

Federal Court



Cour fédérale

**Date: 20210503**

**Docket: T-1303-20**

**Citation: 2021 FC 393**

**Ottawa, Ontario, May 3, 2021**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**REINHOLD POSMYK**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] The Applicant, a self represented litigant, articulate and organized, sought judicial review of a decision by the Minister of National Revenue [Minister] denying his request to cancel tax assessed on his tax free savings account [TFSA] excess contribution in the 2018 taxation year. He wants taxes on his overpayment waived and a refund of penalty/interest.

## II. Background

[2] Section 207.06 (1) of the *Income Tax Act*, RSC 1985, c-1 (5<sup>th</sup> Supp), gives the Minister a discretion to waive or cancel any liability if a) the individual’s liability arose from a “reasonable error”; and b) the withdrawal of the excess contribution is made “without delay”.

[3] The relevant statutory provisions are:

### **Waiver of tax payable**

**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

**(a)** the individual establishes to the satisfaction of the Minister that the liability arose as a consequence of a reasonable error; and

**(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

**(i)** the amount in respect of which the individual would otherwise be liable to pay the tax, and

**(ii)** income (including a capital gain) that is

### **Renonciation**

**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)** le particulier convainc le ministre que l’obligation de payer l’impôt fait suite à une erreur raisonnable;

**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)** la somme sur laquelle le particulier serait par ailleurs redevable de l’impôt,

**(ii)** le revenu, y compris le gain en capital, qu’il est

reasonably attributable, directly or indirectly, to the amount described in subparagraph (i).

raisonnable d'attribuer, directement ou indirectement, à la somme visée au sous-alinéa (i).

...

[...]

**Waiver of penalty or interest**

**220 (3.1)** The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

**Renonciation aux pénalités et aux intérêts**

**220 (3.1)** Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[4] The Minister has applied his discretion to define “reasonable error” as something beyond the taxpayer’s control and “without delay” as within 30 days of being aware of the over-contribution.

[5] The Applicant, as a matter of choice, does not have home internet service nor a cell phone – as is his right. He does use a computer at the local library for personal e-mails. This meant that he did not go on the Applicant's CRA My Account site. CRA e-mail notifications went to an e-mail account in his name that he says he never checked.

[6] The Applicant was a regular TFSA user and routinely over-contributed. In 2016 he made a large TFSA contribution which left him only \$1,000 TFSA contribution room for 2017.

[7] However, in March 2017 he contributed \$5,500 to his TFSA resulting in an over-contribution of \$4,500 in 2017.

[8] In June 2017, after he had made his over-contribution, there was an education letter deposited into his CRA My Account. The letter was not specific to the Applicant's over-contribution in 2018 (the tax year at issue) but warned of the consequences of over-contribution in respect of 2016. The Applicant says he did not see this education letter.

[9] In January 2018, the Applicant contributed \$5,500 to his TFSA. In March 2018, he received notice that he had contribution room of \$1,000 and shortly thereafter contributed a further \$1,000. As a result, he over-contributed in 2018, resulting in contribution room for 2019 of \$500.

[10] In January 2019, he contributed \$6,000 and in July 2019, he received a Notice of Assessment [2018 NOA] in respect of the 2018 over-contribution. The Applicant was required to pay taxes and interest on the excess contributions and late filing fees.

[11] On July 25, 2019, the Applicant sought taxpayer relief in respect of the 2018 NOA but this was denied.

[12] On August 1, 2019, the Applicant claimed that he withdrew \$5,500 from his TFSA. Nevertheless, his taxpayer relief was denied.

[13] On October 21, 2019, the Applicant commenced notice of objection proceedings and made two requests for cancellation of taxes, penalties and interest.

[14] The decision at issue arose from the second cancellation request which was denied by the Minister on the basis that it was the Applicant's responsibility to be aware of TFSA rules, not to exceed annual contribution room and to keep his contact information up-to-date. The Minister also found that he had not withdrawn his excess contribution within a reasonable time of being notified by CRA.

### III. Analysis

[15] This is a discretionary relief and as such, it is governed by the standard of reasonableness review (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras 10, 35-36).

[16] The Applicant made an error in his TFSA contribution limit. This error was not induced or contributed to by CRA. This Court in *Jiang v Canada (Attorney General)*, 2019 FC 629, and in *Weldegebriel v Canada*, 2019 FC 1565, has upheld the Minister's narrow application of "reasonable error". Factors such as receiving bad advice or misreading CRA notices and honest errors are not grounds for relief. The education letter played no role in the Applicant's error.

[17] The Applicant acknowledges that the error was his and that CRA did not cause or contribute to his error, made after the education letter was available but before the Applicant had seen the letter.

[18] Having failed to establish reasonable error, the relief is not available even if he withdrew the excess contribution within 30 days of receiving CRA's notice. In the normal circumstances, the Court would conclude this matter; however, submissions by the Minister require the Court's comment.

[19] In reaching the conclusion that the withdrawal was not done "without delay", the CRA official relied on an entry in the CRA computer base to reach that conclusion. That entry was in error and the Applicant had withdrawn the excess without delay.

[20] The Minister tried to defend this part of his decision by contending that, despite the CRA computer error, the official made a "reasonable" decision based on the computer screen in front of him.

[21] This is a wholly untenable position for the Minister to advocate. It is tantamount to suggesting that facts do not matter. In my view, it is an unreasonable decision if the facts do not support the conclusion.

[22] However, for the Applicant, potential success on this issue is of no importance. He is required to succeed on both parts of the test and he did not.

#### IV. Conclusion

[23] Therefore, this judicial review will be dismissed without costs.

**JUDGMENT in T-1303-20**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed  
without costs.

"Michael L. Phelan"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1303-20

**STYLE OF CAUSE:** REINHOLD POSMYK v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** APRIL 12, 2021

**JUDGMENT AND REASONS:** PHELAN J.

**DATED:** MAY 3, 2021

**APPEARANCES:**

Reinhold Posmyk

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Kieran Meehan

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada  
Vancouver, British Columbia

FOR THE RESPONDENT