Federal Court  Cour fédérale

Date: 20220802

Docket: T-1093-19

Citation: 2022 FC 1156

Ottawa, Ontario, August 2, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

DAVID ZAZULA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a negative decision by the Canada Revenue Agency ("CRA") denying a second request by the Applicant to cancel tax assessed on his tax-free savings account ("TFSA") excess contributions for the 2017 and 2018 taxation years.

II. Background

[2] The self-represented Applicant ("Mr. Zazula") admits that he unknowingly over-contributed to his TFSA during 2017 and 2018.

[3] In 2012, Mr. Zazula made contributions of $19,999.92 to his TFSA. His unused contribution room at the end of 2012 was $169.25 and, on January 1, 2013, Mr. Zazula had a contribution room of $5,669.25. In 2013, Mr. Zazula did not contribute to his TFSA, but withdrew $833.33. Mr. Zazula made no contribution or withdrawal in 2014 and 2015.

[4] On January 1, 2016, Mr. Zazula had a contribution room of $27,502.58. In 2016, Mr. Zazula contributed $46,500.00 to his TFSA, exceeding his contribution room at the end of 2016 by $18,997.42. The 2017 TFSA dollar limit was $5,500. Therefore, on January 1, 2017, Mr. Zazula exceeded his contribution room by $13,497.42. On July 12, 2017, the CRA issued a Notice of Assessment in respect of his over-contribution to his TFSA in the 2016 taxation year.

[5] The 2018 TFSA dollar limit was $5,000. On January 1, 2018, Mr. Zazula exceeded his contribution room by $7,997.42. On July 24, 2018, the CRA issued a Notice of Assessment in respect of his over-contribution to his TFSA in the 2017 taxation year.

[6] In a letter dated September 13, 2018, a manager of the TFSA Processing Unit at the CRA informed Mr. Zazula that they were unable to decipher a request from the note he wrote regarding the lost value on his TFSA investments. The manager recommended that Mr. Zazula

withdraw the excess contributions from his TFSA as soon as possible, as excess contributions are taxed at 1% for each month they remain in his TFSA. The CRA attached to the letter the TFSA contribution room statements from 2010 to 2018 for his reference.

[7] Mr. Zazula withdrew $9,000.00 from his TFSA on October 1, 2018.

[8] On October 10, 2018, Mr. Zazula submitted a first request for taxpayer relief for his over-contribution to his TFSA, in which he claimed that he was not responsible for his over-contribution, as he was not informed by his bank or by the CRA that he was over-contributing to his TFSA. He claimed he was unaware that, unlike a Registered Retirement Savings Plan, withdrawals he made from his TFSA are added to his contribution room the next year only. On or about January 30, 2019, CRA denied his request for relief. On April 25, 2019, Mr. Zazula submitted a second request for taxpayer relief for cancellation of the penalty. He argued that the CRA must administer the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] fairly and reasonably.

[9] In a letter dated June 5, 2019, a Senior Assessment Processing and Resource Officer ("Officer") of the TFSA Processing Unit at the CRA, who was not involved with the first decision, denied Mr. Zazula's second request for relief. The Officer stated that to grant a cancellation of tax assessed on excess TFSA contributions, the tax must have arisen because of a reasonable error and the individual must have acted right away to remove the excess contributions from their TFSA. The Officer noted that Mr. Zazula did not remove the excess contributions from his TFSA over contributions for 2016 and 2017 until October 1, 2018, although the CRA sent him a Notice of Assessment for 2016 dated July 12, 2017, and a letter

dated December 21, 2017, which included transaction statements and contribution room statements. There is no factual dispute in this matter.

III. Issue

[10] The sole issue is whether or not the decision was reasonable.

IV. Standard of Review

[11] The standard for reviewing the Officer's decision is reasonableness. There is a presumption that reasonableness is the applicable standard when reviewing an administrative decision, and none of the exceptions apply in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]).

[12] As noted by the majority in *Vavilov*, 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). This Court should intervene only if the decision under review does not "[bear] the hallmarks of reasonableness – justification, transparency and intelligibility" and if the decision is not justified "in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

V. Analysis

Preliminary issues

[13] The Respondent submits that the following documents should be struck from the Applicant's Record, as they were not before the Officer and/or not attached to Mr. Zazula's affidavit as exhibits:

- Notice of Application filed October 10, 2018;
- Notice of Application filed April 25, 2019;
- June 20, 2018, Fax (4 pages); and
- Exhibit F.

[14] At the hearing of this judicial review, the Respondent partially withdrew his request to remove documents when it was pointed out by the Court that these documents were before the decision-maker but did not make it into the Certified Tribunal Record ("CTR"). Any remaining documents/exhibits though unattached to an affidavit will not be struck. This is an elderly (83 year old) applicant representing himself who has tried his best to present his case within the rules. Although Rule compliance is extremely important, this is an exceptional situation and therefore I will not strike any of the documents as requested by the Respondent.

[15] It became clear at the hearing that Mr. Zazula did not fully understand or appreciate the significance of the CTR certification or the CTR. The Officer who certified the CTR was doing so as per Rule 317 of *the Federal Courts Rules*, SOR/98-106. This rule requires the transmission of *all* the material that was before the decision-maker so that the reviewing court has the

complete record that was before the decision-maker when they made their decision. It is not a discovery of all the documents in a tribunal's possession (*1185740 Ontario Ltd v Canada (Minister of National Revenue)*, [1999] FCJ No 1432 (FCA)).

[16] The misunderstanding became clear to the Court in some of the Applicant's arguments related to the "certification" by the Officer:

> The documents as requested by the applicant and listed below, do not exist and therefore are not enclosed herewith:
>
> > 8. The term fair market value (FMV) is applicable to TSFA please give examples of its application to all TFSA situations.
>
> (see page 2 of the CTR)

Is the Officer's decision reasonable?

[17] According to subsection 207.02 of the *ITA*, an individual over-contributing to his TFSA, has to pay a tax on this excess amount:

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.

[18] Subsection 207.06(1) of the *ITA* provides that the Minister of National Revenue may waive or cancel tax payable on any excess TFSA amount:

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).

[19] These conditions mean that a taxpayer has to satisfy two requirements before the Minister can exercise their discretion to issue relief. To summarize, the taxpayer must establish that the

tax liability arose as a consequence of a reasonable error and that the excess TFSA funds must be removed from the TFSA without delay.

[20] The Respondent argued that Mr. Zazula failed to state a cognizable administrative law claim and that this Court cannot grant the relief he seeks. In response to the fair market value [FMV] argument, the Respondent argued this is related to the assessments and is the jurisdiction of the Tax Court of Canada.

[21] Reading Mr. Zazula's Notice of Application and Memorandum of Fact and Law, I find that Mr. Zazula's primary argument rests on the failure of the CRA to administer the income tax system fairly and reasonably by not taking into consideration the loss value of his investment. In my opinion, this argument rests on the substantive unacceptability of the impugned decision and raises a recognized ground of review in administrative law (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para70 [*JP Morgan*]).

[22] As regards to the relief sought by Mr. Zazula, this Court is limited to the remedies set out in subsection 18.1(3) of the *Federal Courts Act*, RSC, 1985, c F-7. I agree with the Respondent that the relief sought by Mr. Zazula – a request to cancel the penalty and interest tax on excess TFSA contributions – is not the relief I would grant if the Applicant was successful. At the outset of the hearing he was told the remedy, if he was successful, would be to send the Officer's decision back to be re-determined by a different decision-maker. The Applicant is an 83 year old self-represented individual and I am prepared to decide the application on the merits and not dismiss it on this point.

[23] The Respondent further submits that Mr. Zazula failed to provide a copy of the impugned decision; however, Mr. Zazula provided the impugned decision on March 17, 2021, following a Direction issued by Justice Mosley on January 27, 2021, inviting Mr. Zazula, who is self-represented, to address the deficiency of his Application Record. Justice Mosley also reminded Respondent's counsel of his duty of fairness to an unrepresented litigant and his duty as an officer of the Court.

Applicant's arguments

[24] Mr. Zazula argues that the CRA failed "to administer the income tax system fairly and reasonably" (citing *Income Tax Information Circular*, IC07-1R1 dated August 18. 2017).

[25] The Applicant presented "big picture" ideas of how the *ITA* should have operated in his situation. He tied all the faults he found with the relief provisions to his circumstances. There are no factual disputes and most of his arguments centered on how he felt his situation should have been dealt with given the Taxpayer Relief Application and Taxpayer Bill of Rights. As well his arguments related to how the treatment of FMV and refusals in the *ITA* differed from what happened in his case.

[26] At the hearing, the Applicant submitted that he did not withdraw his excess contributions as he was waiting for responses from CRA to his questions and never did have the dialogue with CRA that he wanted. For accuracy, I do note that he did make a withdrawal on Oct 1st before he filed his first application for taxpayer relief so though he might have been waiting for responses

from CRA, he was not waiting for the Relief application decision. He did not withdraw when first informed which is one of the requirements to obtain relief from the interest provisions.

[27] Mr. Zazula's position throughout his applications and the hearing was that the lack of dialogue, contact or engagement by the agents of CRA with his submissions about FMV applicability to TFSA situations was unreasonable and against what the Taxpayer Bill of Rights stands for. He submitted that it is important that CRA address all of the questions raised in correspondence to them to "address any potential confusion".

[28] Mr. Zazula's theory is that given FMV is part of the *ITA* and should be considered when dealing with TFSAs. His initial contributions, which he indicated were stock purchases, were a bad investment and dwindled to only being valued at about $800.00. He says the value should be the FMV at the time and not in the past. These questions he says were never answered.

[29] He argued that it was strange that the Officer would certify there were no FMV documents when in fact FMV is a large part of the *ITA*.

[30] Mr. Zazula submitted that the CRA has a duty of care to have a system that does not allow over-contribution. He relied on *Leroux v Canada Revenue Agency*, 2014 BCSC 720, as well as another case, which he could not recall the citation or name of, for the presumption that CRA has this duty of care. These cases he said show that CRA has a duty of care to taxpayers and in his case CRA did not meet that duty. As well, he argued that the Taxpayer Bill of Rights

includes a duty of care to the taxpayer to be warned of any questionable tax schemes in a timely manner.

[31] Mr. Zazula presented his argument that given the refusal sections throughout the *ITA* and the lack of one in the TFSA section that it apparent that the TFSA section also should have a refusal section.

[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.

[33] Mr. Zazula's "big picture" arguments relating to the pitfalls and omissions in the *ITA* must fail on this judicial review. To make changes to the system is through legislative change, and is not the role of the Court on judicial review of a decision.

[34] Any of the arguments that may be related to assessments are the sole jurisdiction of the Tax Court of Canada and are not relevant to this judicial review.

[35] Mr. Zazula's arguments related to being informed of a tax scheme must also fail given that over-contributing to a TFSA is not a tax scheme.

[36] I find that CRA reasonably responded to his questions that had a legal or factual basis related to TFSA overpayments. It was not unreasonable for the CRA officer on a TFSA relief application to not address the questions not related to TFSA overpayments that were the issue before them. I find it was not unreasonable for the Officer to answer or deal with big picture legislative change questions or inquires in the TFSA relief decision before the Court.

[37] Mr. Zazula confirmed that he did over contribute and that he did receive notice of his over-contribution and did not withdraw that amount as soon as possible. His explanation was that he did not withdraw right away as he had filed a Taxpayer Relief Application and was waiting for that determination, which was refused so he filed another application. The onus is on the taxpayer to conduct his financial affairs according to the law and to understand the law or obtain legal or financial opinions regarding their TFSA transactions.

[38] The Officer's decision is reasonable. Although Mr. Zazula was notified of his over-contributions, he did not act without delay to remove the excess contributions from his TFSA. He also failed to satisfy the Officer that his over-contributions arose as a consequence of a reasonable error. Because he did not meet either of the requirements of subsection 207.06(1), the Officer's decision was a reasonable and coherent and explained in the decision.

[39] I will dismiss this application.

VI. Costs

[40] The Respondent sought costs. I am not prepared to order costs.

JUDGMENT IN T-1093-19

THIS COURT'S JUDGMENT is that :

1. The style of cause is amended to substitute Canada Revenue Agency for Attorney General of Canada.
2. The application is dismissed.
3. No costs are ordered.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1093-19
STYLE OF CAUSE:	DAVID ZAZULA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	JULY 20, 2022
JUDGMENT AND REASONS:	MCVEIGH J.
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