

Federal Court



Cour fédérale

Date: 20090812

Docket: T-1470-08

Citation: 2009 FC 825

Ottawa, Ontario, August 12, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KELLY 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) which denied the Applicant's request for a waiver of penalties and interest for her 2002 to 2005 taxation years.

BACKGROUND

[2] The Applicant's husband, Andrew Uργο, began a home-based business offering professional services in graphic design billed at an hourly rate. Other services included the purchasing and

reselling of finished goods related to graphic design. From 1995 to 2001, the Applicant's husband operated the business as a sole proprietorship. Then, from 2002 to 2004, he operated the business in partnership with the Applicant.

[3] The Applicant's husband hired Mr. Clyde Morrison, a chartered accountant, to prepare financial statements for income tax purposes and advise the husband on setting up accounts. The Applicant and her husband allege that Mr. Morrison did not adequately represent the business's financial statements for 1995, 1996 and 1997. In the spring of 1998, the Applicant's husband ceased to do business with Mr. Morrison because he "never addressed [the Applicant's husband's] repeated attempts to make him show [the Applicant's husband] the true profitability of [the Applicant's husband's business]."

[4] Beginning in 1998, the Applicant's husband used financial statements prepared by another chartered accountant, Mr. Chris Cowland. The Applicant also alleges that Mr. Cowland did not prepare the business's financial statements accurately. The Applicant's husband did not use Mr. Cowland's services as of the 2001-2002 taxation year.

[5] During 2001-2002, the Applicant's husband allegedly began to acquire a basic understanding of accounting fundamentals as they pertained to the computation of income. The Applicant and her husband allege that he used Canada Revenue Agency's (CRA) informational guides and other textbook accounting fundamental resources.

[6] The Applicant's 2002 to 2005 income tax returns were not filed on time. On July 20, 2006, the Minister assessed the Applicant's 2002 to 2004 taxation years under subsection 152(7) of the Act and levied late filing penalties in those years as a result of the Applicant's continued failure to file her 2002 to 2004 returns.

[7] The Applicant's 2002, 2003, and 2004 tax returns were filed late on January 3, 2007 and her 2005 tax return was filed late on December 7, 2006.

[8] In March 2007, the Applicant's tax returns for the 2002 to 2004 taxation years were accepted by the Minister and were assessed as filed. In June 2007, the Applicant's 2005 tax return was accepted by the Minister and assessed as filed. The Applicant's 2002 to 2005 tax returns were not audited prior to being assessed as filed.

First Level Fairness Request

[9] By a letter dated November 20, 2006 and received by the Minister by facsimile on July 10, 2007, the Applicant requested under the fairness provisions for the CRA the cancellation or waiver of the penalties and interest for her 2002, 2003, 2004 and 2005 taxation years.

[10] The Applicant was advised by letter on July 13, 2007 that the Minister had reviewed the Applicant's fairness request and denied it.

Second Level Fairness Request

[11] By letter dated July 18, 2007, and received by the Minister on July 20, 2007, the Applicant made a second level fairness request.

[12] On April 21, 2008, the Applicant's 2002 to 2005 taxation years were reassessed pursuant to an audit conducted by the Minister. A Taxpayer Relief Coordinator reviewed the Applicant's fairness request and all of the information available and 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 recommendation to deny the Applicant's request.

[13] By letter dated June 23, 2008, the Applicant was advised of the Minister's Decision to deny her request.

DECISION UNDER REVIEW

[14] The Minister denied the Applicant's second level fairness request on the basis of the following:

- 1) The Applicant had failed to demonstrate that, due to factors beyond her control, she was prevented from filing her 2002 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 partnership continued to file its GST returns annually for 2002 to 2005 but she did not file her 2002 to 2005 tax returns in a timely manner;
- 3) The Applicant had had adequate time to acquire another accountant's services, or to prepare her 2002 to 2005 tax returns herself, and to file these returns on time. She and her husband had determined in or about March 2002 that the previous accountant had allegedly incorrectly prepared the 1995 to 2000 financial statements and tax returns. This occurred before the Applicant became a partner in the business and before the Applicant's 2002 and subsequent years tax returns were due;
- 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 her from filing her 2002 to 2005 tax returns and remitting the amount owing by the statutory deadlines; and
- 5) A taxpayer's choice of which accountant to consult (if any), how they keep their accounting records, the timeliness with which they file their returns and pay the amounts owing are all factors within the taxpayer's control.

ISSUES

[15] The Applicant submits the following issue on this application:

- 1) Both the first and second level fairness officers failed to act in accordance to their duties under procedural fairness to address all the reasons that the Applicant submitted in the request.

STATUTORY PROVISIONS

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

<p>12.1) There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable</p> <p>Services, etc., to be rendered</p> <p>(a) any amount received by the taxpayer in the year in the course of a business</p> <p>(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</p> <p>(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;</p>	<p>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 année d'imposition, celles des sommes suivantes qui sont applicables :</p> <p>Services à rendre</p> <p>a) les sommes reçues au cours de l'année par le contribuable dans le cours des activités d'une entreprise :</p> <p>(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,</p> <p>(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</p>
---	--

marchandises ont été livrées à un client;

Amounts receivable

(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 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

(i) the day on which the account in respect of the services was rendered, and

(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;

Sommes à recevoir

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 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) le jour où a été remis le compte à l'égard des 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

(a) the taxpayer or person filing the return

(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

(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

(b) the assessment,

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) le contribuable ou la personne produisant la déclaration :

(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) 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) la cotisation est établie

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

(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,

(ii) is made as a consequence of the assessment or reassessment pursuant to this paragraph or subsection 152(6) of tax payable by another taxpayer,

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

(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

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) 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) est établie par suite de l'établissement, en application du présent paragraphe ou du paragraphe (6), d'une cotisation ou d'une nouvelle cotisation concernant l'impôt payable par un autre contribuable,

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

(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

account of the Canadian business, and the documentation in support of which is kept in Canada), or

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

(iv) est établie par suite d'un paiement supplémentaire ou d'un remboursement d'impôt sur le revenu ou sur les bénéfices effectué au 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(8) For the purpose of applying this section (other than subsections (4) and (5)),

163.2(8) Les règles suivantes s'appliquent dans le cadre du présent article, sauf les paragraphes (4) et (5):

- | | |
|--|---|
| <p>(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</p> | <p>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 :</p> |
| <p>(i) one or more planning activities that are in respect of a particular arrangement, entity, plan, property or scheme, or</p> | <p>(i) une ou plusieurs activités de planification qui se rapportent à une entité donnée ou à un arrangement, bien, mécanisme, plan ou régime donné,</p> |
| <p>(ii) a valuation activity that is in respect of a particular property or service; and</p> | <p>(ii) une activité d'évaluation qui se rapporte à un bien ou service donné;</p> |
| <p>(b) for greater certainty, a particular arrangement, entity, plan, property or scheme includes an arrangement, an entity, a plan, a property or a scheme in respect of which</p> | <p>b) il est entendu qu'une entité donnée ou un arrangement, bien, mécanisme, plan ou régime donné comprend une entité, un arrangement, un bien, un mécanisme, un plan ou un régime relativement auquel, selon le cas :</p> |
| <p>(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,</p> | <p>(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,</p> |
| <p>(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</p> | <p>(ii) un avis d'émission visant des actions accréditatives doit être présenté au ministre par l'effet du paragraphe 66(12.68),</p> |
| <p>(iii) one of the main purposes</p> | <p>(iii) l'un des principaux objets</p> |

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.

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.

STANDARD OF REVIEW

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

[18] 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.

[19] 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.

[20] 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, legal and factual error, bad faith and bias issues, 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.”

[21] The Applicant also raises procedural fairness, legal and factual error, bias and bad faith issues.

[22] The standard of review for procedural fairness issues is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1. For legal error and bias I have also applied a correctness standard. See *Uluk v. Canada (Minister of Citizenship and Immigration)*, [2009] F.C.J. No. 149 (F.C.); and *Lai v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 476 (F.C.)

ARGUMENTS

The Applicant

[23] The Applicant relies upon the arguments and authorities put forward by her husband in T-1158-08 as they relate to her application. Both applications were heard and argued together.

The Respondent

The Minister Considered All Relevant Factors

[24] 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 her second fairness request which is the Decision under review.

[25] The Respondent states that in denying the Applicant's request for interest and penalty relief for 2002 to 2005 the Minister properly determined that there were no extraordinary circumstances beyond the Applicant's control that prevented her from filing her tax returns on the basis that:

- 1) During the 2002 to 2005 taxation year the Applicant continued to operate her business as a partnership with Andrew, her husband, and the business continued to file its GST returns annually. However, the Applicant failed to explain why she did not file her tax returns in a timely manner in those years;
- 2) The Applicant had adequate time to acquire another accountant's services or to prepare her 2002 to 2005 tax returns herself and to file these returns and pay any

amounts owing on time. The Applicant and her husband determined in or about March 2002, that the previous accountant had allegedly incorrectly prepared their financial statements and tax returns. This occurred before the Applicant's 2002 and subsequent years tax returns were due;

- 3) Dissatisfaction with a previous accountant or incorrect financial statements prepared by the Applicant's accountant are not extraordinary circumstances beyond the Applicant's control that prevented her from filing her 2002 to 2005 tax returns and remitting the amounts owing by the statutory deadlines;
- 4) A taxpayer's choice of which accountant to consult (if any), how they keep their accounting records, the timeliness with which they file their returns and pay the amounts owing are all factors within the taxpayer's control;
- 5) The Minister did consider the Applicant's submission that she filed her 2002 to 2005 returns late because she was trying to correct the alleged fraudulent errors made by her tax preparers. However, the Minister determined this was not something that prevented the Applicant from filing her returns on time;
- 6) CRA did not provide the Applicant with advice about her personal income tax filings and the April 21, 2008 reassessments of the Applicant's 2002 to 2005 taxation years did not constitute advice from the CRA;
- 7) The Minister did consider the Applicant's submissions in her first level request that she allegedly suffered from emotional and mental distress. However, the Minister still determined that this did not prevent the Applicant from filing her 2002 to 2005 tax returns on time;

- 8) In the Applicant's second level request, which is the Decision under review, the Applicant states only that she was currently experiencing emotional distress but did not indicate that she had suffered emotional distress at the time she was required to file her 2002 to 2005 tax returns; and
- 9) Prior to becoming a partner of the company, the Applicant was a T4 employee and had never been assessed a late filing penalty.

[26] The Respondent states that, because she continued to operate her business in 2002 to 2005, it was reasonable for the Minister to conclude that the Applicant's alleged emotional distress did not prevent her from complying with the Act.

[27] 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 their tax obligations: *Young v. Canada*, [1997] F.C.J. No. 1680 (F.C.T.D.) at paragraphs 13, 19, 20 and 24-26.

[28] The Respondent contends that it was reasonable for the Minister to deny the Applicant's request, even though she allegedly suffered from emotional distress, because she allowed an extraordinary period of time to elapse before rectifying her tax situation. The Applicant's 2002 to 2004 returns were due in June 2003, 2004 and 2005, but were not filed until on or about January 3, 2007. The Applicant's 2005 return was due on June 15, 2006, but it was not filed until on or about December 6, 2006.

[29] 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

[30] 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. The Respondent notes that the Minister did not provide incorrect advice to the Applicant. CRA did not provide the Applicant with advice about her personal income tax filings and the April 21, 2008 reassessments of the Applicant's 2002 to 2005 taxation years did not constitute advice from CRA.

[31] 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.

[32] The Respondent concludes on this issue that the Applicant's record provides no evidence 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

[33] 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, as well as applying the Guidelines in the exercise of his discretion. The Minister did not treat the Guidelines as binding.

[34] The Respondent concludes that there is no evidence that the Minister made his Decision in bad faith, ignored relevant facts or considered irrelevant facts. The Minister acted fairly and reasonably and considered 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 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.

[35] 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 conclusion that he reached.

Therefore, the court should not interfere with the Minister's Decision. The Respondent requests that the application be dismissed with costs.

ANALYSIS

[36] The Applicant's application for judicial review was heard in conjunction with her husband's application on T-1158-08 in Victoria on June 11, 2009. They both represented themselves and there is significant overlap in the points they raise. I am satisfied that, in conjunction with her husband, the Applicant has been able to present her case before the Court with clarity and conviction.

[37] I have reviewed the Applicant's arguments and evidence in detail and I believe that each point she raises is appropriately answered by the Respondent.

Relevant Factors

[38] After reviewing the record, it appears to me that the Minister's decision to deny the Applicant interest and penalty relief was reasonable because the Applicant failed to demonstrate that, due to factors beyond her control, she was prevented from filing her 2002 to 2005 tax returns and from remitting the amounts owing by the statutory deadlines.

[39] The record reveals that the Minister considered all relevant factors and addressed all of the reasons and submissions submitted by the Applicant at the second level.

[40] I am also in agreement with the Respondent that, in denying the Applicant's request for interest and penalty relief for 2002 to 2005, the Minister properly determined that there were no extraordinary circumstances beyond the Applicant's control that prevented her from filing her tax returns on the basis that:

- a) During the 2002 to 2005 taxation years the Applicant continued to operate her business as a partnership with her husband and the business continued to file its GST returns annually; however, the Applicant failed to explain why she did not file her tax returns in a timely manner in those years;
- b) The Applicant had adequate time to acquire another accountant's services, or to prepare her 2002 to 2005 tax returns herself, and to file those returns and pay any amounts owing on time because the Applicant and her husband determined in or about March 2002, that the previous accountant had allegedly incorrectly prepared their financial statements and tax returns. This occurred before the Applicant's 2002 and subsequent years tax returns were due;
- c) 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 her from filing her 2002 to 2005 tax returns and remitting the amounts owing by the statutory deadlines;
- d) A taxpayer's choice of which accountant to consult (if any), how she keeps her accounting records, the timeliness by which she files her returns and the timeliness by which she pays the amounts owing are all factors within the taxpayer's control;

- e) The Minister did consider the Applicant's submission that she filed her 2002 to 2005 returns late because she was trying to correct the alleged fraudulent errors made by her tax preparers; however, the Minister determined this was not something that prevented the Applicant from filing her returns on time;
- f) CRA did not provide the Applicant with advice about her personal income tax filings and the April 21, 2008 reassessments of the Applicant's 2002 to 2005 taxation years did not constitute advice from the CRA;
- g) The Minister did consider the Applicant's submission in her first level request that she allegedly suffered from emotional and mental distress; however, the Minister still reasonably determined that this did not prevent the Applicant from filing her 2002 to 2005 tax returns on time;
- h) In the Applicant's second level request, which is the Decision under review, the Applicant stated only that she was currently experiencing emotional distress but did not indicate that she had suffered emotional distress at the time she was required to file her 2002 to 2005 tax returns; and
- i) Prior to becoming a partner of the company, the Applicant was a T4 employee and had never been assessed a late filing penalty.

[41] The record also shows that Officer Jacks did review the first level fairness decision materials and Officer Green's conclusions. However, it is clear that Officer Jacks undertook her own independent and detailed review to arrive at her conclusion to deny the Applicant's request.

[42] In my view, it was reasonable for the Minister to conclude that, even if the Applicant had suffered from emotional distress, this did not prevent her from complying with the Act because she continued to operate her Business in 2002 to 2005.

[43] It was not unreasonable for the Minister to deny the Applicant's request, even if she had suffered from emotional distress, because she allowed an extraordinary period of time to elapse before rectifying her tax situation. The Applicant's 2002 to 2004 returns were due in June 2003, 2004 and 2005 respectively, but she did not file these returns until on or about January 3, 2007. The Applicant's 2005 return was due on June 15, 2006 but she did not file it until on or about December 6, 2006.

Natural Justice and Procedural Fairness

[44] I can find nothing in the record to support the Applicant's assertion that the Minister failed to observe principles of natural justice, procedural fairness or any other procedure.

[45] Also, I can find nothing in the record to show bad faith, or evidence that the Minister based his Decision on irrelevant facts or erred in law.

[46] In my view, the Minister did not provide incorrect advice to the Applicant. CRA did not provide the Applicant with advice about her personal income tax filings and the April 21, 2008

reassessments of the Applicant's 2002 to 2005 taxation years did not constitute advice from the CRA.

[47] Also, I can find nothing in the record to show that the Minister failed to follow CRA's procedural guidelines.

[48] The IC 07-1 Guidelines advise the taxpayer that she 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.

[49] I can also find no evidence that would give an informed person a reasonable apprehension of bias.

Fettering of Discretion

[50] In my view, 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.

Conclusions

[51] In the end, the Applicant simply disagrees with the Minister's Decision and has sought to frame that disagreement under a wide variety of legal concepts in an attempt to convince the Court that the Decision should be set aside. Disagreement with a decision does not make it unreasonable within the meaning of *Dunsmuir* and it does not make it procedurally unfair or biased. The Minister gave the Applicant a full opportunity to present her case but could not agree to the waiver requests. Ample reasons were given to support and justify the Decision.

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-1470-08

STYLE OF CAUSE: *KELLY UGRO*

v.

THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Victoria, B.C.

DATE OF HEARING: June 11, 2009

**REASONS FOR JUDGMENT
And JUDGMENT:** RUSSELL J.

DATED: AUGUST 12, 2009

WRITTEN REPRESENTATIONS BY:

Ms. Kelly Ugro (Self-represented) FOR THE APPLICANT

Johanna Russell FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ms. Kelly Ugro FOR THE APPLICANT
Victoria, B.C.

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada