Federal Court  Cour fédérale

Date: 20090812

Docket: T-1158-08

Citation: 2009 FC 826

Ottawa, Ontario, August 12, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ANDREW UGRO

Applicant

and

THE MINISTER
OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made by the Minister of National Revenue (Minister) in a letter dated June 23, 2008 (Decision) with respect to the Applicant's request for refunds beyond the normal 3-year period and the waiver of penalties and interest.

BACKGROUND

[2] The Applicant began a home-based business offering professional services in graphic design which were billed at an hourly rate. Other services included the purchasing and reselling of finished

goods relating to graphic design. From 1995 to 2001, the Applicant operated the business as a sole proprietorship and from 2002 to 2004 he operated the business in partnership with his wife, Kelly Urgo.

[3] The Applicant hired Clyde Morrison, a chartered accountant, to prepare financial statements for income tax purposes and to advise the Applicant on setting up accounts. In the spring of 1996, the Applicant met with Clyde Morrison to discuss the first set of prepared financial statements for tax purposes for the 1995 reporting period. The Applicant filed the statements of income prepared by Mr. Morrison for the 1995 reporting period. The Applicant's wife filed her income taxes separately, as she did not generate any income from the business.

[4] Mr. Morrison prepared the 1996 and 1997 financial statements for the business which were filed for income tax purposes. In the spring of 1998, the Applicant ceased to do business with Mr. Morrison because the Applicant alleges he "never addressed [the Applicant's] repeated attempts to make him show [the Applicant] the true profitability of [the Applicant's business]."

[5] For the business's 1998 income tax reporting period, the Applicant used financial statements prepared by another chartered accountant, Mr. Chris Cowland, who was given the Applicant's previous years financial statements and other records.

[6] The Applicant had the 1999 financial statements prepared by Mr. Cowland in the spring of 2000. The Applicant says he "realized that nothing had been changed about the way in which [the

Applicant's] financial statements were being prepared for tax purposes." He alleges that he communicated to Mr. Cowland that his first three years of business were "deliberately prepared to show positive profitability, and that the true profitability of the company had not as of yet been properly determined." The Applicant alleges that he was "still ignorant about accounting fundamentals" and had failed to convince Mr. Cowland that "he had incorrectly prepared [the Applicant's] accounting for income tax purposes."

[7] The Applicant's 1995, 1997, 1998, 1999 and 2000 tax returns were all filed on time. He filed his 1996 tax return late and was assessed a late filing penalty of $32.97. The Minister accepted as filed the amounts of income reported by the Applicant for his 1995 to 2000 taxations years. The Applicant filed his 2001 to 2005 income tax returns after the statutory deadlines and was issued assessments for those years and levied late filing penalties. The Applicant filed his 2001 to 2004 tax returns late on or about November 20, 2006, and also filed his 2005 tax return late on or about March 8, 2007.

[8] In 2001, Mr. Cowland filed the Applicant's 2000 financial statement for income purposes, allegedly without the Applicant's approval. During 2001-2002, the Applicant says he began to acquire a basic understanding of accounting fundamentals as they pertained to the computation of income. He alleges that he used Canada Revenue Agency's (CRA) informational guides and other textbook accounting resources.

[9] In 2002, the Applicant re-filed his 2000 income statement himself using CRA's T2124. Specifically, he requested that his 2000 tax return be reassessed to reduce his net business income from $43,147.00 to $7, 453.00 on the basis that the accountant who prepared his original tax return had improperly stated his business income.

[10] The Applicant was reassessed on the 2000 income statement he filed himself. He met with a CRA auditor to discuss the reduced business net income. The request to reduce his 2000 net business income was denied and the auditor concluded that the income had been properly reported.

[11] The Applicant filed a notice of objection in respect of the request to reduce his 2000 net business income. The objection was reviewed by a CRA Appeals Officer. The Applicant met with the Appeals Officer on two occasions to discuss his request but it was denied on July 23, 2002. The Appeals Officer concluded that the business income had been properly reported in 2000 by his accountant. The Applicant's 2000 objection was allowed only with respect to the deduction of additional business expenses. The Applicant did not appeal this reassessment to the Tax Court of Canada.

First Level Fairness Request

[12] By a letter dated November 20, 2006 and received by the Minister on December 7, 2006, the Applicant requested that the Minister:

1) Accept amended income tax returns for his statute-barred taxation years of 1995 to 2000 in which he claimed to be entitled to refunds based on an accounting method that he had invented;
2) Accept late filed tax returns for his 2001 to 2004 taxations years; and
3) Cancel and waive penalties and interest.

[13] By a letter dated December 29, 2006, the CRA agreed to review the years to which penalties and interest applied. In a letter dated January 3, 2007, the CRA acknowledged the Applicant's late-filed returns for processing but requested that he re-supply the returns using CRA's T2124 form. The CRA stated that the failure to do so could constitute the disallowance of the Applicant's business expenses.

[14] On January 6, 2007, the Applicant called the CRA officer who had sent the request to use the T2124 forms and mentioned that there was no requirement to use specific forms. The Applicant also informed the CRA that they have, and will accept, other types of financial statements. The Applicant was told he was incorrect and that his financial statements would not be processed in their current form.

[15] In January 2007, the Applicant re-filed all the returns as requested by the CRA using the T2124 form. On March 8, 2007, the Applicant's 2001 to 2004 tax returns were accepted by the Minister and assessed as filed. The 2001 to 2004 tax returns were not reviewed by audit prior to being assessed as filed.

[16] The Applicant's fairness request was denied by a letter dated May 29, 2007 from the fairness officer who found that the business income had been properly reported for those years.

Second Level Fairness Request

[17] By letter dated July 1, 2007, the Applicant made a second level fairness request. Additional submissions were received by the Minister in support of this request. In a letter dated October 9, 2007, the CRA advised that they would review the Applicant's 1996-2000 returns in a second level fairness review. In late September 2007, the Applicant was contacted by an auditor at CRA to review his accounting for income tax purposes.

[18] As part of the second level review, the CRA auditor reviewed the previous fairness request. The auditor also met with the Applicant and had several telephone conversations with him to discuss his request to reduce the business net income for his 1995 to 2000 taxation years. The officer concluded that the Applicant's 1995 loss claim was not supportable in fact, and was also not consistent with the provisions of the Act, Generally Accepted Accounting Principles (GAAP), tax law or general business practices. The officer concluded that the accounting method created by the Applicant in support of his 1995 to 2000 loss claims did not provide accurate net income for tax purposes, so that his loss claims for 1995 to 2000 were not correct in law and the business income had been properly reported in those years.

[19] The officer also reviewed the Applicant's 2001 and 2004 taxation years. On April 8, 2008, the Minister issued reassessments in respect of the Applicant's 2001 to 2004 taxation years in accordance with the officer's audit report.

[20] An additional CRA Taxpayer Relief Coordinator reviewed the Applicant's fairness request and considered the Applicant's additional request to cancel interest and penalties for his 2005 taxation year. The Taxpayer Relief Coordinator prepared a report with a recommendation to deny the Applicant's request. The Manager of the Revenue Collections division of the Vancouver Island Tax Services Office concurred with the Taxpayer Relief Coordinator's recommendation to deny the Applicant's request and advised the Applicant of the Minister's Decision to deny his second level fairness request by a letter dated June 23, 2008.

DECISION UNDER REVIEW

[21] The Minister undertook a second review of the taxpayer relief decision rendered July 1, 2007. The Minister considered the Applicant's comments and considered the circumstances of the case, including the initial request for relief under the taxpayer relief provisions. The Minister noted that the taxpayer relief provisions give the Minister the discretion to cancel or waive all or part of any penalty or interest payable and accept returns beyond the normal three-year period.

[22] The Minister noted that the Applicant's second review request was based on the grounds that the first request was not handled in a fair or reasonable way. The second review was also based on the information the Applicant provided and the documentation on CRA's file.

[23] The Minister commented that the CRA had completed a detailed review of the Applicant's 1995 to 2005 tax returns and provided a conclusion on April 3, 2008, which determined if the amendments might be accepted. The Minister stated that the Applicant's accounting method is not acceptable for taxation purposes and the figures originally submitted by the Applicant's accountant would constitute the Applicant's assessment for the 1995 to 2000 tax return years.

[24] The Applicant's 2001 to 2005 tax returns were reassessed and the reassessments were issued on April 21, 2008. The Applicant was notified of the changes and that he had the right to appeal. The Minister noted that the Applicant had not provided any evidence that he had been given incorrect information by CRA and the Applicant was "quite emphatic that the information and procedures [used] were created by [the Applicant] with the help of an accounting textbook."

[25] The Minister notes that the Applicant's request expressed a concern that the situation had not been under the Applicant's control. Information Circular 07-01 gives a number of examples to illustrate situations beyond a taxpayer's control. The Minister notes that, in the Applicant's case, he had control in the choices he made.

[26] The Minister concluded that the first fairness decision should stand. A review of all of the circumstances of the case, including recent submissions, failed to substantiate that the Applicant was prevented from complying with CRA's filing and remitting requirements due to factors beyond the Applicant's control. The Applicant had not demonstrated that he was entitled to the adjustments requested.

[27] The Minister felt that cancellation of the interest and penalty was not warranted because:

1) The Applicant had failed to demonstrate that, due to factors beyond his control, he had been prevented from filing his 2001 to 2005 tax returns and from remitting the amounts owing by the statutory deadlines;
2) The Applicant had failed to provide details of why the business continued to file its GST returns annually for 2001 to 2005 but the Applicant did not file his 2001 to 2005 tax returns in a timely manner;
3) The Applicant had had adequate time to acquire another accountant's services, or to prepare his 2001 to 2005 tax returns himself, and to file these returns on time because, before they were due in or about March 2002, the Applicant had already determined that his previous accountant had allegedly incorrectly prepared his financial statements and tax returns;
4) Dissatisfaction with a previous accountant or incorrect financial statements prepared by the Applicant's accountant were not extraordinary circumstances beyond the Applicant's control that prevented him from filing his 2001 to 2005 tax returns and remitting the amounts owing by the statutory deadlines; and

5) A taxpayer's choice of which accountant to consult (if any), how he keeps his accounting records, the timeliness with which he files his returns and the timeliness with which he pays the amounts owing are all factors within the taxpayer's control.

ISSUES

[28] The Applicant submits the following issues on this application:

1) That the CRA and the Minister failed to observe the principles of natural justice, procedural fairness and other procedures in not allowing the Applicant to use a computation of income formula that is not inconsistent with the Act and the GAAP;
2) The first level fairness officer produced a decision that did not consider all of the relevant facts and was based upon irrelevant facts. The officer also failed to consider the unique circumstances and merits of the Applicant's case and acted in bad faith in not following procedural fairness and erred in law;
3) The first level fairness officer failed to recognize relevant legislation that was fundamental to the CRA's statutory duty with respect to procedural fairness;
4) The auditor assigned to the second level fairness review failed to consider relevant facts, observed irrelevant facts, and erred in law for tax purposes and GAAP. The review failed to consider procedural fairness by not conducting the second level review independently of the first level review;
5) Both the first and second level fairness officers failed to observe procedural fairness when addressing all the reasons that the Applicant submitted in his request;

6) The second level fairness officer failed to follow procedural fairness guidelines and acted in bad faith by not fully considering all the relevant facts and by observing irrelevant facts.

STATUTORY PROVISIONS

[29] The following provisions of the Act are applicable to these proceedings:

3. The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:	**3.** Pour déterminer le revenu d'un contribuable pour une année d'imposition, pour l'application de la présente partie, les calculs suivants sont à effectuer :
(*a*) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,	*a*) le calcul du total des sommes qui constituent chacune le revenu du contribuable pour l'année (autre qu'un gain en capital imposable résultant de la disposition d'un bien) dont la source se situe au Canada ou à l'étranger, y compris, sans que soit limitée la portée générale de ce qui précède, le revenu tiré de chaque charge, emploi, entreprise et bien;
…	…
9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.	**9.** (1) Sous réserve des autres dispositions de la présente partie, le revenu qu'un contribuable tire d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette

année.

(2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

(2) Sous réserve de l'article 31, la perte subie par un contribuable au cours d'une année d'imposition relativement à une entreprise ou à un bien est le montant de sa perte subie au cours de l'année relativement à cette entreprise ou à ce bien, calculée par l'application, avec les adaptations nécessaires, des dispositions de la présente loi afférentes au calcul du revenu tiré de cette entreprise ou de ce bien.

(3) In this Act, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.

(3) Dans la présente loi, le revenu tiré d'un bien exclut le gain en capital réalisé à la disposition de ce bien, et la perte résultant d'un bien exclut la perte en capital résultant de la disposition de ce bien.

…

…

10(1.01) For the purpose of computing a taxpayer's income from a business that is an adventure or concern in the nature of trade, property described in an inventory shall be valued at the cost at which the taxpayer acquired the property.

10(1.01) Pour le calcul du revenu d'un contribuable tiré d'une entreprise qui est un projet comportant un risque ou une affaire de caractère commercial, les biens figurant à l'inventaire sont évalués à leur coût d'acquisition pour le contribuable

…

…

12. (1) There shall be included in computing the income of a taxpayer for a taxation year as income from a business or

12. (1) Sont à inclure dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien, au cours d'une

property such of the following amounts as are applicable Services, etc., to be rendered

année d'imposition, celles des sommes suivantes qui sont applicables :
Services à rendre

(*a*) any amount received by the taxpayer in the year in the course of a business

a) les sommes reçues au cours de l'année par le contribuable dans le cours des activités d'une entreprise :

(i) that is on account of services not rendered or goods not delivered before the end of the year or that, for any other reason, may be regarded as not having been earned in the year or a previous year, or

(i) soit qui sont au titre de services non rendus ou de marchandises non livrées avant la fin de l'année ou qui, pour toute autre raison, peuvent être considérées comme n'ayant pas été gagnées durant cette année ou une année antérieure,

(ii) under an arrangement or understanding that it is repayable in whole or in part on the return or resale to the taxpayer of articles in or by means of which goods were delivered to a customer;

(ii) soit qui sont, en vertu d'un arrangement ou d'une entente, remboursables en totalité ou en partie lors du retour ou de la revente au contribuable d'articles dans lesquels ou au moyen desquels des marchandises ont été livrées à un client;

(*b*) any amount receivable by the taxpayer in respect of property sold or services rendered in the course of a business in the year, notwithstanding that the amount or any part thereof is not due until a subsequent year, unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require the taxpayer to include any amount receivable in computing the taxpayer's

b) les sommes à recevoir par le contribuable au titre de la vente de biens ou de la fourniture de services au cours de l'année, dans le cours des activités d'une entreprise, même si les sommes, en tout ou en partie, ne sont dues qu'au cours d'une année postérieure, sauf dans le cas où la méthode adoptée par le contribuable pour le calcul du revenu tiré de son entreprise et acceptée pour l'application de la présente partie ne l'oblige pas à inclure dans le calcul de

income for a taxation year unless it has been received in the year, and for the purposes of this paragraph, an amount shall be deemed to have become receivable in respect of services rendered in the course of a business on the day that is the earlier of	son revenu pour une année d'imposition les sommes à recevoir qui n'ont pas été effectivement reçues au cours de l'année; pour l'application du présent alinéa, une somme est réputée à recevoir pour services rendus dans le cours des activités de l'entreprise à compter du premier en date des jours suivants :
(i) the day on which the account in respect of the services was rendered, and	(i) le jour où a été remis le compte à l'égard des services,
(ii) the day on which the account in respect of those services would have been rendered had there been no undue delay in rendering the account in respect of the services;	(ii) le jour où aurait été remis ce compte si la remise n'avait pas subi un retard indu;
…	…
152(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if	152(4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation

applicable au contribuable pour l’année que dans les cas suivants :

(*a*) the taxpayer or person filing the return

a) le contribuable ou la personne produisant la déclaration :

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year; or

(ii) soit a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période normale de nouvelle cotisation applicable au contribuable pour l’année;

(*b*) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and

b) la cotisation est établie avant le jour qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l’année et, selon le cas :

(i) is required pursuant to subsection 152(6) or would be so required if the taxpayer had claimed an amount by filing the prescribed form referred to in that subsection on or before the day referred to therein,

(i) est à établir en conformité au paragraphe (6) ou le serait si le contribuable avait déduit un montant en présentant le formulaire prescrit visé à ce paragraphe au plus tard le jour qui y est mentionné,

(ii) is made as a consequence of the assessment or reassessment pursuant to this

(ii) est établie par suite de l’établissement, en application du présent paragraphe ou du

paragraph or subsection 152(6) of tax payable by another taxpayer,

paragraphe (6), d'une cotisation ou d'une nouvelle cotisation concernant l'impôt payable par un autre contribuable,

(iii) is made as a consequence of a transaction involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length,

(iii) est établie par suite de la conclusion d'une opération entre le contribuable et une personne non résidente avec laquelle il avait un lien de dépendance,

(iii.1) is made, if the taxpayer is non-resident and carries on a business in Canada, as a consequence of

(iii.1) si le contribuable est un non-résident exploitant une entreprise au Canada, est établie par suite :

(A) an allocation by the taxpayer of revenues or expenses as amounts in respect of the Canadian business (other than revenues and expenses that relate solely to the Canadian business, that are recorded in the books of account of the Canadian business, and the documentation in support of which is kept in Canada), or

(A) soit d'une attribution, par le contribuable, de recettes ou de dépenses au titre de montants relatifs à l'entreprise canadienne (sauf des recettes et des dépenses se rapportant uniquement à l'entreprise canadienne qui sont inscrits dans les documents comptables de celle-ci et étayés de documents conservés au Canada),

(B) a notional transaction between the taxpayer and its Canadian business, where the transaction is recognized for the purposes of the computation of an amount under this Act or an applicable tax treaty.

(B) soit d'une opération théorique entre le contribuable et son entreprise canadienne, qui est reconnue aux fins du calcul d'un montant en vertu de la présente loi ou d'un traité fiscal applicable,

(iv) is made as a consequence of a payment or reimbursement of any income or profits tax to or by the government of a country other

(iv) est établie par suite d'un paiement supplémentaire ou d'un remboursement d'impôt sur le revenu ou sur les bénéfices effectué au

than Canada or a government of a state, province or other political subdivision of any such country,

gouvernement d’un pays étranger, ou d’un état, d’une province ou autre subdivision politique d’un tel pays, ou par ce gouvernement,

(v) is made as a consequence of a reduction under subsection 66(12.73) of an amount purported to be renounced under section 66, or

(v) est établie par suite d’une réduction, opérée en application du paragraphe 66(12.73), d’un montant auquel il a été censément renoncé en vertu de l’article 66,

(vi) is made in order to give effect to the application of subsection 118.1(15) or 118.1(16).

(vi) est établie en vue de l’application des paragraphes 118.1(15) ou (16).

…

…

163.2 (1) The definitions in this subsection apply in this section.
"subordinate" , in respect of a particular person, includes any other person over whose activities the particular person has direction, supervision or control whether or not the other person is an employee of the particular person or of another person, except that, if the particular person is a member of a partnership, the other person is not a subordinate of the particular person solely because the particular person is a member of the partnership.
163(2) Every person who makes or furnishes, participates in the making of or causes another person to make

163.2 (1) Les définitions qui suivent s’appliquent au présent article.
«activité de planification »
«subalterne » Quant à une personne donnée, s’entend notamment d’une autre personne dont les activités sont dirigées, surveillées ou contrôlées par la personne donnée, indépendamment du fait que l’autre personne soit l’employé de la personne donnée ou d’un tiers. Toutefois, l’autre personne n’est pas le subalterne de la personne donnée du seul fait que celle-ci soit l’associé d’une société de personnes.
163(2) La personne qui fait ou présente, ou qui fait faire ou présenter par une autre personne, un énoncé dont elle

or furnish a statement that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by another person (in subsections (6) and (15) referred to as the "other person") for a purpose of this Act is liable to a penalty in respect of the false statement.

sait ou aurait vraisemblablement su, n'eût été de circonstances équivalant à une conduite coupable, qu'il constitue un faux énoncé qu'un tiers (appelé « autre personne » aux paragraphes (6) et (15)) pourrait utiliser à une fin quelconque de la présente loi, ou qui participe à un tel énoncé, est passible d'une pénalité relativement au faux énoncé.

…

…

(8) For the purpose of applying this section (other than subsections (4) and (5)),

(8) Les règles suivantes s'appliquent dans le cadre du présent article, sauf les paragraphes (4) et (5):

(*a*) where a person makes or furnishes, participates in the making of or causes another person to make or furnish two or more false statements, the false statements are deemed to be one false statement if the statements are made or furnished in the course of

a) lorsqu'une personne fait ou présente, ou fait faire ou présenter par une autre personne, plusieurs faux énoncés, ou y participe, ceux-ci sont réputés être un seul faux énoncé s'ils ont été faits ou présentés dans le cadre des activités suivantes :

(i) one or more planning activities that are in respect of a particular arrangement, entity, plan, property or scheme, or

(i) une ou plusieurs activités de planification qui se rapportent à une entité donnée ou à un arrangement, bien, mécanisme, plan ou régime donné,

(ii) a valuation activity that is in respect of a particular property or service; and

(ii) une activité d'évaluation qui se rapporte à un bien ou service donné;

(*b*) for greater certainty, a particular arrangement, entity, plan, property or scheme includes an arrangement, an

b) il est entendu qu'une entité donnée ou un arrangement, bien, mécanisme, plan ou régime donné comprend une

entity, a plan, a property or a scheme in respect of which

entité, un arrangement, un bien, un mécanisme, un plan ou un régime relativement auquel, selon le cas :

(i) an interest is required to have, or has, an identification number issued under section 237.1 that is the same number as the number that applies to each other interest in the property,

(i) un droit a ou doit avoir un numéro d'inscription attribué en vertu de l'article 237.1 qui est le même numéro que celui qui s'applique à chacun des autres droits dans le bien,

(ii) a selling instrument in respect of flow-through shares is required to be filed with the Minister because of subsection 66(12.68), or

(ii) un avis d'émission visant des actions accréditives doit être présenté au ministre par l'effet du paragraphe 66(12.68),

(iii) one of the main purposes for a person's participation in the arrangement, entity, plan or scheme, or a person's acquisition of the property, is to obtain a tax benefit.

(iii) l'un des principaux objets de la participation d'une personne à l'entité, à l'arrangement, au mécanisme, au plan ou au régime, ou de l'acquisition du bien par une personne, est l'obtention d'un avantage fiscal.

…

…

220. (1) The Minister shall administer and enforce this Act and the Commissioner of Revenue may exercise all the powers and perform the duties of the Minister under this Act.

220. (1) Le ministre assure l'application et l'exécution de la présente loi. Le commissaire du revenu peut exercer les pouvoirs et fonctions conférés au ministre en vertu de la présente loi.

(2) Such officers, clerks and employees as are necessary to administer and enforce this Act shall be appointed or employed in the manner authorized by law.

(2) Sont nommés ou employés de la manière autorisée par la loi les fonctionnaires, commis et préposés nécessaires à l'application et à l'exécution de la présente loi.

STANDARD OF REVIEW

[30] Generally speaking, the standard review for fairness decisions is reasonableness: *Lanno v. Canada Customs and Revenue Agency* 2005 FCA 153 and *Nail Centre and Esthetics Salon v. Canada (Customs and Revenue Agency)* 2005 FCA 166 at paragraph 5.

[31] In *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[32] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[33] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues, with the exception of procedural fairness, bad faith and errors of law, to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[34] The Applicant has also raised issues of procedural fairness, natural justice, and error of law issues.

[35] The standard of review for procedural fairness issues is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1. The standard of review for errors of law is correctness. See *Uluk v. Canada (Minister of Citizenship and Immigration)*, [2009] F.C.J. No. 149 (F.C.).

ARGUMENTS

The Applicant

Profit 1 Computation of Profit

[36] The Applicant points out that expenses are not in dispute in this application. The issue is the characterization of income as a whole and the concept of “the deductibility of expense[s]” from that income as a whole. The Applicant cites and relies upon *Canderel Ltd. v. Canada*, [1998] S.C.J. No. 13 (*Canderel*) at paragraphs 30-31:

> **30** What, then, is the true nature of "profit" for tax purposes? While the concept has been variously expressed, perhaps the clearest and most concise articulation of the term is to be found in the oft-quoted decision of this Court in *M.N.R. v. Irwin*, [1964] S.C.R. 662, at p. 664, where profit in a year was taken to consist of "the difference between the receipts from the trade or business during such year ... and the expenditure laid out to earn those receipts" (emphasis in original). This definition was echoed by Jackett P. in *Associated Investors of Canada Ltd. v. M.N.R.*, [1967] 2 Ex. C.R. 96, where he stated at p. 102:
>
> > Ordinary commercial principles dictate, according to the decisions, that the annual profit from a business must be ascertained by setting against the revenues from the business for the year, the expenses incurred in earning such revenues.
>
> **31** Accepting this fundamental definition, in Symes, supra, at pp. 722-23, the majority made the following observations about the computation of profit:
>
> . . . the "profit" concept in s. 9(1) is inherently a net concept which presupposes business expense deductions. It is now generally accepted that it is s. 9(1) which authorizes the deduction of business expenses; the provisions of s. 18(1) are limiting provisions only. . . .

[37] The Applicant says that receipts and revenues are synonyms with profits and that they all have the same meaning. He says that the language in *Canderel* “confers a separation between ‘receipts’ and ‘expense’ and the terms ‘difference between’ and ‘setting against’ implies a distinct separation or independent characterization.”

[38] The Applicant also says that the meaning and intent of subsection 18(1) of the Act is to restrict a deduction, expense or outlay to only the purpose of gaining income. The inclusion of the term “gaining” is significant as it provides meaning to the word “income” within the Act. He says the meaning of a “gain” or “profit” cannot include a cost incurred or the sum of an expense. Therefore, the concept of computing income and expense separately is also incurred for the purpose of a gain.

[39] The Applicant claims that subsection 9(1) of the Act does not provide a conclusive meaning to the computation of income for tax purposes. He argues that if profit in section 9 of the Act is net profits then it could be construed that sales (or revenue or receipts), minus expenses, equal profits. However, the offsetting or difference between the concepts in *Canderel* would have no effect, nor would any of the terms parallel to income have that meaning assigned to them or be grammatically correct, as they would include their opposite meaning. Therefore, if section 9 of the Act is net profits, and that section confirms deductions because it presupposes them, then gross profit would still have the same general meaning of a profit or gain. If *Canderel* is applied, it would take the form of gross profit set against expense. The Applicant concludes in relation to sections 18 and 9 of the Act that, by using the *Canderel* formula, all of the terms have the same meaning as profits and gains. Income and expenses are computed separately before offsetting.

Computation of Profit

[40] The Applicant also discusses the computation of profit and relies on *Wallace Realty Co. Ltd. v. Ottawa (City)*, [1930] S.C.R. 387 (*Wallace*) at paragraphs 3, 5, 7, 10, 12, 13 and 14:

> In our opinion, the determination of this question rests entirely on the proper view to be taken of the definition of the word “income” in s. 1 of the Assessment Act, which reads as follows:
>
> > (e) “Income” shall mean the profit or gain
>
> …
>
> *Mersey Docks v. Lucas, in the House of Lords* [(1883) 8 App. Cas. 891.], is authority for the general principle that in ascertaining the "profits and gains" of any trade, manufacture, adventure or concern for the purpose of the Income Tax Acts, the taxpayer is entitled to deduct from the gross profits of his trade or business the expenses necessary to earn them.
>
> …
>
> In the Gresham case (ubi supra) [[1892] A.c. 309.] the company was held entitled to deduct the amount paid out by it for annuities in ascertaining its profits or gains for income tax purposes. Lord Herschell said, at p. 323,
>
> > Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obligations to which they have given rise.
>
> …
>
> The Privy Council, in *Lawless v. Sullivan* [[(1881) 6 App. Cas., 373.], dealing with a taxing Act of the Province of New Brunswick (31 V, c. 36), held that
>
> > The tax imposed by s. 4 (of the statute) upon "income" is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word

> "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense, as the balance of gain over loss.

…

…So, a trader who keeps a general store may gain on some of the articles in which he deals and incur losses on others. In these cases, though the losses balanced or exceeded the gains, and consequently no income was or could be received from the business of the year, it would follow from the construction contended for by the Respondents that the gain on the particular sales which yielded a profit would still be subject to taxation. Such a construction implies, as already observed, that the tax would attach on each sale producing profit, which is not the ordinary or fair meaning of a tax upon the income of the fiscal year (p. 380).

…

At p. 970 of the report of *Scottish North American Trust, Ltd. v. Inland Revenue* [1909-10 Sess. Cas., 966.], Lord Salvesen, presiding at the Court of Session, said,

> If the question had arisen for the first time for decision it would appear to me to present no difficulty whatever. From an ordinary business point of view it seems preposterous to suggest that the money which a trader pays to a bank upon overdraft or on a secured loan forms part of the profits or gains of his business. Money which he receives by way of interest will no doubt, in the ordinary case, go to swell his profits; but how payments which in fact diminished his receipts should be regarded as in any sense part of his income it is at first sight very difficult to understand. ... The interest which a trader pays to a bank with which he deals for financial accommodation is not in any sense payable out of profits. It is an ordinary claim of debt with which the whole assets of the company or trader are chargeable.

At p. 971, His Lordship quotes from the decision of the Lord President of the Court of Sessions in *Inland Revenue v. Stewart & Lloyds* [(1906) 8F. 1129.], as follows:

> ...it all depended on whether this expenditure was really an outlay to earn profit or was an application of profit earned.

Lord Salvesen goes on to say that

> Assuming that to be the test, it would certainly be a strange abuse of language to say that interest which a trader has had to pay on money borrowed for the purposes of his business is an application of the profits earned, when it may be that the interest exceeds the total amount of the profits.

[41] The Applicant states that the main points in *Wallace* depend on whether or not it was an application of profit earned or an application of expenditure. He says they are clearly separate. Therefore, including the sum of payables, an ordinary claim of debt, within the sum of receipts or revenue, amounts to an unsubstantiated accounting for taxation purposes and ignores relevant facts. The Applicant says that the fairness officers erred in law in their computation of income.

The First Review Under Fairness

Income for Tax Purposes

[42] Under the first fairness request, the Applicant submits that the officer did not consider all the relevant facts and based his decision on irrelevant facts. The Applicant relies on section 12 of the *Interpretation Act*, R.S., 1985, c. I-21 which states that “Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”

[43] The Applicant cites and relies upon *Canada v. Johns Manville Corp.*, [1985] 2 S.C.R. 46 at paragraph 33:

> **33** The characterization in taxation law of an expenditure is, in the final analysis (unless the statute is explicit which this one is not), one of policy. In the mining industry, where the undertaking is underground mining with its associated assets such as vertical shafts and horizontal transportation elements not created directly by the removal of commercial ore, the tax treatment of capitalization is invoked. On the other hand, open pit or strip mining requiring none of these fixed facilities leads to the attribution of the associated expenditures to the revenue account. Strip mining or open pit mining with conical access (as we have here) and its associated expenditures falls in between these two rough categories of mining undertakings. The assessment of the evidence and the conclusions to be derived therefrom, and the application of the common sense approach to the business of the taxpayer in relation to the tax provisions, leads, in my respectful view, to the conclusion that the mining operations here approximate the circumstances encountered in the traditional open pit mining more than underground mining and so conclude, with all respect to those who have otherwise concluded, that the appropriate taxation treatment is to allocate these expenditures to the revenue account and not to capital. Such a determination is, furthermore, consistent with another basic concept in tax law that where the taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer.

[44] The Applicant also relies on *Canderel* at paragraph 29:

> …Significantly, "profit" is not defined in s. 9(1) or anywhere else in the Act. It seems to me that this approach was a deliberate legislative choice, particularly given that the Act contains exhaustive definitions of numerous other concepts and terms with which it deals. This choice reflects the reality that no single definition can adequately apply to the millions of different taxpayers bound by the Act…

[45] The Applicant cites *Mueller v. Canada (Attorney General)*, [2000] F.C.J. No. 1510 at paragraph 39:

> **39** In the Estate of the *Late Henry H. Floyd v. The Minister of National Revenue* [1993] F.C.J. No 986, Dubé J. considered the scope of the duty to act fairly in the context of subsection 220(3.1) and stated at paragraph 9:
>
> > A duty to act fairly, in general, means a duty to observe the rudiments of natural justice in the exercise of administrative functions. (See *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 at 630)
> >
> > At common law, a duty to exercise procedural fairness lies on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. (See *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R.643 at 653 and *R. v. Miller*, [1985] 2 S.C.R. 613 at 623-24.)

[46] The Applicant also cites *Singh v. Canada (Attorney General)* 2005 FC 1457 at paragraph 22:

> **22** I have been satisfied that the decision was based on observations that were improprely submitted by audit at CCRA, that as a result of these submissions the forgiveness officer clearly ignored relevant facts or took into consideration irrelevant facts and the decision is contrary to law.

[47] The Applicant submits that he explained his accounting formula to the fairness officer and that numerous sample statements were included as "objective demonstrations to confirm that [the Applicant's] accounting formula works from strictly a mathematical perspective, with the focus pointing to the accuracy of the Gross Profit and the relevance of opening balances of equity." The Applicant alleges that the officer ignored the objectivity of the sample statements, the accuracy of the accounting formula, and the GAPP that the samples presented. In the Applicant's view, the Officer acted in bad faith by not giving any credence to his sample statements and what they projected.

Extraordinary Circumstances Beyond a Tax Payers Control/Misrepretentation of a Tax Matter by a Third Party

[48] The Applicant also says that the language and definition of "subordinate" in section 163.2 of the Act was central to his fairness request because it interplays with section 25 of Information circular IC07-1 which says "Penalties and interest may be waived where they result from circumstances beyond the taxpayer's control."

[49] The Applicant insists that the officer ignored the fact that the Applicant was a subordinate under section 163.2 and the officer acted in bad faith in not considering the legislation and denying his fairness request. The Applicant says he acted with due diligence in attempting to correct what had been communicated to him in relation to his 1995 income tax filing. The series of events that had led to the misrepresentations in his tax statements were explained, as well as his efforts to correct those misrepresentations, by hand written letter, which was submitted for the CRA appeal in 2002 and submitted again with the fairness request in 2006.

[50] The Applicant submits that he is under the control of the original misrepresentations prepared by Mr. Morrison for the 1995, 1996 and 1997 taxation years.

[51] The Applicant cites and relies upon *897366 Ontario Ltd. v. Canada*, [2000] T.C.J. No. 117 at paragraph 20:

> **20** In Farm Business Consultants Inc. v. The Queen, 95 D.T.C. 200 (aff'd F.C.A., 96 D.T.C. 6085) at pages 205-206, the following

> discussion of the civil onus of proof required in the case of penalties appears:
>
> …
>
> and at page 6026:
>
> > I take it to be a clear rule of construction that in the imposition of a tax or a duty, and still more of a penalty if there be any fair and reasonable doubt the statute is to be construed so as to give the party sought to be charged the benefit of the doubt.

[52] The Applicant also relies upon *Robinson v. Canada (Minister of National Revenue – M.N.R.)*, [2000] F.C.J. No. 262 at paragraphs 17 and 21:

> **17** In summary, on the evidence before me, I find the defendant could not have known, when he signed his 1986 income tax return, that the amount of $64,022 had been erroneously credited to his shareholder loan account, instead of having been included in the company's income for 1986. Similarly, I find the evidence does not establish on the balance of probabilities that the defendant knew or ought to have known of the misclassification when he signed the 1986 corporate tax return.
>
> …
>
> **21** The position of the plaintiff, expressed in terms of the defendant's constructive knowledge, comes fairly close to imposing vicarious liability on the taxpayer for the errors of the accountant, a road upon which I am not prepared to embark on the basis of these facts and the legislative provisions in force in 1986. I simply cannot conclude in this case that the accountant's error constitutes an appropriation or benefit to the shareholder from the corporation about which the defendant ought to have known and for which he must be held responsible.

Application of section 63.2 in Respect of a "Subordinate"

[53] The Applicant further submits that the inclusion of “subordinate” in section 163.2 of the Act infers the intent of Parliament to recognize that there may be extraordinary circumstances where a taxpayer is under the control of, and reliant upon, the knowledge of a third party who is acting on their behalf. It is not reasonable to conclude that the section would have no fair or equitable effects for the taxation of an individual in such circumstances. The Applicant alleges that he was a subordinate within 163.2(8) and made a request for fairness with respect to the three years of false statements in 1995, 1996 and 1997, which should have been considered as one false statement for the purpose of the fairness provisions.

[54] The Applicant says the first fairness officer was unreasonable in restricting his fairness request and by not including the 1995 year; it was within the officer’s statutory duty to exercise her powers and perform the duties of the Minister under the Act. The Applicant is self-represented and alleges that he was unable to find the specific legislation to support the wording in IC07-1. However, for the purposes of the fairness review, he should have been entitled to the plain meaning and wording in IC07-1. By not reviewing the 1995 year, he says the first fairness officer erred in law.

Second Review Under Fairness

The Audit Decision

[55] The Applicant submits that the second fairness review officer erred in law by not properly applying the principles outlined in *Canderel* and by preparing a report that was not supported or required by law. The Applicant also submits that it was unfair for the officer to consider the material

filed on his first fairness application and that she should have considered the material filed for his second fairness review exclusively.

Relevance of Property of a Business to Taxation

[56] The Applicant notes that it is incorrect to say that inventory, as defined as “property held for sale,” is the only type of property relevant to the computation of income for tax purposes. This is inconsistent with the plain wording of the Act and accounting principles. The Applicant submits that “[i]nventory as defined in the Act means a description of property the cost or value of which is ‘relevant to the computation of income’. Property means property of any kind.”

[57] The Applicant cites and relies upon *Friesen v. Canada*, [1995] S.C.J. No. 71 at paragraphs 20, 44 and 45:

> **20** In order to take advantage of the valuation method in s. 10(1), a taxpayer must also establish that the property in question is inventory. A definition of "inventory" is contained in s. 248(1) of the Act:
>
> "inventory" means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year;
>
> The first point to note about this definition of inventory is that property is not required to contribute directly to income in a taxation year in order to qualify as inventory. Provided that the cost or value of an item of property is relevant in computing business income in a year that property will qualify as inventory. Generally the cost or value of an item of property will appear as an expense (and the sale price as revenue) in the computation of income.

…

44 Thus, under well-accepted principles of commercial and accounting practice the value of unsold inventory is relevant to the computation of business income. This is based on the accounting presumption that holding onto unsold inventory represents a cost to a business. This is a principle generally applicable to the calculation of business income from businesses of any size and with inventories of any size although the popular formula was originally created as a convenient shortcut for the computation of business income for companies with large inventories.

45 Section 10(1) of the *Income Tax Act* recognizes the well accepted commercial and accounting principle of requiring a business to value its inventory at the lower of cost or market value. This principle is an exception to the general principle that neither profits nor losses are recognized until realized. As well, it represents a departure from the general principle that assets are valued at their historical cost. The underlying rationale for this specific exception to the general principles is usually explained as originating in the principle of conservatism. The generally accepted accounting principle applicable in this situation is explained by D. E. Kieso et al., Intermediate Accounting (2nd Canadian ed. 1986), at pp. 421-22, as follows:

> A major departure from adherence to the historical cost principle is made in the area of inventory valuation. Applying the constraint of conservatism in accounting means recognizing known losses in the period of occurrence. In contrast, known gains are not recognized until realized. If the inventory declines in value below its original cost for whatever reason ..., the inventory should be written down to reflect this loss. The general rule is that the historical cost principle is abandoned when the future utility (revenue-producing ability) of the asset is no longer as great as its original cost. A departure from cost is justified on the basis that a loss of utility should be reflected as a charge against the revenues in the period in which the loss occurs. Inventories are valued, therefore, on the basis of the lower of cost and market instead of on an original cost basis. [Emphasis added.]

[58] The Applicant argues as follows:

> Where it states '(revenue producing ability) of the asset is no longer as great as its original cost'. A capital 'asset' that depreciates, is an asset, with the prescribed method of depreciation reflecting its reduced value at the end of that year (as recorded on the balance sheet). That loss of the utility is reflected as a charge against revenues in the period the loss occurs through the depreciation expense allowable for that year. So a capital asset, which is depreciable property, which would be valued at the end of the year at its lower cost, fits well within the meaning of inventory in s.10(1), and represents a cost to a business within the well-accepted principles of commercial and accounting practice. The cost is not realized in a tax year where the cost was not incurred in that year, it is an application of GAAP with respect to the accrual method of accounting.

[59] The Applicant contends that section 12(1) of the Act confirms that receivables are relevant for income tax purposes; however, the specific wording is "shall be included in computing the income." The Applicant notes that for the realization principles to have any effect within the intent of section 12(1) of the Act receivables would "have to have their common and more appropriate place in the computation of income, which by GAAP standards would be a current asset in the balance sheet, as the Applicant has done with every year of accounting."

[60] The Applicant further submits that GAAP dictate that a balance sheet is a required statement in the computation of income. It includes accruals that reflect a cost or value that significantly balance against each other, along with the net income for the year and the equity accounts. The Applicant suggests that the officer erred in the computation of his income tax by adding the receivables to the income statement. He says the Officer did not consider any other value on cost in an accrual context including payables relating to receivables the Applicant had been taxed on.

[61] The Applicant insists that the accounting implemented in his tax returns involves GAAP, with the inclusion of a complete balance sheet (which recognizes the opening balancing equity of the previous year), which is entered as a credit and carried forward into the current year as a valuation of capital and, as a whole, is one figure, that reflects or accounts for all the relevant accrued opening balances, to be computed as a part of, and with all the transactions of, the year. The Applicant says that the officer should have acknowledged that the principles of GAAP were evidenced in his accounting method.

[62] The Applicant contends that the officer acted in bad faith by not including in her report any reference to the Applicant's explanation of his accounting. He alleges that the officer was biased in the way she prepared her report because she was provided with correspondence from the first level fairness review and had also mentioned to the Applicant her dissatisfaction with the way in which the Applicant had conducted his correspondence at the first level fairness review.

Mental Distress

[63] The Applicant submits that both fairness reviews failed to address mental distress. The Applicant acknowledges that, after the first fairness review, he wrote a letter to the director requesting a second level of fairness review and "attacked" the officer in his letter. The Applicant acknowledges that the letter was irrational and was born out of exasperation and anger from his

dealings with the CRA. The Applicant alleges that he has been dealing with the distress of this situation for approximately seven years and requested relief for it under the fairness provisions.

[64] The Applicant cites and relies upon *Dort Estate v. Canada (Minister of National Revenue – M.N.R.)* 2005 FC 1201 at paragraphs 22 and 23:

> **22** On this point, Mr. Gibson's decision was in review of J.F. Lee's decision. He found that there was no evidence that Mrs. Dort's natural distress upon the death of her husband prevented her from dealing with the Estate's financial matters. She had demonstrated an ability to attend to complex financial matters. Mr. Gibson's decision is not reviewable.
>
> **23** There must be at least some causal connection between the mental distress and an inability to act.

[65] The Applicant submits that he was operating a business through the years he requested relief for penalties and interest. There was no ambiguity or uncertainty with respect to both his GST and PST tax matters and it was clear to him and his wife that these were obligations with no grey areas. They were able to deal with and accept these matters. However, the Applicant’s personal income tax liability was entirely different and made both him and his wife feel hopeless, which ultimately caused stress, anxiety, depression, confusion, and even separation from the matter entirely in some situations.

[66] The Applicant submits that he has suffered mental distress and has told the truth. He says that no one would accept what he said as true. He communicated this truth in many different ways and to the best of his ability. He says there were and are significant financial liabilities with respect to the same truth that no one would accept. The Applicant also notes that there is a casual

connection between the mental distress endured by him and his wife and their financial affairs: *Dort.*

The Second Review Under Fairness

[67] The Applicant relies on IC 92-3, IC 92-2 and IC 07-1 to support his position in relation to why he developed his new concept of accounting. He also relies upon the doctrine of legitimate expectations and cites *Edison v. Canada* 2001 FCT 734 at paragraphs 21, 22, 37 and 38:

> **21** However, before analysing the process that led to the decisions, this Court must analyse if the review process created any legitimate expectations for the applicants…
>
> **22** This view was reaffirmed by Madam Justice L'Heureux-Dubé in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R 817 at paragraph 26, where she stated:
>
> > As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: (...) Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: (...). Nevertheless, the doctrine of legitimate

> expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.
>
> …
>
> **37** …the public interest that is sought to be protected by the doctrine of legitimate expectation, namely, the protection of the individual from an abuse of power through the breach of an undertaking. The implied undertaking in the case at bar is the non-discriminatory application of procedural norms set out by published guidelines in the application of the fairness legislation.
>
> **38** …It is in the failure of the respondent to follow his own published procedural guidelines that I find a breach of the duty of fairness owed to the applicants under the rules of natural justice and procedural fairness.

[68] The Applicant submits that he provided CRA with the accounting balancing formula that he had developed for himself. It was a new expression or mathematical formula. Under IC 92-2 and IC 92-3, he was required to ensure that he could adequately communicate his new concept and the details surrounding why he had developed his own accounting. He says that there was a legitimate expectation that a certain result would be reached if that procedure was followed.

[69] The Applicant says that, under the circumstances, the officers who dealt with him did not review the material in the manner that the Applicant requested. He asked that they review his accounting model. The Applicant cites *Simmonds v. Canada (Minister of National Revenue)* 2006 FC 130 where a taxpayer's request was granted by the CRA office.

[70] The Applicant also says he had a legitimate expectation that the second fairness review would be independent of the first and would involve a "fresh look at the original material" that he had submitted. He also requested that the second level fairness review specifically address each point in the original material he had filed and say why it was incorrect or untrue.

[71] The Applicant alleges that the fairness review officer made erroneous findings of fact and that the 2000 tax return and appeal should not have been used as a reason to revisit a decision under fairness. He says that "it is clear from the records, that same appeals decisions [were] given consideration by the officers assigned to this Fairness review as a reason to deny the Fairness request." The Applicant states that he never signed his 2000 tax return and that it was filed by his previous accountant.

Conclusion

[72] The Applicant concludes by stating that his affidavit should have been given more credence in both of the fairness reviews and that the description of his accounting methods was not addressed in the second level of fairness review. The records demonstrate that "neither those documents, were given the interpretation owed to [the Applicant] as part of procedural fairness." Therefore, on a balance of probabilities, the Applicant says he should not have been denied his request for fairness.

The Respondent

The Minister Considered All Relevant Factors

[73] The Respondent submits that the Minister considered all of the relevant factors and addressed all of the reasons and submissions submitted by the Applicant in respect of his second fairness request, which is the Decision under review in this application.

[74] The credit adjustments requested by the Applicant were not supportable based on the evidence before the Minister and the Minister's Decision to deny the requested adjustments was reasonable. See: *Gagné v. Canada (Attorney General)* 2006 FC 1523 at paragraphs 24-26. The Minister considered the following factors in respect of the Applicant's request for credit adjustments:

1) The Minister properly denied the Applicant's request for an adjustment of his 1995 taxation year because the Applicant did not submit his adjustment request for that year before the ten-year deadline required by the Act;
2) The Minister completed a detailed review of the Applicant's adjustment requests for his 1995 to 2000 taxation years and of the documents and submissions the Applicant provided in support of his fairness request;
3) The Applicant was provided with several opportunities to substantiate his request both in writing and during several face to face interviews with the CRA officers;
4) The accounting method created by the Applicant in support of his credit adjustment claims did not provide accurate net income for tax purpose;
5) The CRA employees working on the second fairness review reviewed the previous decisions made on the Applicant's requests, but CRA employees still undertook

their own independent and detailed reviews to arrive at their decisions that the Applicant's requested adjustments were not supportable in fact or in law;

6) The Applicant's fairness request for an adjustment to his 2000 year is contrary to the IC 07-01 guidelines because he requested an adjustment to his business income for a year that the CRA Appeals officer had reviewed and denied; and

7) The Applicant was provided with a detailed explanation of why his accounting method, submitted in support of his adjustment requests for the 1995 to 2000 taxation years, was not acceptable for taxation purpose.

[75] The Respondent also says that the Minister's Decision to deny interest and penalty relief was reasonable because the Applicant failed to demonstrate that, due to factors beyond his control, he was prevented from filing his 2001 to 2005 tax returns and from remitting the amounts owed by the statutory deadlines. In denying the Applicant's request for interest and penalty relief for 2001 to 2005, the Minister properly considered the following factors:

1) During the 2001 to 2005 taxation years the Applicant continued to operate his business and the business continued to file its GST returns annually. However, the Applicant failed to explain why he did not file his tax returns in a timely manner in those years;

2) The Applicant had adequate time to acquire another accountant's services or to prepare his 2001 to 2005 tax returns himself and to file these returns on time because, before these returns were due, in or about March 2002, the Applicant had already determined that his previous accountant had allegedly incorrectly prepared his financial statements and tax returns;

3) The Minister did consider the Applicant's submissions that he filed his 2001 to 2005 returns late because he was trying to correct the alleged fraudulent errors made by his tax preparers. However, the Minister determined this was not something that prevented the Applicant from filing his returns on time;

4) Dissatisfaction with a previous accountant or incorrect financial statements prepared by the Applicant's accountant were not extraordinary circumstances beyond the Applicant's control that prevented him from filing his 2001 to 2005 tax returns and remitting the amounts owing by the statutory deadlines;

5) A taxpayer's choice of which accountant to consult (if any), how he keeps his accounting records, the timeliness by which he files his returns and the timeliness by which he pays the amounts owing are all factors within the taxpayer's control; and

6) The Minister did consider the Applicant's submission that he allegedly suffered from emotional and mental distress resulting from his attempts to explain the accounting method he had created to several CRA officers. However, the Minister still determined that this did not prevent the Applicant from filing his 2001 to 2005 tax returns on time.

[76] The Respondent says that it was reasonable for the Minister to conclude that the Applicant's alleged emotional distress did not prevent him from complying with the Act because he continued to operate his business in 2001 to 2005.

[77] Where a taxpayer has health problems but is still able to operate a business, it is reasonable for the Minister to conclude that those health problems do not prevent a taxpayer from dealing with his tax obligations: *Young v. Canada*, [1997] F.C.J. No. 1680 (F.C.T.D.) at paragraphs 13, 19, 20 and 24-26.

[78] The Respondent also says that it was reasonable for the Minster to deny the Applicant's request, even though he allegedly suffered from emotional distress, because he allowed an extraordinary period of time to elapse before rectifying his tax situation. The Applicant's 2001 to 2004 returns were due on June 17, 2002, June 16, 2003, June 15, 2004 and June 15, 2005, but were not filed until on or about November 20, 2006. The Applicant's 2005 return was due on June 15, 2006, but it was not filed until on or about March 8, 2007.

[79] The Respondent notes that when a taxpayer suffers from health problems, but allows an extraordinary period of time to elapse before taking steps to rectify their tax situation, it is reasonable for the Minister to deny the taxpayer's fairness request: *Sutherland v. Canada (Customs and Revenue Agency*) 2006 FC 154 (F.C.T.D.) at paragraph 21.

The Minister Observed the Principles of Natural Justice and Procedural Fairness

[80] The Respondent submits that the Applicant's record provides no evidence of a failure by the Minister to observe the principles of natural justice, procedural fairness or any other procedure. The Applicant's record also, in the Respondent's view, provides no evidence of bad faith or evidence

that the Minister based his decision on irrelevant facts or erred in law or that the Minister failed to follow the CRA's procedural guidelines.

[81] The IC 07-01 Guidelines advise taxpayers that they are entitled to a second fairness review, but they do not provide that the taxpayer's second level review will be conducted by the tax services officer's director.

[82] The Applicant first submitted his 2001 to 2004 tax returns with his first level fairness request and the normal procedure required that his fairness request be held in abeyance. This procedure was employed because the Minister first needed to determine whether there would be any change to the penalties and interest assessed in those years which could affect the amount of fairness relief requested.

[83] The Respondent concludes on this issue by stating that the Applicant's record provides no evidence of the Minister making a Decision that would give an informed person a reasonable apprehension of bias. See: *Superior Filter Recycling Inc. v. Canada* 2006 FCA 248 at paragraph 4.

The Minister Did Not Consider Himself Bound by His Own Guidelines and Policy

[84] The Respondent submits that the Minister did not fetter his discretion by considering himself bound by his own guidelines and policy. The Minister reviewed and considered all of the

information and submissions available to him, and applied the Guidelines in the exercise of his discretion. The Minister did not treat the Guidelines as binding.

[85] The Respondent contends that there is no evidence that the Minister made the Decision in bad faith, ignored relevant facts or considered irrelevant facts. The Minister acted fairly and reasonably, considering all of the submissions made by the Applicant and all the relevant factors before him. The Minister did not consider himself bound by the Guidelines. The Decision to not reassess the Applicant's taxation years beyond the normal reassessment period and not to waive or cancel penalties and interest was reasonable and was supported by lines of analysis on each of the points raised by the Applicant.

[86] The Minister's reasons, taken as a whole, withstand a probing examination and support the Decision made. There are multiple lines of analysis within the Minister's reasons that could reasonably lead the Minister from the evidence before him to the conclusions that he reached. Therefore, a reviewing court should not interfere with the Minister's Decision. The Respondent requests that the application be dismissed with costs.

ANALYSIS

[87] At the hearing of this mater on June 11, 2009 in Victoria, the Applicant presented his case (as well as that of his wife in T-1470-08) with considerable ability and knowledge. I am satisfied that, as a self-represented litigant, he has been able to make his case before the Court with clarity

and conviction, even when dealing with complex concepts in the areas of tax law and judicial review.

[88] At the heart of this application lies a disagreement between the Applicant and CRA regarding a new system of accounting that the Applicant claims to have developed himself because his former accountant filed fraudulent returns on his behalf, or so he alleges. This is not a dispute over the figures used by CRA. The Applicant says that his accounting system provides a more accurate picture of this net business income for tax purposes and he takes issue with the way that CRA has calculated gross revenue, gross profit, and net business income. CRA's concern with the Applicant's accounting system is focused on the method he uses to calculate his revenue and gross profit.

[89] CRA's concerns over the Applicant's system have been explained to him in numerous discussions and decisions. In the end, he just disagrees with CRA's explanations and the results yielded by the more traditional accounting methods that CRA has used to compute his net business income for the years in question.

[90] As a result of this disagreement, the Applicant alleges bad faith, lack of procedural fairness, bias, errors of law, errors of fact and unreasonableness on the part of CRA, all of which have culminated in the second fairness Decision currently under review.

[91] I have reviewed the written record carefully. I can see that this protracted dispute has given rise to considerable frustration on both sides. In the end, however, at least as far as the Applicant's requests for credit adjustments are concerned, there is simply a disagreement over whether the Applicant's self-invented accounting system yields an accurate result.

[92] CRA's objections and concerns with the Applicant's system have been explained to him on numerous occasions and he has been given every opportunity to demonstrate why his methodology, and the results it yields, should be accepted by CRA.

[93] I can find no evidence of bad faith, bias, or lack of procedural fairness on the part of CRA and the officers and officials who have been involved with the Applicant and his accounting and tax problems.

[94] As regards the accuracy of his accounting methodology, and the alleged inaccuracy of the methods employed by CRA to determine net business income for the years in question, the Applicant offers his own assertions and his reading of certain statutory provisions and case law. However, on the central issue of how net business income is most accurately calculated for the Applicant, he has not demonstrated that CRA has been wrong in law, has overlooked any material fact, or has been unreasonable in its calculations and conclusions.

[95] The Applicant's disagreement with the Minister's Decision does not render it wrong in law or unreasonable. I am not in a position to substitute my own views of the matter in question for those of the Minister, unless the evidence shows that the Minister has not exercised his discretion in

good faith or in accordance with the principles of natural justice, or where reliance has been placed upon considerations that are irrelevant or extraneous to the statutory purpose. See: *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 at paragraphs 7-8.

[96] Similarly with the Applicant's request for the cancellation of penalties and interest, there is nothing in the record, in my view, to support the Applicant's allegations of bad faith, bias, error of fact, error of law or unreasonableness. The Minister was asked to exercise his discretion and has given a full account to the Applicant as to why he has chosen to exercise it in a particular way. It is always possible to disagree and to claim that the Minister should have decided otherwise, but there is nothing in the record I can find that suggests that the Minister has acted in error or has rendered an unreasonable Decision within the meaning of *Dunsmuir*.

[97] I have reviewed the Applicant's arguments and evidence on all points raised. I believe that the Minister has provided accurate and jurisprudentially sound responses that the Court must accept.

Request for Credit Adjustments

[98] After reviewing the record, I agree with the Respondent that, in respect of the Applicant's request for credit adjustments the Minister considered the following factors:

a) The Minister properly denied the Applicant's request for an adjustment of his 1995 taxation year because the Applicant did not submit his adjustment request for that year before the ten year deadline required by the Act;

b) The Minister completed a detailed review of the Applicant's adjustment requests for his 1995 to 2000 taxation years and of the documents and submissions the Applicant provided in support of his fairness request;

c) The Applicant was provided with several opportunities to substantiate his request both in writing and during several face to face interviews with Officers Green and Norminton;

d) The Applicant has not demonstrated that the accounting method he created in support of his credit adjustment claims provided accurate net income for tax purposes;

e) Officers Green and Norminton did review the previous decisions made by Officers Bain and Nasato in respect of the Applicant's 2002 request to have his 2000 taxation year reassessed; however, both Officers Green and Norminton undertook their own independent and detailed reviews to arrive at their conclusions that the Applicant's requested adjustments were not supportable in fact or in law;

f) Officers Norminton and Jacks did review the first level fairness decision materials and Officer Green's conclusions; however, both Officer Norminton and Officer Jacks undertook their own independent and detailed reviews to arrive at their decisions that the Applicant's requested adjustments were not supportable in fact or in law;

g) The Applicant's fairness request for an adjustment to his 2000 year is contrary to the IC 07-01 Guidelines because he requested an adjustment to his business income for that year which CRA Appeals had reviewed and denied; and

h) The Applicant was provided with a detailed explanation of why his accounting method, submitted in support of his adjustment requests for the 1995 to 2000 taxation years, was not acceptable for taxation purposes in Officer Norminton's letter of April 3, 2008 and in Officer Norminton's audit reports.

[99] In my view, then, the adjustments requested by the Applicant were not supported by the evidence before the Minister and the Minister's Decision was reasonable. The Decision was not made in bad faith or in breach of procedural fairness and is not based upon an error of fact or law.

Request for Interest and Penalty Relief

[100] Likewise, after reviewing the record, I am satisfied that the Minister's Decision to deny interest and penalty relief was reasonable because the Applicant failed to demonstrate that, due to factors beyond his control, he was prevented from filing his 2001 to 2005 tax returns and from remitting the amounts owed by the statutory deadlines.

[101] The record demonstrates to me that the Respondent is correct that , in denying the Applicant's request for interest and penalty relief for 2001 to 2005, the Minister properly considered the following factors:

a) During the 2001 to 2005 taxation years the Applicant continued to operate his business and the business continued to file its GST returns annually; however, the

Applicant failed to explain why he did not file his tax returns in a timely manner in those years;

b) The Applicant had adequate time to acquire another accountant's services or to prepare his 2001 to 2005 tax returns himself and to file these returns on time because, before these returns were due, in or about March 2002, the Applicant had already determined that his previous accountant had allegedly incorrectly prepared his financial statements and tax returns;

c) The Minister did consider the Applicant's submission that he filed his 2001 to 2005 returns late because he was trying to correct the alleged fraudulent errors made by his tax preparers; however, the Minister determined this was not something that prevented the Applicant from filing his returns on time;

d) Dissatisfaction with a previous accountant or incorrect financial statements prepared by the Applicant's accountant were not extraordinary circumstances beyond the Applicant's control that prevented him from filing his 2001 to 2005 tax returns and remitting the amounts owing by the statutory deadlines;

e) A taxpayer's choice of which accountant to consult (if any), how he keeps his accounting records, the timeliness by which he files his returns and the timeliness by which he pays the amounts owing are all factors within the taxpayer's control; and

f) The Minister did consider the Applicant's submission that he allegedly suffered from emotional and mental distress resulting from his attempts to explain the accounting method he had created to several CRA officers; however, the Minister still

determined that this did not prevent the Applicant from filing his 2001 to 2005 tax returns on time.

[102] It was reasonable, within the meaning of *Dunsmuir*, for the Minister to conclude that the Applicant's alleged emotional distress did not prevent him from complying with the Act because he continued to operate his business in 2001 to 2005 and that his health problems did not prevent him from dealing with his tax obligations.

[103] In my view, it was not unreasonable for the Minister to deny the Applicant's request even though he allegedly suffered from emotional distress. The Applicant allowed an extraordinary period of time to elapse before rectifying his tax situation. The Applicant's 2001 to 2004 returns were due on June 17, 2002, June 16, 2003, June 15, 2004 and June 15, 2005, respectively, but were not filed until on or about November 20, 2006. The Applicant's 2005 return was due on June 15, 2006, but it was not filed until on or about March 8, 2007.

Natural Justice and Procedural Fairness

[104] I agree with the Respondent that the Applicant's Record provides no evidence of a failure by the Minister to observe principles of natural justice, procedural fairness or any other procedure. Nor does it reveal bad faith, any reasonable apprehension of bias, or any breach of legitimate expectations.

[105] The Applicant's Record provides no evidence that the Minister based his decision on irrelevant facts or erred in law.

[106] Nor can I find any evidence that the Minister failed to follow CRA's procedural guidelines.

[107] The IC 07-1 Guidelines advise the taxpayer that he is entitled to a second level fairness review, but these Guidelines do not provide that the taxpayer's second level review will be conducted by the tax services office's director.

Fettering of Discretion

[108] After reviewing the record, I must also agree with the Respondent that the Minister did not fetter his discretion by considering himself bound by his own Guidelines and Policy. The Minister reviewed and considered all of the information and submissions available to him and applied the Guidelines in the exercise of his discretion. The Minister did not treat the Guidelines as binding.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is dismissed;

2. The Respondent shall have costs of the application.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	T-1158-08
STYLE OF CAUSE:	***ANDREW UGRO***
	v.
	THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Victoria, B.C.
DATE OF HEARING:	June 11, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	August 12, 2009

WRITTEN REPRESENTATIONS BY:

Mr. Andrew Ugro	FOR THE APPLICANT
Johanna Russell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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