

Tax Dispute Insights

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TFSA Trading and Tax Disputes

Lessons from the Tax Court's Decision in
Ahamed v. HMK

The Canada Revenue Agency may examine your TFSA transactions and argue that you were engaged in the business of trading securities within your TFSA.

When the CRA believes it can justify this argument, it will classify the income earned as business income and issue reassessment notices accordingly. If you attempt to overturn the reassessments solely on the basis the income is exempt, you will fail.

We examine the Tax Court's decision in *Canadian Western Trust Company as trustee of the Fareed Ahamed TFSA v. His Majesty the King*¹ (Ahamed) to harvest the lessons and provide a few reflections at the end of this article.

Tax Case Summary

In *Ahamed*, the CRA audited Ahamed's self-directed TFSA trust transactions related to the 2009 to 2012 taxation years. Ahamed worked as an investment advisor who traded speculative junior mining stocks in his TFSA and owned shares for short periods.

The CRA claimed Ahamed carried on a business of trading qualified investments, and the income was subject to Part I tax under subsection [146.2\(6\)](#) of the Act.

Ahamed argued the provisions in the Act that exempt income earned in an RRSP also exempt income earned in TFSAs. Basically, he asked the Tax Court to reimagine the provisions in a new way that would change Parliament's intention and the text. Ahamed did not present an alternative argument that he was not carrying on business.

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Ahamed offered different reasons to support his interpretation of the relevant provisions. For example, he asked the Tax Court to use a 1969 Revenue Canada letter about the RRSP provisions as evidence. He also relied on the Tax Court's *obiter* statement in *Prochuk* that "trading qualified investments cannot constitute the 'carrying on of a business' within an RRSP" to argue the same applies to TFSAs.²

Justice Spiro rejected Ahamed's legal argument.

Justice Spiro's analysis starts by interpreting subsection [146.2\(6\)](#) of the Act. The subsection includes the words "carries on one or more business". The text and its meaning are clear. Justice Spiro underscored the Supreme Court's direction to give more weight to the text (over context and purpose) when interpreting legislation.

Also, Justice Spiro examined Parliament's purpose and objectives when drafting legislation. He quoted the Supreme Court of Canada and other sources to highlight that assuming a single purpose oversimplifies Parliament's intention and objectives.

How did Parliament intend to achieve this primary purpose? To answer that question, we must consider the limits that Parliament chose in order to achieve its overall objective in a fiscally responsible way. As Professor Sullivan notes, the "legislature never pursues a goal single-mindedly, without qualification, and at all costs. There are always additional or competing factors to be taken into account."³

Ahamed's arguments misinterpreted or twisted the applicable provisions.

This Court has no power to redraft Parliament's TFSA legislation to incorporate (a) policies inferred from interdepartmental correspondence relating to a different statutory scheme, (b) policies transplanted from a different statutory scheme, or (c) *obiter dicta* found in reasons for judgment dealing with a different statutory scheme (i.e., *Prochuk*).⁴

Justice Spiro did not find Ahamed's arguments compelling. He found subsection [146.2\(6\)](#) clear and unambiguous, and applied the law to the parties' agreed facts.

The outcome was predictable. Justice Spiro dismissed Ahmed's appeal, with costs.

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Evaluating Tax Cases with Skill & Understanding

Ahamed's legal argument was, with respect, weak. And, as noted earlier, he did not argue he was not carrying on business. It seems Ahmed was grasping at straws. But we don't read the Court's reasons and smirk.

Professor Sullivan reminds us in *Ahamed* there are always different and competing factors at play when evaluating Parliament's purpose and methods. The same is true when evaluating Ahmed's purpose and methods in this case.

In every case, there are always competing personal, business, and legal factors at play. The Tax Court's reasons don't tell the whole story. It's easy to oversimplify, fall into the "knew-it-all-along effect", and speak about cases from a distance and in an unskillful way.

Ahamed's Broader Impact

We do feel concerned *Ahamed* might have a broader impact. The CRA is already targeting more HNWIs and TFSAs. *Ahamed* will give the CRA even more confidence to expand the audit scope and expand boundaries. We expect this will lead to more tax disputes related to TFSA activity and a CRA opponent more likely to persist, even when mistaken.

Early Tax Dispute Strategy Matters

When evaluating whether someone is "carrying on business" is a question of fact and law. And the facts, evidence, and assumptions established early in the process can have an outsized impact on the outcome of the case.

We've observed a common oversight among some taxpayers and advisors: a misguided view of the specific dispute, specific stakeholders, and the audit and objection stages. If the CRA believes it can justify the argument that a taxpayer was carrying on a business, it is unlikely that the taxpayer or their representatives will convince the CRA otherwise during the audit or objection stages. Instead, the CRA is likely to use the opportunity to select the data and refine the frame in a way that supports their case.

It is common for taxpayers and their advisors to approach tax disputes in a somewhat naïve way and thinking things will not escalate. Audits or objections not executed properly contain obvious and imperceptible missteps with costly effects on the later stages.

A strategic approach and experienced professionals are critical in managing tax disputes to minimize disruption and financial losses. By executing the right strategy from the beginning, taxpayers can avoid significant costs.

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¹ *Ahamed v. The King*, 2023 TCC 17

² *Ibid.* at para 33.

³ *Ibid.* at para 76.

⁴ *Ibid.* at para 92.

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