dealing with a taxpayer's RRSP contribution room or limit for a year, viewed reasonably, can only be as good as the information the taxpayer provides CRA. If a taxpayer does not keep CRA up- to-date with respect to his or her RRSP contributions, in my view it is reasonable for CRA to issue such reports based on what the taxpayer has in fact chosen to report if, as and when he or she decided to file. In other words, CRA acted reasonably in calculating this individual's RRSP contribution room based on what this taxpayer reported.

[26] The case at bar illustrates the reasonableness of the Respondent's decision. Here, CRA sent the Applicant a Notice of Assessment showing a contribution limit of $20,234. That advice was accurate based on what the Applicant told CRA about his contributions. However, when CRA issued that information, CRA did not know of the $1,435 and $4,469 contributions to his RRSP. It did not know because the Applicant had not told CRA of either. Therefore, when the Applicant made his $20,000 RRSP contribution, he exceeded his RRSP contribution limit. When CRA became aware of at least one of these two contributions it recalculated the deduction limit at $15,226. At that time, however, CRA did not know about the Applicant's further contribution of $20,000 (items D and E). Instead of making a withdrawal to eliminate his over-contribution, the Applicant made a further contribution, this time in the amount of $15,000 which put the Applicant into an even more serious over-contribution situation.

[27] The RRSP regime is a voluntary system. The Applicant could and should have known what his contribution limits were. Had the Applicant kept track of these four contributions he could at any time have ascertained his true situation. Having failed to keep CRA up-to-date with his contributions, the Applicant could not expect CRA to provide accurate contribution room advice.

[28] If the Applicant was indeed free to either report or not report his income and RRSP contributions at any time (a point to which I will return later), the case law is clear that he still had a duty to act with due diligence: see *Dimovski* at para 17. In my view, the Applicant failed to act with due diligence in determining how much contribution room he had left. He had the relevant information. He knew or should have known what his limits were. This is another

reason why I am unable to accept his argument that CRA was responsible for the situation he created and found himself in.

[29] I appreciate that generally speaking, taxpayers are entitled to rely on their Notices of Assessment to determine RRSP contributions, a point noted by Justice Simpson in *Kerr v Canada (Attorney General)*, 2008 FC 1073 [*Kerr*]:

> [40] Further, CRA publications consistently affirmed the reasonableness of the Applicant's belief by saying that a taxpayer is entitled to rely on the RRSP deduction limit contained in his or her notice of assessment. Guide T4040 RRSPs and Other Registered Plans for Retirement (RRSP Guide) says:
>
> > How much can you deduct?
> >
> > The amount of RRSP contributions you can deduct [for the taxation year] is based on your … RRSP deduction limit, which appears on your latest Notice of Assessment or Notice of Reassessment, or on a T1028, Your RRSP Information for [year].
> >
> > You can also deduct amounts for contributions you make for certain income you transfer to your RRSP. The RRSP deduction limit does not include these amounts.

[30] However, the problem with the Applicant's reliance on *Kerr* is that *Kerr* does not say that all taxpayers may at all times rely on CRA contribution room statements. Moreover, I have not accepted the Applicant's contention that he might rely on CRA's advice where he failed to keep CRA up-to-date with respect to his true RRSP contribution status. *Kerr* is also distinguishable on the facts; it involved a very serious mistake made not by the taxpayer, as here, but by CRA. In *Kerr*, CRA entered inaccurate information on the taxpayer's return. That is very different from

the present situation where the unreliability of CRA's advice derives exclusively from the taxpayer's failure to keep CRA up-to-date.

[31] The Applicant says he made a "reasonable error" in relying on the various Notices of Assessment in making his RRSP contributions. For the reasons above, I do not accept his submissions. I am unable to see how on this record CRA could have done anything else but issue the contribution room statements that it did. In my view, the Minister's delegate acted reasonably in concluding the taxpayer's over-contributions were not consequences of "reasonable error" for the purposes of paragraph 204.1(4)(a).

[32] The Applicant submitted and I accept there was no evidence he had an intention to over-contribute. As in *Dimovski*, this is an unfortunate situation where the Applicant made an innocent error. But the case law establishes that innocence and lack of intent do not determine reasonableness in terms of "reasonable error" under the ITA.

(2) Were the Applicant's Returns Filed Late?

[33] The second part of the Applicant's argument that he acted "as a consequence of reasonable error" per paragraph 204.1(4)(a) of the ITA, are his allegations that his returns were not filed late and that the delegate erred in so holding. The Applicant submits his returns were not late because he did not owe any taxes and had no tax to pay in the taxation years in question and therefore was under no duty to file by April 30 the following year. He relies on subparagraph 150(1.1)(b)(i) which says that the duty to file an annual return (by April 30 of the following year)

does not apply to an individual such as the Applicant unless there is "tax payable under this Part by the individual for the year".

[34] I will review the facts to see if lateness was a ground on which the delegate dismissed the claim for relief based on alleged "reasonable error." I will then determine the reasonableness of the delegate's decision in terms of lateness.

[35] In my view, the delegate's reasoning certainly focussed on the alleged "lateness" in the Applicant's income tax filings over the years. The opening paragraph of the reasons relates numerous instances in which the Applicant filed after a date for a particular year. It notes there were time lags between the date of his tax return and the end of the taxation year in respect of which the return was filed. The delegate said:

> Our records indicate that a Schedule 7, "RRSP unused Contributions, Transfers, and HBP or LLP Activities," was not correctly completed for tax years 2008 to 2012. Moreover, your tax return of 2007 was filed in August 2009, your tax return of 2008 in July 2011, your tax return of 2009 in January 2012, your tax return of 2010 in July 2012, your tax return of 2011 in October 2012 and your tax return of 2012 in August 2013.

[36] Lateness was the delegate's first reason for dismissing the request according to her notes to file which form part of her decision, and which state under "Recommendation" as follows:

> I recommend to refuse the waiver. t/p never filed his t1 return on time. He was 1 year and more late on each t1 from 2003 to 2010.
> …
>
> CRA cannot be responsible for giving wrong information when t/p send wrong and late information. It's t/p responsibility to filed t1-return accurately and in time. [emphasis added]

[37] In argument, the Minister's counsel also submitted the Applicant had filed his returns late.

[38] In my view, the delegate's consideration of lateness could have been addressed to one of two different concerns. First, her consideration could be construed as a finding that the Applicant failed to comply with a legal requirement of the ITA to file his returns by April 30 of the following year. Secondly, it could be construed as addressing her concern that the Applicant was late in reporting his correct RRSP contribution information such that CRA had no way of knowing what his correct status was when it issued the contribution room reports.

[39] I am inclined to view the references to lateness as referring to the Applicant's failure to meet a statutory filing deadline, however for completeness and because it is open to debate, I will deal with both eventualities.

[40] If the references to lateness addressed the Applicant advising CRA of his contributions some time after CRA sent out contribution room advice, such that the notices were accurate based on what the Applicant had reported to CRA, and inaccurate only to the extent the Applicant did not give CRA up-to-date contribution information, I have already discussed this and found the delegate's decision reasonable.

[41] If the references to lateness addressed a failure of the Applicant to meet a statutory deadline, the Applicant says his returns were not late because he did not owe any taxes and had no tax to pay, therefore he had no duty to file by April 30 the following year. He relies on

subparagraph 150(1.1)(b)(i) which says the duty to file an annual return does not apply to an individual unless "tax is payable under this Part by the individual for the year". The ITA states:

150 (1) Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,	150 (1) Sous réserve du paragraphe (1.1), une déclaration de revenu sur le formulaire prescrit et contenant les renseignements prescrits doit être présentée au ministre, sans avis ni mise en demeure, pour chaque année d'imposition d'un contribuable :
…	…
Individuals	Particuliers
(d) in the case of any other person, on or before	d) dans le cas d'une autre personne :
(i) the following April 30 by that person …	(i) au plus tard le 30 avril de l'année suivante, par cette personne …
…	…
Exception	Exception
(1.1) Subsection (1) does not apply to a taxation year of a taxpayer if	(1.1) Le paragraphe (1) ne s'applique pas à l'année d'imposition d'un contribuable dans les cas suivants :
…	…
(b) the taxpayer is an individual unless	b) le contribuable est un particulier, sauf si, selon le cas :
(i) tax is payable under this Part by the individual for the year, …	(i) un impôt est payable par lui pour l'année en vertu de la présente partie, …

[42] At issue in this scenario is whether the delegate acted reasonably in deciding that a taxpayer must file an annual return even though he or she neither owes taxes nor has taxes to pay. In my view, this issue has been addressed by the jurisprudence; I agree the delegate's decision was reasonable because of this jurisprudence as discussed by the Respondent as follows:

> 12. The term "tax is payable" is not defined in the Act for the purposes of this subsection. The term "under this Part" refers to Part I of the Act.
>
> 13. Part I includes Division E, which contains rules pertaining to additions, deductions and credits that will establish a taxpayer's tax liability. The term "tax payable" is used throughout this section in reference to the calculation of the liability.
>
> 14. The term "tax payable" has also be [*sic*] interpreted by the Courts to be distinct to "balance owing". In *Valdis v R*, the Tax Court held that an assessment of tax referred to the exigible tax to be paid for that year and not the tax owing after source deductions were subtracted from exigible tax as assessed for the year.
>
> 15. Accordingly, even if the applicant's notice of assessment indicated that he had no balance due, he nevertheless could have had tax payable for the year that was remitted by way of source withholdings.

[43] In this connection, the Respondent relies upon three decisions, two of the Tax Court: *Valdis v R*, [2001] 1 CTC 2827 at para 17 [*Valdis*] and *Ruffolo v R*, [2000] 3 CTC 142 at paras 4-5 [*Ruffolo*], and one of the Federal Court of Appeal: *Interior Savings Credit Union v R*, 2007 FCA 151 at para 22. While none of these are directly on point, I accept that they distinguish between tax that is payable and tax that is owing (*Valdis*), between tax that is payable and the balance unpaid (*Ruffolo*), and between a preferred rate amount pool [PRA] and an assessment of tax not impacted by that PRA for the purposes of appeal rights.

[44] Of these, *Valdis* is very close to the point in this case; in particular, see para 17 where the Tax Court of Canada stated:

> In my view, under subsection 152(1), an "assessment" is stipulated by Parliament to "assess the tax for the year … if any, payable" and not to assess the tax for the year owing by a taxpayer after source deductions withheld by an employer are subtracted from exigible tax as assessed for the year. [emphasis added]

[45] While I have reviewed arguments on the above, my mandate on judicial review is not to decide whether the Minister's delegate acted correctly but to determine if the decision is reasonable. Given the state of the jurisprudence, I am of the view that this aspect of the delegate's decision was also reasonable; if she decided this matter because the Applicant was late in filing his annual returns, her decision falls within the range of permitted outcomes that are defensible on the facts and law as permitted by *Dunsmuir*.

[46] In summary, the delegate's decision to deny the Applicant's claim for relief on the basis that he did not make a "reasonable error" was reasonable on the facts of this case. The reasoning is justified, transparent and intelligible. In my view, the decision under subparagraph 204.1(4)(a) of the ITA falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

(3) Were "reasonable steps" being taken to Eliminate the Excess per Paragraph 204.1(4)(b) of ITA?

[47] I turn now to the reasonableness of the second part of the delegate's decision which found the Applicant did not take "reasonable steps" to eliminate his over-contribution as required by paragraph 204.1(4)(b) of the ITA.

[48] Having found the delegate acted reasonably in rejecting the Applicants "reasonable error" arguments under paragraph 204.1(1)(4)(a), strictly speaking, it is unnecessary to review the issue of "reasonable steps" to eliminate the over-contribution. I do so for completeness' sake and having had the benefit of reviewing the record together with oral and written submissions on the point.

[49] In this connection, the evidence is that even before CRA advised him there was an over-contribution, the Applicant had already withdrawn the over-contribution, as seen from the following chronology taken from paragraph 14 above:

I. The Applicant filed his 2009 return on November 22, 2011. No RRSP purchases were reported. The Applicant did not report the $15,000 contribution referred to in F above; he considered it could have been reported in respect of either his 2009 or 2010 taxation year tax returns;

J. The Applicant filed his 2010 return on January 3, 2012. On this return he reported a) his $15,000 contribution to his spousal RRSP (purchased in February 2010, see F above), and b) his eligible pension transfer of $33,500. The CRA issued him a Notice of Assessment dated July 19, 2012. CRA did not advise the Applicant of the additional over-contribution created by his $15,000 contribution in item F;

K. The Applicant filed his 2011 return on September 28, 2012. No RRSP contributions were reported. The CRA mailed a Notice of Assessment on October 16, 2012, which again made no reference to additional over-contribution caused by his $15,000 contribution in item F;

L. On or about October 19, 2012, the Applicant withdrew $34,971 from his spousal RRSP;

M. On July 8, 2013, the Applicant wrote the CRA to request that the $15,000 spousal RRSP purchased in February 2010 (as outlined in items F and J above) be transferred from the 2010 tax year to the 2009 tax year;

N. On October 1, 2013, the Applicant withdrew $15,000 from his RRSP;

O. On November 18, 2013, the CRA responded to the Applicant's July 8, 2013 letter denying the request on the basis the RRSP limits for both 2009 and 2010 were $0;

[50] On the basis of the above, I conclude that but for the Applicant's request to transfer his contributions from taxation years 2010 to 2009, which he made in July 2013, CRA might not have discovered his RRSP over-contribution. The Respondent offers no explanation why it did not reassess in 2012 after it received all relevant information respecting the Applicant's RRSP contributions in early January of that year. Indeed, when asked on written examination for an explanation, the Respondent refused to answer saying it was "hypothetical". With respect, it is fairly apparent and I find that CRA likely misplaced the Applicant's January 2, 2012 filing concerning his $15,000 contribution per item J above, only to discover it a year and a half later when in July 2013 the Applicant asked to transfer that $15,000 from the 2010 tax year to the 2009 tax year.

[51] Given the Applicant's history of prompt payment on demand, which is not disputed, and his history of over-paying his taxes, I find that if CRA had informed the Applicant of the over-contribution to his RRSP, his over-contribution would have been removed by the Applicant even

sooner than he did. In this connection, I note that the Minister is obliged by subsection 152(1) of the ITA to assess taxes "with all due dispatch". In the past, the CRA had issued Notices of Assessment within a few weeks to a few months from the Applicant filing his return. For example, the Applicant filed his 2006 return on July 8, 2008, and received the CRA Notice of Assessment on July 31, 2008; when he filed his 2008 return on June 15, 2011, he received the Notice of Assessment on July 14, 2011, and then received two Notices of Re-Assessment on August 12 and December 19, 2011. Had taxes been assessed as promptly on this occasion as on others, and with dispatch as required, in my view, repayment would have been made before October 19, 2012, when he withdrew $34,971 - an amount more than double his over-contribution of $15,305. I consider October 19, 2012 as the date on which the Applicant reduced his RRSP over-contribution to zero.

[52] In my view, CRA failed to consider whether and to what extent CRA itself contributed to the delay in repayment by not reassessing sooner after receipt of the Applicant's January 2012 filing - the filing which brought CRA up-to-date with respect to the Applicant's RRSP contributions. In my view, this failure put the delegate's decision on "reasonable steps" per paragraph 204.1(1)(4)(b) outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law in this case.

B. *Overall Assessment of Reasonableness*

[53] Having set out the various considerations, I must now assess the overall reasonableness of the delegate's decision. The entire decision is to be assessed as an organic whole, not simply through its individual parts: *Communications, Energy and Paperworkers Union of Canada,*

Local 30 v Irving Pulp & Paper, Ltd, 2013 SCC 34 at para 54. In addition, this Court owes deference to the delegate: *Kapil* tells us OCT-waiver decisions "are discretionary decisions and as such, are to be accorded deference".

[54] I have found the Applicant failed to establish unreasonableness respecting paragraph 204.1(4)(a) "reasonable error". I have also found the Applicant succeeded in establishing the delegate's "reasonable steps" decision per paragraph 204.1(4)(b) was unreasonable. However, given the jurisprudence and the wording of the statute, the Applicant's application must be dismissed because to succeed, he must meet both parts of the subsection, not just one.

VII. Costs

[55] I note the Respondent consented to judicial review respecting interest and penalties, but did so very late in the day shortly before the hearing. I also note the Applicant succeeded on one of the two parts discussed in these reasons. That said, the Respondent has overall success in this case. In my view, this is a case where both parties should bear their own costs.

[56] For the record, I asked both parties to advise me of what lump sum all-inclusive amount costs each sought. The Applicant presented a Bill of Costs, claiming $9,320. Of this, $6,690.66 was for the over-contribution tax, interest and penalties that he paid; these are clearly not taxable as costs. Therefore, the total allowable amount claimed by the Applicant is $2,629.34, which had I awarded him costs, I would consider reasonable. The Respondent filed a Bill of Costs seeking $4,811, which had I awarded costs to the Respondent, I would consider reasonable.

[57] I will order, on consent, judicial review respecting the interest and penalty determinations made under subsection 220(3.1) of the ITA.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted in part, the decision of the Minister's delegate concerning interest and penalties dated October 27, 2014 is set aside and remitted for re-determination pursuant to subsection 220(3.1) of the ITA by a different Minister's delegate, otherwise the application is dismissed, with no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-24-15
STYLE OF CAUSE:	REID LEVENSON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 14, 2015
JUDGMENT AND REASONS:	BROWN J.
DATED:	JANUARY 7, 2016

APPEARANCES:

Reid Levenson	SELF-REPRESENTED FOR THE APPLICANT
Gabrielle White	FOR THE RESPONDENT

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