Date: 20081008

Docket: T-2118-07

Citation: 2008 FC 1142

Ottawa, Ontario, October 8, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

SLAU LIMITED

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Minister of National Revenue ("the Minister") denying relief from interest and penalties arising from the reassessment of Slau Limited's ("the applicant") 1988-1990 tax returns under s. 220 (3.1) of the Income Tax Act ("ITA"), one of a set of provisions commonly referred to as "the fairness provisions". The applicant corporation carries on a business in Ottawa as the Yangtzee Restaurant and also formerly owned and operated the Golden Dragon Restaurant.

FACTS

Background

1988 to 1990 Tax Years

[2] On November 2, 1990, the applicant filed its tax return for the 1988 tax year, declaring no taxable income. On January 25, 1991 and December 2, 1991, the applicant filed its tax returns for the 1989 and 1990 taxation years respectively, declaring no taxable income. In 1992, the Canada Revenue Agency ("CRA") audited the applicant for the years 1988, 1999 and 1990 and on May 14, 1993, issued reassessments showing taxable income and assessing tax for these taxation years, plus interest and penalties.

[3] The Notice of Assessment for the 1988 tax year showed an additional $33,531.90 owing in federal tax, $485.74 in instalment interest, $26,893.09 in arrears interest and a $5,700.12 late filing penalty. The total additional tax assessed to be owing for the 1988 tax year was $66,611.15. The Notice of Reassessment for the 1989 tax year showed $41,526.39 owing in federal tax, $2,791.03 in instalment interest, $22,883.30 in arrears interest and a $4,567.90 late filing penalty, equalling a total of $ 71,768.62 owing for the 1989 tax year. The Notice of Reassessment for the 1990 tax year showed $24,057.01 owing in federal tax, $3,210.52 in instalment interest, $7,671.83 in arrears interest and a $2,405.70 late filing penalty, equalling a total of $37,345.06 owing for the 1990 tax year.

[4] The applicant filed a Notice of Objection to the Reassessments and eventually appealed to the Tax Court of Canada. During the trial before the Tax Court, in December 1996, the applicant and the respondent arrived at terms of settlement.

[5] The settlement reached by the parties resulted in a Disposition of Appeal on Consent ("the Disposition"), dated December 16, 1996. The Disposition specifically provided for ten adjustments to the taxable income for the 1988 to 1990 tax years.

Loss Carry-Back

[6] The applicant filed its tax return for the 1991 taxation year on June 6, 1994. On June 20, 1995, the applicant filed tax returns for the tax years 1992 and 1993. The applicant reported non-capital losses for these taxation years.

[7] The settlement and the Disposition for the 1988-1990 tax years did not deal with the issue of carry-back of non-capital losses from the 1991-1993 taxation years. The applicant states that it understood it would be entitled to carry back any losses from the 1991-1993 taxation years against those taxes assessed by the CRA for the years 1988-1990.

Reassessment Following the Disposition

[8] The Disposition required the applicant to file amended financial statements for the 1990 taxation year incorporating adjustments agreed to by the parties and outlined in the Disposition. The Disposition provided that the CRA would issue Notices of Reassessment for the 1988-1990 years

upon receipt of the amended 1990 tax return. The applicant filed the amended return on January 15, 1997. In addition, the applicant also submitted "Adjustments to Income Statement" for the 1998-1990 taxation years whereby it requested that non-capital losses incurred in taxation years 1991-1993 be applied to the tax years 1988-1990.

[9] On February 12, 1997, the CRA sent out Notices of Reassessment specifying the applicant's tax liability for the 1988-1990 years with related penalties and interest, as contained in the Disposition. The Notices of Reassessment showed a credit for each of the 1988-1990 tax years, reducing the amount owing for each year. The CRA also mailed the applicant a Corporate Statement of Account, showing the total amounts owing for each of the 1988-1990 tax years in 1997, applying the credits from the Notices of Reassessment and interest for late instalment payments. The Notice of Reassessment for the 1988 tax year shows a credit of $40,860.09. The Corporate Statement of Account applied this amount to the $89,399.54 plus interest owing for the 1988 tax year in 1997, reducing the balance to a total of $71,173.07. Similarly, the Notice of Reassessment for the 1989 tax year shows a credit of 88,206.36; this was applied to the $88,345.75 plus interest owing for a balance of $12,311.28. The Notice of Reassessment for the 1990 tax year shows a credit of $ 2,469.60. This was applied to the 41,808.17 owing plus $10,647.65 in interest payments, for a balance of $49,978.09.

[10] The total credits assessed to the applicant in the Notices of Reassessment equalled $131,536.05. This was applied to the total balance $211,553.46 plus interest payments owing for the 1988-1990 tax years, equalling a total balance of $133,462.44. The Notices of Reassessment

did not take into consideration the “Adjustments to Income Statement” submitted by the applicant requesting loss carry-back.

[11] The applicant received a letter from the Ontario Ministry of Finance on August 20, 1997, accepting the applicant’s request to carry-back losses.

[12] Between 1997 and 2003, the applicant corresponded with the CRA on numerous occasions regarding the issue of loss carry-back. On March 20, 2003, the applicant submitted the forms T2A(E) – Request for Corporation Loss Carry-back from taxation years 1991-1993 to the CRA. On June 6, 2003, the CRA accepted the applicant’s request for non-capital losses carry-back from these years to be applied to the taxation years 1988-1990. The CRA also confirmed that related penalties and interest were cancelled as of December 16, 1996, the date of the settlement. This date was used because the applicant had stated in a letter to the CRA that it had raised the issue with counsel for the Crown during negotiations that took place December 1996, and had filed amended statements requesting loss carry-back in 1997. Although the applicant did not file the T2A(E) forms until 2003, the record indicated that the issue of loss carry-back had arisen as early as December 1996. Therefore, the CRA cancelled interest and penalties as of December1996. (Second level report, Applicant’s Record, p. 223)

First Level Review

First Fairness Request

[13] In two letters to the CRA, dated March 3, 2004 and August 17, 2004, the applicant requested the cancellation of all penalties and interest from 1988 onwards. The applicant argued that the interest and penalties arose primarily because of the actions of the CRA and should thus be waived on fairness grounds.

[14] The applicant received a letter dated October 7, 2004, from Vince Seguin, Team Leader in the Fairness Unit of the Ottawa Tax Services Office. The letter informed the applicant that the Minister had partially allowed the requested fairness relief by allowing the cancellation of penalties and interest from December 1996 onwards, but denied the applicant's request for the cancellation of all penalties and interest from 1988. The letter stated that non-capital losses could not be available before the returns were filed, and noted that the 1991 return was not filed until June 1994 and the 1992 and 1993 returns were not filed until June 1995. The letter also stated that the fairness legislation did not permit cancellation of interest where the taxpayer had made an error or incorrect assumption. The applicant continued to correspond with the CRA and received another letter on January 19, 2005, confirming the decision of the letter dated October 7, 2004.

[15] The applicant received a letter from the CRA on March 11, 2005, advising that the full balance of the arrears was due and immediately payable as the appeal process had ended. The applicant states that there were numerous errors in the CRA statement accompanying this letter.

[16] On March 22, 2005, the CRA ordered the applicant to pay the sum of $160,014.36 in penalties and interest that had accrued between 1988 and 1996 on the amount owed by the applicants for the 1988-1990 tax years. The applicant paid $90,000 immediately and paid the balance of $70,000 over 10 months.

Second Fairness Request

[17] The applicant then retained counsel and by letter dated December 13, 2005, requested an independent review of the October 7, 2004 decision to deny the cancellation of interest and penalties for the 1988-1990 tax years. The applicant states that this request went unanswered for several months despite subsequent attempts by applicant's counsel to obtain a reply.

[18] On July 6, 2006, the applicant received a letter from Janet deKergommeaux, acting Director of the Tax Services Office in Ottawa, informing the applicant that the Minister had decided to uphold the October 7, 2004 decision. This letter informed the applicant that it had 30 days to apply to the Federal Court for judicial review of the Minister's decision. The applicant applied to the Federal Court within the prescribed time.

First Judicial Review

[19] After negotiation, the parties consented to judgment allowing the applicant's application. By Order dated February 7, 2007, Madam Justice Mactavish set aside the July 6, 2006 decision of the Minister without costs, and referred the applicant's request for a waiver of penalties and interest charges relating to the 1988-1990 tax years back to the Minister for a new second level review by a

person, or persons, not previously involved in the matter, for consideration of the issues in accordance with the principles of natural justice and procedural fairness, specifically that all relevant documents and facts be reviewed by the decision maker.

Second Level Review

[20] An external taxpayer relief report dated October 11, 2007 was prepared by Raji Narayan, Taxpayer Relief Officer, and approved by Vance Smith, Team Leader, of the CRA Audit Division. This report recommended that the applicant's request to cancel interest and penalties be denied. This report was forwarded to Lucie Bergevin, Director of the Tax Services Office in Ottawa .

[21] On November 6, 2007, the applicant received a letter from Ms. Bergevin informing it of the Minister's decision to maintain the previous decisions in the first and second reviews and not to cancel the penalty and interest charged on the applicant's account for the 1988-1990 tax years.

[22] On December 7, 2007, the applicant applied to the Federal Court for judicial review of the November 6, 2007 decision.

ISSUES

[23] The issue in this application is whether Minister erred in exercising his discretion under the fairness provisions in denying the applicant relief from penalties and interest. Both the applicant and respondent claim that the other party was responsible for the delays resulting in the accumulation of interest and penalties.

STANDARD OF REVIEW

[24] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[25] In *Nail Centre and Esthetics Salon v. Canada (Customs and Revenue Agency)*, 2005 FCA 166, 335 N.R. 178, the Federal Court of Appeal held that discretionary decisions under s. 220(3.1) of the Income Tax Act are subject to review on a standard of reasonableness. The Court of Appeal in that case cited *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, 334 N.R. 348, in which the Court found that reasonableness was the applicable standard of review to other discretionary provisions of the "fairness package" in the Act.

[26] In reviewing the CRA's decision on a standard of reasonableness, the Court is concerned with whether the decision falls within a range of possible, defensible outcomes. As the Supreme Court of Canada held in *Dunsmuir* at paragraphs 47 and 49:

> ¶ 47 … In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> […]
>
> ¶ 49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the

> determinations of decision makers. … In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[27] Accordingly, the Court will review this decision on a "reasonableness" standard of review.

ANALYSIS

The Fairness Provision

[28] S. 220 (3.1) of the ITA gives the Minister broad discretion to waive or cancel all or a portion of penalties and interest that have accrued under the Act.

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.	**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.

[29] The Minister has also issued the Guidelines for the Cancellation or Waiver of Penalties and Interest, which are currently found currently found in Information Circular 07-1, *Taxpayer Relief Provisions*, dated May 31, 2007.

[30] The applicant's argument for the cancellation of interest and penalties is that the decision of the CRA to allow the loss carry-back effectively negated any previous findings that taxes were owed for the years 1988-1990. Thus, the applicant argues, it cannot logically be required to pay interest and penalties for non-payment of a non-existent debt. Further, the applicant maintains that to the extent there was a delay in requesting the loss carry-back, this delay was caused by the actions of CRA. The applicant argues that it could not request a loss carry-back when it was appealing the re-assessment, as it was unclear whether any tax was owed for the 1988-1990 tax years until the appeal of the re-assessment had been settled. Thus, the applicant requests that all penalties and interest be waived. These total approximately $160,000.

[31] The respondent argues that the interest and penalties were levied as a result of the applicant's errors and thus cannot be waived under the fairness provisions. First, the respondent argues that the applicant filed its taxes late for the 1988-1990 tax years as well as the 1991-1993 tax years, and that the applicant's duty as a taxpayer was to file taxes in a timely manner. Second, non-capital losses did not become available for carry-back until 1994 and 1995 when the applicant filed its 1991, 1992 and 1993 tax returns. Third, the respondent argues that the reassessments were the result of inaccurate tax returns being filed for the 1988-1990 years. Thus, the penalties and interest levied as a result of the reassessment were due to the error or the applicant rather than to delays

caused by the CRA. The applicant was responsible for keeping track of the income received during a tax year in order to correctly calculate the tax owing and file tax returns as and when required. The respondent's position is that granting relief under the fairness provisions when interest and penalties are the result of taxpayer error undermines the incentive for practitioners and their clients to comply with the ITA.

[32] The respondent also states that the applicant did not request loss carry-back until March 2003 when it filed the T2A(E) forms. However, the loss-carry back was applied using an effective date of December 16, 1996 (the date of the settlement). The respondent's statement that the T2A(E) forms requesting loss carry-back were not filed until March 2003 is therefore irrelevant. The relevant time period during which the penalties and interest in question in this application were accrued is 1988-1996. The issue is whether the applicant or the CRA was responsible for the delays resulting in the accumulation of the interest and penalties.

Loss Carry-back

[33] S. 111 (1) of the *Income Tax Act* provides that the taxpayer is entitled to claim non-capital losses.

111. (1) For the purpose of computing the taxable income of a taxpayer for such a taxation year, there may be deducted such portion as the taxpayer may claim of the taxpayer's	**111. (1)** Pour le calcul du revenue imposable d'un contribuable pour une anneée d'imposition, peuvent être déduites les sommes appropriées suivantes :
Non-capital losses	Pertes autres que des pertes en capital
(a) non-capital losses for the 20 taxation years immediately preceding and the 3 taxation years	a) ses pertes autres que des pertes en capital subies au cours des 20 années d'imposition

immediately following the year;

précédentes et des 3 années d'imposition suivantes;

[34] Subsection 161(7)(b) describes the impact of loss carry-back on accrued interest:

161. (7) For the purpose of computing interest under subsection 161(1) or 161(2) on tax or a part of an instalment of tax for a taxation year, and for the purpose of section 163.1…

b) the amount by which the tax payable under this Part and Parts I.3, VI and VI.1 by the taxpayer for the year is reduced as a consequence of the deduction or exclusion of amounts described in paragraph (*a*) is deemed to have been paid on account of the taxpayer's tax payable under this Part for the year on the day that is 30 days after the latest of

(i) the first day immediately following that subsequent taxation year,

(ii) the day on which the taxpayer's or the taxpayer's legal representative's return of income for that subsequent taxation year was filed,

(iii) where an amended return of the taxpayer's income for the year or a prescribed form amending the taxpayer's return of income for the year was filed in accordance with subsection 49(4) or 152(6) or paragraph 164(6)(*e*), the day on which the amended return or prescribed form was filed, and

(iv) where, as a consequence of a request in writing, the Minister reassessed the taxpayer's tax for the year to take into account the deduction or exclusion, the day on which the

161. (7) Pour le calcul des intérêts à verser en application des paragraphes (1) ou (2) sur l'impôt ou sur une partie d'un acompte provisionnel pour une année d'imposition et pour l'application de l'article 163.1: …

b) la somme qui est appliquée en réduction de l'impôt payable par le contribuable pour l'année en vertu de la présente partie et des parties I.3, VI et VI.1 par suite de la déduction ou de l'exclusion de montants visés à l'alinéa *a*) est réputée avoir été versée au titre de son impôt payable pour l'année en vertu de la présente partie le trentième jour suivant le dernier en date des jours suivants :

(i) le premier jour qui suit cette année d'imposition ultérieure,

(ii) le jour où la déclaration de revenu du contribuable ou de son représentant légal pour cette année d'imposition ultérieure a été produite,

(iii) le jour où une déclaration de revenu modifiée du contribuable pour l'année a été produite ou un formulaire prescrit modifiant sa déclaration de revenu pour l'année a été présenté conformément au paragraphe 49(4) ou 152(6) ou à l'alinéa 164(6)*e*), dans le cas où il y a une telle production ou présentation,

(iv) le jour de la demande écrite à la suite de laquelle le ministre établit une nouvelle cotisation concernant l'impôt

request was made.	du contribuable pour l'année et qui tient compte de la déduction ou de l'exclusion, dans le cas où il y a une telle nouvelle cotisation.

Here, the relevant sub-paragraph is (iv), the day on which the taxpayer requested that the Minister reassess taxpayer's tax for the 1988-1990 years to take into account the loss carry back (s.161(7)(b)(iv)). However, as noted above, the respondent cancelled penalties and interest as of the date of the settlement because the record indicated that the applicant had requested a carry-back as early as December 1996.

[35] Because s. 161(7) specifically provides dates for the computing of interest on taxes reduced by loss carry-back, it indicates that according to the ITA, loss carry-back does not operate to negate the original existence of taxes owed and any related interest and penalties. Loss carry-back does not create a legal fiction that taxes from prior years were never owed. Rather, it simply allows a tax-payer to offset the taxes they owe with non-capital losses reported previously or subsequently. Thus, the argument that the taxes were never owed is incorrect. The taxes were owed until the applicant requested that they be offset by losses from the 1991-1993 tax years.

[36] The applicant states that the delay in requesting the reassessment was because the tax return for 1988 was only filed in 1990 and the tax returns for 1989 and 1990 were only filed in 1991. The assessment of these tax returns was only made by Revenue Canada in 1993. Accordingly, the applicant was appealing the assessment from 1993 until 1996. In 1996 they reached the settlement, which provided that the applicant would file amended tax returns adding certain income and

including certain deductions as outlined in the settlement. When the applicant filed the required amended returns, it included amended returns requesting carry-back of non-capital losses from the 1991-1993 tax years.

[37] The Disposition settled the tax liability for the 1988-1990 tax years, but did not deal with the issue of loss carry-back. In its March 20, 2003 letter requesting loss carry-back, the applicant states that before signing the disposition, counsel for the applicant brought up the matter of loss carry-back with the counsel for the Crown. The applicant was "advised that the loss carry-backs should be settled with the CRA as a separate issue apart from tax litigation." This is specifically referred to in the "second level review report" by Canada Revenue Agency (Applicant's record, p. 220).

[38] The CRA did not immediately accept the request for loss carry-backs, but ultimately did so in 2003, applying the losses to the tax years for 1988 to 1990. As a result, the applicant did not owe any income taxes for the 1988-1990 tax years. Nevertheless, the CRA maintains that the applicant still owes interest and penalties on the original tax debt until the date of the 1996 settlement.

[39] The question before the Court is whether this decision by the CRA falls within a range of possible, acceptable outcomes. Was it reasonably open to the CRA to refuse to waive penalties and interest accrued from 1988 to the date of the 1996 settlement? The applicant argues that if, as a result of a loss carry-back from 1991 to 1993, the applicant did not owe any income taxes before the 1988 to 1990 tax years, it is unreasonable that the applicant would be expected to pay interest and penalties on that tax debt which has been erased.

[40] This case involves almost $160,000 in interest and penalties with respect to taxes that were eventually found not to be owing due to the application of loss carry-backs. In fact, the CRA accepted that there would be no interest and penalties owing after December 1996, but this decision was only made by the Respondent in 2003.

[41] The fairness decision under review dated July 6, 2006 (p.9, Applicant's Record), states:

> My review reveals no indication that an error or delay on the CRA's part, or circumstances beyond your control, would have caused additional amounts of interest, arrears or penalties to be incurred with respect to the taxation years 1988, 1989 and 1990. Therefore, I have concluded that it would not be appropriate to cancel the penalty and interest charged on your client's account for these years.

[42] However, the CRA did make the error of initially denying the application of the loss carry-back; or, at least, took six years before it decided that the loss carry-back did apply and thus eliminated the applicant's tax liability for 1988-1990.

[43] Does fairness and equity in the particular circumstances of this case reasonably warrant the cancellation of interest on the interest and penalties owing as of December 1996? The taxpayer thought that the application of these losses would eliminate the taxpayer's liability for the tax and incorrectly but understandably assumed that would also eliminate the taxpayer's liability for interest and penalties.

[44] When the CRA eventually accepted the loss carry-backs on June 6, 2003, it accepted that "related penalties and interest [would] be cancelled from December 1996" (Letter from Elaine

Routledge, Applicant's Record, p. 72). The rationale given by the respondent for selecting this date was that there was evidence that the applicant had requested the loss carry-backs as early as 1996, and also that the delay in accepting the loss carry-backs was partially due to the CRA's failure to communicate effectively with the applicant in settling the issue of loss carry-backs. It is logical, and only reasonable, that these same reasons would apply to interest on late filing penalties and installment interest charged after December 1996. From the time of the settlement to the date the loss carry-backs were accepted, the applicant tried to persuade the CRA to carry-back the losses from the 1991-1993 years. If the applicant's request for loss carry-back had been handled by the CRA in a timely manner, these debts may never have accrued.

[45] The applicant is not without fault in the accumulation of this debt. The Auditor's Report states that the applicant failed to file tax returns for the three years preceding 1988, and filed 15 out of 20 tax returns late between 1987 and 2006. (Applicant's Record, p. 225). The applicant is a sophisticated business with an accountant, and knows that it must file its tax returns on time and pay assessments immediately if it wishes to prevent the accumulation of interest. However, the interest and penalties that accrued prior to 1996 reasonably address the late filing and subsequent failure to pay owing taxes for the 1988-1990 tax years, particularly as the applicant was charged a more severe late filing penalty under Section 162(2) of the ITA for repeated failure to file, rather than the regular late filing penalty under Section 162(1). In view of the amount of money involved, and the amount that the applicant will still pay in interest and penalties accrued prior to December 1, 1996, it is reasonably fair and equitable that all interest accrued after this date be cancelled.

[46] Another equitable consideration is the confusion surrounding the communications the applicant received from the CRA. The applicant states that the Notices of Reassessment issued after the settlement contained numerous errors. Respondent's counsel conceded that the forms were "very confusing," explaining that the forms the CRA uses have changed a number of times. Respondent's counsel suggested that the applicant could have telephoned the CRA to clarify the amount owing. Considering the volume of correspondence between the applicant and the CRA, it is quite clear that guidance from the CRA in understanding its calculations was not easily obtained.

[47] The Court must conclude that the only reasonable application of fairness and equity by the Fairness Committee in this case would be to apply the CRA rationale of cancelling penalties and interest on the taxes from December 1996 to all interest after this date. According to the information received from the parties following the hearing, this means that the applicant would owe interest and penalties totalling $71,195.44.

[48] For this reason, the court will set aside the decision as unreasonable.

CRA information provided after the hearing

[49] At the hearing before the Court, the CRA documents were confusing at best and unintelligible at worst. Accordingly, the Court asked the CRA to provide the Court with a clear statement as to the amount owing by the applicant as of December 1, 1996 for late filing penalties, installment interest and arrears interest. The Court requested this information within a one week period. At the end of that week the CRA requested a second week to prepare the information. When the information was received, the CRA information was again confusing, unintelligible, and upon a

careful analysis by the Court with the assistance of counsel for both parties, it was clear that the information provided by the CRA was completely wrong. This reinforces the Court's sense that the CRA has been responsible for a number of mistakes and significant delays while assessing the applicant's tax returns in this matter.

Letter to the Court from Counsel for the CRA

[50] The letter to the Court dated October 3, 2008 from counsel for the CRA stated that the applicant owed in excess of $143,000 as of December 1, 1996 for penalties and interest. Upon the Court doing its own analysis with the assistance of counsel and the accountant for the applicant, the Court and counsel concluded that the correct amount owing by the applicant as of December 1, 1996 was $71,195.44. The CRA information provided to the Court was clearly wrong.

Teleconference with the Court and the parties on October 7, 2008

[51] Counsel for the respondent during a teleconference with the Court on October 7, 2008 conceded that the information provided by the respondent was clearly wrong and the amounts set out above are the correct amounts owing as of December 1, 1996.

Correct amount to be refunded

[52] Since the applicant has paid $159,973.92 toward the debt which CRA said was owing (instead of $71,195.44), the applicant is entitled to the refund of its excess payment. That is a matter for CRA to refund.

Power of the Court

[53] Under subsection 18.1(3) of the *Federal Courts Act*, R.S., 1985, c.F-7, S., 2002, c.8, s.14, the Court may order a federal board or other tribunal to do any act or thing it has unlawfully failed or unreasonably delayed in doing. Accordingly, the Court will set aside the decision of the fairness committee in this case and refer the matter back to the fairness committee (acting on behalf of the Minister under section 220 of the ITA) to waive or cancel all interest that has accrued under the Act after December 1, 1996 and declare that the reasonable amount owing by the applicant as of December 1, 1996 was $71,195.44.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review of the decision by the Minister of National Revenue dated November 6, 2007 is allowed with costs;

2. The decision by the Minister dated November 6, 2007 is set aside and this matter is referred back to the Minister for a redetermination of the decision with directions that the only reasonable application of fairness and equity in this case would be to waive the interest after December 1, 1996 so that the amount owing by the applicant for penalties, instalment interest and arrears interest is $71,195.44, not the $159,973.92 which the applicant paid.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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Ms. Joanna Hill	FOR THE RESPONDENT

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