Federal Court  Cour fédérale

Date: 20230316

Docket: T-1904-22

Citation: 2023 FC 356

Ottawa, Ontario, March 16, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ZHANHONG ZHANG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a delegate [the Delegate] of the Minister of National Revenue [the Minister], dated August 15, 2022 [the Decision]. In the Decision, the Delegate refused the Applicant's request to reconsider the refusal by the Canada Revenue Agency [CRA] to exercise discretion available under section 204.1(4) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] to cancel the tax assessed against the Applicant for

2017, 2018, and 2019 in relation to Registered Retirement Savings Plan [RRSP] excess contributions.

[2] As explained in more detail below, this application is allowed, because the Decision is unreasonable. The Delegate was unpersuaded by the evidence and arguments adduced by the Applicant, because the Delegate erroneously concluded that the Applicant had been placed on notice of the 2013 RRSP contribution, that is at issue in this application, in sufficient time to obtain corroborating evidence from his bank and yet failed to act diligently to do so.

II. **Background**

[3] In 2006, the Applicant, Zhanhong Zhang, and his spouse [the Spouse] purchased their first home together. Each made a withdrawal from their respective RRSP as part of the federal government's Home Buyers' Plan [HBP].

[4] In 2012, the Spouse had an outstanding HBP balance of $13,142. On July 12, 2013, she went into a Royal Bank of Canada [RBC] branch to make a payment into her RRSP to pay off this HBP balance. However, the Applicant asserts that RBC mistakenly placed this payment into the Spouse's spousal RRSP account with the Applicant as the contributor, rather than into her personal RRSP account with her as the contributor. RBC issued a Spousal Contribution Receipt [the Receipt] reflecting the transaction in this manner. The Spouse claimed this $13,142 HBP repayment in her tax return for the 2013 taxation year.

[5] The Applicant did not claim this $13,142 payment in his tax return for the 2013 taxation year. Rather, he made a payment of $13,111, in repayment of his own HBP balance, and claimed that repayment in his return. However, because of the alleged error by RBC, CRA takes the position that the Applicant was also the contributor of the $13,142 payment, as a result of which he exceeded his available RRSP contribution room in 2013.

[6] In addition to other RRSP contributions made in the intervening years, the Applicant contributed $19,000 to his RRSP in February 2018, in relation to the 2017 taxation year, following a pension buyout. While not directly relevant to the aspect of the Decision challenged in this application (which relates only to the 2013 over-contribution), it appears that this $19,000 also resulted in an excess contribution, attributable to the Applicant misunderstanding the effect of his pension buyout.

[7] Under s 204.1(1) of Part X.1 of the *ITA*, a taxpayer who has made excess RRSP contributions is required to pay a monthly tax of 1% of the excess. On November 1, 2019, the CRA sent the Applicant a request for a T1-OVP return (a return intended to account for this tax on overpayments) for the 2018 taxation year. CRA sent a follow up letter on December 3, 2020, as the Applicant did not respond to the November 1, 2019 letter.

[8] On December 21, 2020, at the Applicant's request, CRA completed T1-OVP returns for the Applicant for the 2017 to 2019 taxation years. On June 3, 2021, CRA sent the Applicant Notices of Assessment related to the 2017 to 2019 T1-OVP returns.

[9] The Applicants states that it was only in December 2020, during a phone call with a CRA representative, that he learned of CRA's position that he had made a $13,142 excess contribution in 2013. Following this call, the Applicant realized that this situation resulted from what he considered to be an error made by RBC when it processed the Spouse's HBP repayment. In July 2021, the Applicant requested a waiver of his Part X.1 tax, pursuant to the discretion available under s 204.1(4) of the *ITA*. The Applicant raised the following arguments in support this request:

A. RBC mistakenly transferred the Spouse's July 2013 payment of $13,142 into her spousal RRSP rather than her personal RRSP;

B. After the Applicant became aware of the mistake, he contacted RBC but, because more than seven years had passed since the time of the transaction, RBC no longer had records of the transaction;

C. The Applicant was therefore unable to obtain a letter from RBC acknowledging the mistake; and

D. The Applicant misunderstood the pension buyout rules when he made the $19,000 contribution in 2018.

[10] Following a first level review of the Applicant's request to waive the Part X.1 tax, a delegate of the Minister denied the request on the following basis:

A. The Applicant did not provide an amended RRSP receipt or a letter from RBC acknowledging the alleged error;

B. It was the Applicant's responsibility to make sure that all contributions were made according to the rules and regulations;

C. Notwithstanding that the Applicant's RRSP deduction limit for 2017 was $8,614, he nevertheless contributed $19,000 during the first 60 days of 2018; and

D. The Applicant had not made an RRSP withdrawal to remedy the excess contribution situation.

[11] The Applicant was notified of this decision by letter dated April 29, 2022.

[12] The Applicant then submitted a second request for waiver of the Part X.1 tax, by letter dated May 26, 2022. The Delegate's refusal of that request is the Decision under review in this application.

III. **Decision under Review**

[13] The Decision summarizes the Applicant's arguments in support of his request. These consisted of arguments raised in support of his first request, as well as others including the explanation that the TurboTax software he used to prepare his tax returns did not guide him to the T1-OVP form.

[14] The Decision summarizes the requirements of s 204.1(4) of the *ITA*, as allowing the Minister to cancel or waive Part X.1 tax where the excess contributions were made because of a reasonable error and the taxpayer took or was taking reasonable steps to remove the excess.

[15] The Decision acknowledges that the Applicant's RRSP excess contributions were not intentional but states that third party errors do not normally justify the cancellation of a tax. The Delegate states that a third party error should usually be resolved between the Applicant and the third party and, where a bank cannot provide an acknowledgement letter, CRA would accept a statement of account, showing from which account the money came and to whom the account belongs.

[16] The Decision then explains that a participant in a deferred income plan, such as an RRSP, is required to make every effort to know what they are investing in. This portion of the Decision appears to relate to the February 2018 over-contribution (which is not directly relevant to this application for judicial review), as the Delegate notes that no explanation had been provided as to why the Applicant did not make the necessary verifications before investing the $19,000 sum in his RRSP in the first 60 days of 2018. The Decision reiterates that the Applicant is responsible for ensuring that all RRSP contributions are within the guidelines set out in the legislation.

[17] The Delegate then addresses the Applicant's arguments relating to the tax software he employed. The Delegate states that the Applicant is responsible for ensuring the accuracy of the tax information he submits, even when using tax preparation software, and that cancellation of tax is not available for errors arising from the use of such software. Further, TurboTax is designed for the filing of tax returns, not the T1-OVP. Again, this portion of the Decision appears to relate to the February 2018 over-contribution.

[18] The Decision states that the Applicant was informed of his excess contributions to his RRSP on his 2017 and 2018 Notices of Assessment [NOAs], dated May 10, 2018 and April 29, 2019, respectively. The Decision concludes that, had the Applicant acted upon this information at that time, RBC would still have had the required records from 2013.

[19] The Decision also notes that CRA's records show no attempt by the Applicant to withdraw the excess RRSP contributions to resolve the over-contribution situation.

[20] The Delegate refers to, but rejects, arguments challenging CRA's calculations in the T1-OVP returns. However, this application for judicial review does not challenge that aspect of the Decision.

[21] The Delegate concludes there were no circumstances beyond the Applicant's control, such as a natural or human-made disaster, that would permit the cancellation of the penalty, and expresses regret that the Decision cannot be more favourable.

IV. **Issues**

[22] As previously noted, this application seeks judicial review of the Decision only in relation to the $13,142 excess contribution made in 2013. The Applicant has not expressly identified a list of issues for the Court's determination. The Respondent submits that the sole substantive issue is whether the Decision is reasonable. As suggested by that articulation, the standard of review applicable to the merits of the Decision, involving consideration of arguments

that the Delegate erred in applying the test under s 204.1(4) of the *ITA*, is reasonableness (see *Connolly v Canada (National Revenue)*, 2019 FCA 161 [*Connolly*] at para 56).

[23] The Respondent also raises the following procedural issues:

A. The Respondent submits that the style of cause in this application should be amended to name the Attorney General of Canada [AGC], rather than CRA, as the Respondent; and

B. The Respondent submits that there is evidence in the Applicant's Record that was not before the Delegate when making the Decision, which therefore should not be considered by the Court in this application.

V. **Analysis**

A. *Amendment of the Style of Cause*

[24] As the Respondent submits, Rules 303(1) and (2) of the *Federal Courts Rules*, SOR/98-106, provide that, where an application does not directly affect another person other than a tribunal in respect of which the application is brought, the application shall name the AGC as a respondent. As CRA is effectively the tribunal in respect of which the application is brought, the Respondent takes the position that the appropriate respondent is the AGC.

[25] The Applicant has not taken a position on this issue. I agree with the Respondent's analysis, and my Order will provide for an amendment to the style of cause to replace CRA with the AGC as the Respondent.

B. *Record Before the Delegate*

[26] The record before the Court in this application includes affidavits sworn by the Applicant, the Spouse, and a Resource Officer with the T1-OVP Compliance Program of the National Verification and Collections Centre of CRA [the Resource Officer] who prepared the report and recommendation that led to the Decision by the Delegate. The Resource Officer's affidavit states that the supporting documents attached to the Spouse's affidavit were not submitted by the Applicant in support of his request for waiver of the Part X.1 tax and were not reviewed by the Resource Officer in preparing his recommendation.

[27] However, the Respondent's Memorandum of Fact and Law acknowledges that the statement in the Resource Officer's affidavit is partially in error, as certain of the documents attached to the Spouse's Affidavit had indeed been submitted by the Applicant and were taken into consideration during the waiver review process. The documents that remain in issue, and which the Respondent argues should not be considered by the Court in this application, are the following [the Disputed Documents]:

A. the Spouse's 2013 NOA;

B. a CRA website printout of the Spouse's 2013 T1 Assessment; and

C. the Applicant's RRSP Deduction and Contribution summary dated June 25, 2021.

[28] The Respondent notes that an application for judicial review is to be determined on the basis of the evidence that was provided to the administrative decision-maker at the time of the

decision (see *Wood v Canada (Attorney General)*, [2001] FCJ No 52 (QL) at para 34). The Respondent acknowledges that there are exceptions to this rule (see *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 98-100) but argues that the Disputed Documents do not fall within these exceptions.

[29] In response, the Applicant submits that the Disputed Documents are all tax records in the possession of CRA and were therefore available to the administrative decision-maker. The Applicant also explains that the information in these documents upon which he wishes to rely is found elsewhere in other documents that the Respondent acknowledges were before the decision-maker.

[30] I am not convinced that the fact the Disputed Documents were broadly within the possession of CRA is sufficient for them to constitute part of the record before the decision-maker and therefore the record for the Court to consider in conducting this judicial review. As the Respondent submits, an applicant in taxpayer relief applications bears the burden to provide the Minister with all necessary evidence prior to the rendering of the decision (see *Dougal & Co Inc v Canada (Attorney General)*, 2017 FC 1075 at para 23). As such, I will not take the Disputed Documents into account in this application. However, nothing turns on this determination, as the Applicant does not appear to be relying on any information in the Disputed Documents that is not found elsewhere in the record.

C. *Reasonableness of the Decision*

[31] Turning to the merits of this application, I note that one of the Applicant's principal arguments is that it was unreasonable for the Delegate to conclude that he could not establish that the 2013 RRSP contribution was attributed to him in error other than through evidence obtained from RBC. The Applicant notes that the evidence submitted with his waiver request demonstrates that the amount of the 2013 contribution ($13,142) is precisely the same amount as was owing under the Spouse's HBP in 2013 and that, as recognized in the report prepared by the Resource Officer in support of the Decision [the Report], this contribution was claimed by the Spouse, not by the Applicant. He submits that the Delegate unreasonably ignored this evidence in concluding that, in the absence of evidence from RBC, the Applicant was unable to demonstrate that the Receipt erroneously attributed the $13,142 contribution to him.

[32] The Applicant has not convinced me that the Delegate overlooked or ignored this evidence. The Report prepared in support of the Decision acknowledges the Applicant's submission that the $13,142 contribution represented the amount of the Spouse's 2013 HBP balance and that this contribution was claimed by the Spouse, not by the Applicant. While I appreciate the Applicant's position that this evidence should have been sufficient to convince the Delegate that the contribution was attributed to him in error, it is not the Court's role on judicial review to reweigh the evidence before an administrative decision-maker.

[33] However, the Applicant's arguments also rely heavily on the analysis, contained in both the Report and the Decision, that the Applicant was warned of his excess contributions in his 2017 and 2018 T1 NOAs, dated May 10, 2018 and April 29, 2019, respectively, and that, had he acted upon this information, RBC would have been in a position to correct their error while still

in possession of records from the 2013 transaction. The Applicant takes issue with this analysis, as he submits that there is no information in the 2017 and 2018 NOAs that relates to, or could have alerted him to, CRA's position that he made a RRSP contribution of $13,142 in 2013.

[34] I find merit to this portion of the Applicant's argument. As he explains, the 2017 NOA identifies that his RRSP deduction limit for 2017 was $8614, to which an additional $2226 was added for 2018. After taking into account contributions, the NOA identified the Applicant having negative available contribution room for 2018, expressed as "(11,688)". The Respondent also notes that he made RRSP contributions for 2017 in the total amount of $22,528, composed of $3258 in stock options from his employer and the $19,000 contribution that he made when he took his pension buyout. These figures are supported by documents attached as an exhibit to the Resource Officer's affidavit and described as the Applicant's RRSP receipts.

[35] As the Applicant submits, the ($11,688) figure appears to result from adding the 2017 and 2018 RRSP deduction limit figures ($8614 + $2226) and subtracting the $22,528 total contribution made for 2017. In other words, the 2017 NOA reflects the $19,000 excess contribution that the Applicant made in February of 2018, as a result of his misunderstanding of the pension buyout rules, but it does not reflect the $13,142 contribution made in 2013.

[36] Similarly, the 2018 NOA accounts adjusts for an additional deduction limit for 2019 and additional contribution made for 2018, the overall effect of which is to reduce the negative contribution room from the ($11,688) figure to a figure of ($5,326). However, again the 2018 NOA does not reflect the $13,142 contribution made in 2013.

[37] At the hearing, the Respondent's reply to the Applicant's arguments was to that point out that both the 2017 and 2018 NOAs include a notation that, if the available contribution room is a negative amount (shown in brackets), the taxpayer has no contribution room available for the relevant year and may have over-contributed to their RRSP and therefore may have to pay tax on any excess contributions.

[38] It is unclear to me how the Delegate could have concluded that, simply by alerting the Applicant to the fact that he was in an over-contribution situation, the 2017 and 2018 NOAs were sufficient to put him on notice that CRA considered him to have made a $13,142 over-contribution in 2013 such that he could pursue that subject with RBC. I consider this reasoning to be lacking in logic and transparency.

[39] I also note the Respondent's reliance on the letter from CRA dated November 1, 2019, as placing the Applicant on notice that he was in an over-contribution situation. However, this letter states only that CRA's records show that, starting in the 2018 tax year, the Applicant had RRSP excess contributions. As with the NOAs, there is nothing in this letter that identifies CRA's position that the Applicant had made an excess contribution in 2013. Moreover, the Delegate does not reference this letter in the reasoning set out in Decision.

[40] As emphasized above, it is not the Court's role on judicial review to reweigh the evidence before an administrative decision-maker. However, in the case at hand, it appears that the Delegate was unpersuaded by the evidence and arguments adduced by the Applicant, because the Delegate erroneously concluded that the Applicant had been placed on notice of the 2013

contribution issue in sufficient time to obtain corroborating evidence from RBC and yet failed to act diligently to do so. This undermines the reasonableness of the Delegate's analysis as to whether the Applicant met the first element of the s 204.1(4) test - establishing that the excess contribution resulted from a reasonable error.

[41] As the Respondent correctly points out, the s 204.1(4) test is conjunctive. That is, in order to obtain relief, a taxpayer must establish not only that the excess contribution resulted from a reasonable error but also that reasonable steps were being taken to eliminate the excess. Even if both elements of the test are satisfied, the Minister retains the discretion not to waive the tax (see *Kapil v Canada (Revenue Agency)*, 2011 FC 1373 at para 28).

[42] In relation to the second element of the test, the Decision states that CRA's records show the Applicant made no attempt to end the over-contribution situation by withdrawing the excess RRSP contributions. Factually, this is accurate. However, the Applicant submits that his situation is distinguishable from, for instance, the sort of situation addressed in *Connolly*, in which it was acknowledged by the taxpayer that he had over-contributed to his RRSP over several years, due to misunderstanding his available contribution limits as well as the contribution limits with respect to a spousal RRSP. The required analysis in that case therefore surrounded whether this error by the taxpayer in making the excess contribution was a reasonable one (see *Connolly* at para 77). In contrast, the Applicant's position is that he did not err and make an excess contribution to his RRSP in 2013. Rather, he submits that the error was that of RBC in documenting the transaction such that it attributed to him an RRSP contribution that he did not actually make.

[43] In that context, the Applicant submits that he should not be expected to make an RRSP withdrawal to correct an over-contribution situation that would not exist if the Minister accepted his position that the $13,142 contribution made in 2013 should not be attributed to him. This argument raises what I consider to be a valid point that what constitutes reasonable steps, under the second element of the s 204.1(4) test, may in some circumstances be influenced by the particular facts surrounding the excess contribution for which a tax waiver is sought. In the case at hand, the Delegate's unreasonable analysis under the first element of the test precluded the possibility of the Delegate accepting the Applicant's characterization of the 2013 contribution and considering what, if anything, would be required as reasonable remedial steps in the context of that characterization.

[44] As such, my conclusion is that the Delegate's error identified above in these Reasons is a reviewable error that undermines the reasonableness of the Decision.

VI. **Relief**

[45] By way of remedy in this application for judicial review, the Applicant seeks an Order cancelling the taxes and penalties imposed by CRA in relation to the $13,142 contribution in 2013. He also seeks $1.00 for causing mental illness and stress during the time of the COVID-19 pandemic, and he seeks costs of this application.

[46] The usual remedy in the case of a successful application for judicial review is for the Court to remit the matter to the decision-maker to have it reconsider the decision, this time with

the benefit of the Court's reasons (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 141 [*Vavilov*]). There are limited scenarios in which remitting the matter would stymie the timely and effective resolution of the matter, where a particular outcome is inevitable and remitting the case would therefore serve no useful purpose (see *Vavilov* at para 142). However, this is not such a scenario. Rather, the appropriate remedy is the usual one. My Order will therefore provide that the Decision be set aside and the matter returned to a different decision-maker for redetermination in accordance with these Reasons.

[47] As this is an application for judicial review, not an action for damages, the Applicant's claim of nominal damages for mental distress is not available.

[48] Neither party made any submissions with respect to costs. Consistent with this Court's recent decision in *Kotowiecki v Canada (Attorney General*), 2022 FC 1314 at paragraph 40, the self-represented Applicant has not demonstrated any lost opportunity cost in the sense of foregoing remunerative activity to prepare and present his case. I decline to award costs other than his disbursements before this Court.

JUDGMENT in T-1904-22

THIS COURT'S JUDGMENT is that:

1. The style of cause in this application is amended to replace the Canada Revenue Agency with the Attorney General of Canada as the Respondent.

2. This application is allowed, the Decision is set aside, and the matter is returned to a different decision-maker for redetermination in accordance with the Court's Reasons.

3. The Respondent will reimburse the Applicant his disbursements in this Court.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1904-22
STYLE OF CAUSE:	ZHANHONG ZHANG v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 6, 2023
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	MARCH 16, 2023

APPEARANCES:

Zhanhong Zhang	ON HIS OWN BEHALF
Lalitha Ramachandran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT