Federal Court  Cour fédérale

Date: 202000619

Docket: T-1667-19

Citation: 2020 FC 712

Ottawa, Ontario, June 19, 2020

PRESENT: Madam Justice Walker

BETWEEN:

DALVIR S. SANGHA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Dalvir Sangha, the applicant, requests the Court's review of the refusal by a delegate of the Minister of National Revenue (Minister) to cancel tax imposed for the 2017 and 2018 taxation years on excess contributions in Mr. Sangha's Tax Free Savings Account (TFSA). The refusal is set forth in a letter to Mr. Sangha dated October 2, 2019 (Decision).

[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.

[3] By way of preliminary matter and with the consent of the parties, the style of cause in this matter is amended to reflect the correct respondent, the Attorney General of Canada.

I. Overview

[4] The background to Mr. Sangha's application to the Court is straightforward. At issue are a number of TFSA contributions and withdrawals made by Mr. Sangha in 2016, 2017 and 2018 that resulted in excess amounts in his TFSA in each of 2017 and 2018. The Canada Revenue Agency (CRA) imposed a 1% monthly tax on the excess amounts pursuant to section 207.02 of the *ITA*.

[5] The sequence of contributions and withdrawals is important in my consideration of whether the Decision was reasonable. The relevant dates and events are as follows:

- In 2016, Mr. Sangha contributed a total of $81,000 to his TFSA. His TFSA contribution room for 2016 was $44,592, resulting in an excess contribution amount in the account as at December 31, 2016. Consequently, Mr. Sangha had no available contribution room for 2017.

- In March 2017, Mr. Sangha deposited $10,000 to his TFSA.

- In April 2017, Mr. Sangha withdrew the entire balance of his TFSA.

- On June 1, 2017, the CRA sent Mr. Sangha a letter informing him of his excess 2016 TFSA contributions (June 2017 Letter). The letter indicated, in part, that if he continued to make excess contributions "in the future", he could be subject to a 1% tax for each month the excess remained in the TFSA.

- In September 2017, Mr. Sangha contributed $35,000 to his TFSA, resulting in an excess contribution amount of $35,000 as at December 31, 2017.

- The excess contribution remained in the TFSA until August 2018, when Mr. Sangha withdrew the excess amount.

[6] The CRA issued TFSA tax assessments for the 2017 and 2018 taxation years, each of which set out the excess TFSA amount in the account by month and the calculation of the tax, interest and penalties imposed in respect of the excess amounts.

[7] Mr. Sangha made a first request for a waiver of the tax, interest and penalties on the excess TFSA amounts on April 28, 2019 (First Waiver Request). He relied on the June 2017 Letter to argue that he should not be charged TFSA tax until July 2017. Mr. Sangha accepted "full responsibility for any charge after June 2017". He acknowledged that he deposited $35,000 to his TFSA in September 2017 but explained that he was not aware that he was required to wait until 2018 to make any further contribution.

[8] The First Waiver Request was refused by the CRA on July 15, 2019 (First Refusal). The CRA officer based the refusal on the fact that Mr. Sangha made the excess TFSA contribution in September 2017, after receipt of the June 2017 Letter.

[9] On July 22, 2019, Mr. Sangha sent a second waiver request to the CRA (Second Waiver Request). He emphasized that he removed all of the funds in his TFSA in May 2017 (the reference should be to April 2017) and that, between May and August 2017, the balance in his TFSA was zero. Mr. Sangha again relied on the June 2017 Letter and its reference to the fact that future contributions could result in the imposition of the TFSA tax on excess amounts. Mr. Sangha acknowledged his September 2017 TFSA deposit of $35,000 but submitted that the Minister should nonetheless exercise the discretion contemplated by the *ITA* to cancel all of the tax reflected in the 2017 and 2018 TFSA assessments. In closing, Mr. Sanga noted that the dispute with the CRA was causing stress that was unfortunate in light of his ill health.

II. Decision under review

[10] The Decision responds to the Second Waiver Request. Having reviewed the information submitted and the facts of the case, the Minister's delegate concluded that Mr. Sangha continued to make contributions to his TFSA in 2017, after he was notified of his excess 2016 contributions by the CRA's June 2017 Letter. The Minister's delegate confirmed that there were no circumstances that would support the cancellation of the tax levied on the excess TFSA amounts for 2017 and 2018, and that the CRA's initial assessment was correct. I summarize the Decision more fully in paragraph 25 of this judgment as part of my substantive analysis.

III. Issue and standard of review

[11] The sole issue in this application is whether the Decision was reasonable.

[12] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*), the majority of the Supreme Court of Canada (SCC) established reasonableness as the presumptive standard of review of the merits of administrative decisions, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Vavilov* at para 10). There is no basis for departing from the presumptive standard of review in this case (*Canada Post Corp. v Canada Union of Postal Workers*, 2019 SCC 67 at para 27 (*Canada Post*)). A review of the Decision for reasonableness is also consistent with the pre-*Vavilov* jurisprudence (*Bonnybrook Park Industrial Development Co. Ltd. v Canada (National Revenue)*, 2018 FCA 136 at para 22; *Weldegebriel v Canada (Attorney General)*, 2019 FC 1565 at para 5 (*Weldegebriel*)).

[13] The majority in *Vavilov* set out guidance for reviewing courts in the application of the reasonableness standard. I have applied that guidance in my review, exercising restraint but conducting a robust review of the Decision for justification and internal coherence (*Vavilov* at paras 12-15, 85-86, 99; see also *Canada Post* at paras 28-29). Such a review respects the distinct role of administrative decision makers (*Vavilov* at para 13) and emphasizes the importance of the reasons and justification given by the decision maker for their decision (*Vavilov* at paras 86, 95).

IV. Analysis

[14] I note first that one of Mr. Sangha's arguments in this application challenges the CRA's 2017 and 2018 TFSA assessments. He argues that the assessments were incorrect and that, in fact, he should not be subject to any excess contribution tax for either of the years. I agree with the Respondent's position that this argument gives rise to a jurisdictional issue. As I explained at the hearing, the underlying CRA assessments, including the calculations establishing the excess contributions, are not subject to review by the Court. The sole issue before me is the refusal by the Minister's delegate to grant Mr. Sangha's request for a discretionary waiver of the tax imposed on the excess contributions. To the extent Mr. Sangha argues that the Decision was unreasonable because the underlying assessments were incorrect, I have disregarded that argument as a collateral attack on the 2017 and 2018 TFSA assessments.

[15] Mr. Sangha's remaining submissions can be summarized as follows:

(a) The Decision unreasonably ignored the June 2017 Letter. Mr. Sangha relies on two aspects of the letter: (1) a statement that, if he had made excess contributions to his TFSA, he should withdraw the excess amount(s) immediately; and (2) the warning that, if in the future he continued to contribute more than his available contribution room, the CRA could charge him a 1% tax for each month any excess remains in his TFSA. Mr. Sangha states that he had withdrawn all amounts, not merely the excess amounts, from his TFSA prior to receipt of the June 2017 Letter.

(b) The September 2017 excess contribution was an honest mistake and reflected Mr. Sangha's misunderstanding of the applicable law that required him to wait until January 2018 to make additional TFSA contributions.

(c) The failure by the Minister's delegate to take into account Mr. Sangha's serious ill health and the stress he has experienced due to the assessment of the TFSA tax renders the Decision unreasonable.

[16] The Respondent's submissions rest heavily on the framework for reasonableness review set out in *Vavilov*. The Respondent submits that the Decision was internally coherent and justified in light of the information before the Minister's delegate and emphasizes the importance of the record and the scope of subsection 207.06(1) of the *ITA* (*Vavilov* at paras 83, 86 and 90). The Respondent argues that the Minister's delegate analysed the record, including the June 2017 Letter and the First Refusal, against the two conditions for relief set forth in subsection 207.06(1) and reasonably concluded that Mr. Sangha had repeatedly over-contributed to his TFSA. He was warned of the consequences of excess contributions and yet contributed more funds in September 2017. In addition, he allowed those funds to remain in the TFSA until August 2018.

[17] I have carefully considered the Respondent's submissions against the relevant provisions of the *ITA*, the record before the Minister's delegate, the SCC's framework and the Decision. Although the Respondent's submissions were comprehensive and very ably made, I do not find them persuasive and conclude that the Decision was not reasonable as it lacks analysis and justification.

[18] The provisions of the *ITA* under which the Minister's delegate made the Decision establish the legal context for my review of the parties' submissions (*Vavilov* at para 108). The excess TFSA tax was assessed by the CRA pursuant to section 207.02 of the *ITA*. Mr. Sangha's request for a discretionary waiver of the TFSA tax imposed was made under subsection 207.06(1).

[19] Subsection 207.06(1) of the *ITA* provides that the Minister's discretion may be exercised if:

1. The taxpayer establishes to the satisfaction of the Minister's delegate that the tax liability arose as a consequence of a reasonable error; and
2. The excess TFSA amounts are removed from the TFSA by the taxpayer without delay.

[20] For ease of reference, the provisions of section 207.02 and subsection 207.06(1) of the *ITA* are set out in full in Annex A to this judgment.

[21] The evidence before the Minister's delegate established that Mr. Sangha entered the 2017 taxation year having made excess contributions to his TFSA, which he added to in March 2017. He withdrew all funds from his TFSA in April 2017. Mr. Sangha then received the June 2017 Letter. Despite the warning contained in the June 2017 Letter, Mr. Sangha contributed $35,000 to his TFSA in September 2017, resulting in an excess contribution amount of $35,000. He maintained the excess contribution in his TFSA until August 2018.

[22] The 2017 and 2018 TFSA assessments indicate that the section 207.02 TFSA tax was imposed in respect to the following monthly excess amounts

January-February 2017:	$30,908
March-April 2017:	$40,908
May-August 2017:	$0
September-December 2017:	$35,000
January-August 2018:	$15,816.03
September-December 2018:	$0

[23] Mr. Sangha's submissions in the Second Waiver Request centre on (1) the June 2017 Letter and its implications for the excess contribution amounts in his TFSA from January to April 2017; and (2) the fact that his September 2017 contribution was caused by reasonable error.

[24] The Minister's delegate is required to apply the conditions for relief set out in subsection 207.06(1) to the factual matrix of the particular case (*Vavilov* at paras 125-126) and to meaningfully address the central concerns identified by the taxpayer, in this case the arguments raised by Mr. Sangha in his Second Waiver Request (*Vavilov* at paras 94, 127).

[25] As a result, I turn now to the Decision. The Minister's delegate referred to Mr. Sangha's Second Waiver Request, noting only that "you stated that you contributed in error to your TFSA, but you removed the excess". The delegate confirmed that a separate CRA official who was not involved in the first refusal considered Mr. Sangha's circumstances but concluded that the request for a waiver could not be granted. Other than a number of generalized paragraphs providing basic TFSA information, the operative paragraphs of the Decision are as follows:

> 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 2017, after you were notified by the Canada Revenue Agency about TFSA excess contributions made in 2016.
>
> …
>
> 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 TFSA contributions.

[26] My role is not to substitute my own decision for that of the Minister's delegate, nor am I to review the Decision against a standard of perfection (*Vavilov* at paras 83, 91). Therefore, I refrain from comment on the ultimate determination of Mr. Sangha's Second Waiver Request. However, I find that the reasons given by the Minister's delegate contain fundamental gaps. I emphasize that my conclusion does not require a Minister's delegate to draft lengthy reasons but it does require an analysis, which may be brief, of the applicable legal framework, significant evidence, and submissions in the record that permits the reader to understand the delegate's rationale for the outcome of the case.

[27] The majority in *Vavilov* emphasized the importance of the reasons given by a decision maker, stating that "the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83; see also paras 91-98). The Decision actually made in this case does not explain the reasoning of the Minister's delegate. The reason for the refusal to waive the TFSA tax is explained in one statement: Mr. Sangha's continued contributions after receipt of the June 2017 Letter. The Minister's delegate failed to address three material issues, the first of which is a determinative error. Specifically, the delegate did not consider Mr. Sangha's submission regarding the impact of the June 2017 Letter and his prior withdrawal of all amounts from his TFSA. Second, the Minister's delegate failed to explain why Mr. Sangha's submission regarding reasonable taxpayer error was not persuasive. Finally, the delegate did not refer to the subsection 207.06(1) conditions or their application to Mr. Sangha's circumstances.

[28] The Minister's delegate referred in general terms to the June 2017 Letter but did not distinguish between Mr. Sangha's excess contributions made, and withdrawn, before June 2017 and the subsequent September 2017 contribution, an obvious and critical focus for Mr. Sangha. The delegate appears to have viewed Mr. Sangha's September 2017 excess contribution as colouring all of his actions, pre- and post-letter, placing him in the category of repeat over-contributor. There is also no discussion in the Decision of the warning in the June 2017 Letter of the possible future imposition of TFSA tax. Mr. Sangha relies on the CRA's future-looking statement to argue that the tax imposed on his pre-June excess contributions should be waived. The Minister's delegate ignored the argument. This omission materially compromises the Respondent's position that the Decision is fully justified. The taxpayer is left with the belief that the Minister has disregarded the information provided by the CRA.

[29] The Respondent submits that the Minister's delegate was not required to look at individual over-contributions but properly focussed on Mr. Sangha's series of excess contributions. In my view, in order to adequately justify the refusal to waive any part of the tax imposed on this basis, the Minister's delegate was required to explain to Mr. Sangha why his actions prior to the June 2017 Letter were impacted by the September 2017 contribution.

[30] Second, the Minister's delegate did not address Mr. Sangha's submission regarding reasonable error and the September 2017 contribution. The Respondent submits that Mr. Sangha's argument of innocent mistake is not itself sufficient to support a waiver, particularly as Mr. Sangha was warned of the effects of further excess TFSA contributions (*Weldegebriel* at paras 10, 15; *Dimovski v Canada (Revenue Agency)*, 2011 FC 721 at para 17). I

acknowledge the Respondent's submission regarding the existing jurisprudence and this Court's emphasis that in the Canadian system of self-assessment, a taxpayer's lack of understanding of the law is not generally a reasonable error within the meaning of subsection 207.06(1). I also acknowledge the reference in the Decision to Mr. Sangha's continued excess contributions after receipt of the June 2017 Letter. This reference may have been intended to rebut Mr. Sangha's characterization of his September 2017 contribution as an innocent mistake but I find that the connection between Mr. Sangha's submission, the delegate's statement and the jurisprudence is not evident (*Vavilov* at para 97, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11).

[31] The Respondent argues that the Minister's delegate relied on the guidance contained in the CRA's Tax-Free Savings Account manual for decision makers regarding the practical application of subsection 207.06(1). The CRA manual sets out key factors for a delegate to consider, including whether the taxpayer is a first time or repeat over-contributor; whether the over-contribution(s) were removed without delay; and, whether there were exceptional circumstances that were beyond the taxpayer's control and may indicate that the tax liability arose due to reasonable error on the part of the taxpayer.

[32] I accept that the Minister's delegate relied on the CRA manual in arriving at the Decision. However, there is no indication in the Decision that the factors set out in the manual were assessed against Mr. Sangha's circumstances and submissions.

[33] Finally, the Minister's delegate made no reference to the two conditions necessary to a waiver of the TFSA tax (subsection 207.06(1) of the *ITA*). The Respondent relies on the fact that the First Refusal set out the two conditions and argues that I must review the reasonableness of the Decision in light of the record. While I agree with the Respondent that the record is critical to the review of an administrative decision, the Decision itself must contain sufficient reasons such that a reader is able to understand the effect of the evidence and documents in the record on the outcome of the case. Here, there is no reference in the Decision to the First Refusal nor is there any reference to or explanation of the conditions set forth in subsection 207.06(1).

[34] I am persuaded that Mr. Sangha has demonstrated that the Decision was not reasonable. I find that the Decision does not reflect a coherent assessment of the relevant law and significant facts and submissions from the record and that the Minister's refusal to exercise their discretion was not intelligible or justified. The reader is left to formulate its own chain of analysis to explain the refusal. The guidance in *Vavilov* makes clear the importance of looking to the reasons given by an administrative decision maker and warns the reviewing court against providing supplemental reasons to buttress the result in the decision in question (*Vavilov* at para 96):

> [96] … To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses and Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

V. Conclusion

[35] The application for judicial review will be granted. Mr. Sangha's second request for a waiver of the tax imposed on his excess TFSA contributions for the 2017 and 2018 taxation years must be returned for reconsideration by another delegate of the Minister.

[36] At the hearing, Mr. Sangha appeared to request that the Court award him costs which he framed in the language of damages. However, subject to one limited and unusual exception, which does not apply here, damages cannot be sought in a judicial review (*Canada (Attorney General) v Oshkosh Defense Canada Inc.*, 2018 FCA 102 at para 33). Nevertheless, I see no reason for departing from the general rule of awarding costs in favour of the successful party and, taking into account the factors set out in Rule 400(3) of the *Federal Courts Rules*, award Mr. Sangha the amount of $350.00 in costs.

JUDGMENT IN T-1667-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter returned for reconsideration by another delegate of the Minister.

2. The style of cause is amended to reflect the Attorney General of Canada as the Respondent.

3. Costs in the amount of $350.00 are awarded to Mr. Sangha.

"Elizabeth Walker"
Judge

Annex A

Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.)	*Loi de l'impôt sur le revenu*, L.R.C. (1985), ch. 1 (5e suppl.)
Tax payable on excess TFSA amount	**Impôt à payer sur l'excédent CÉLI**
207.02 If, at any time in a calendar month, an individual has an excess TFSA amount, the individual shall, in respect of that month, pay a tax under this Part equal to 1% of the highest such amount in that month.	207.02 Le particulier qui a un excédent CÉLI au cours d'un mois civil est tenu de payer pour le mois, en vertu de la présente partie, un impôt égal à 1 % du montant le plus élevé de cet excédent pour le mois.
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).

FEDERAL COURT

SOLICITORS OF RECORD

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