

Federal Court



Cour fédérale

Date: 20110106

Docket: T-1150-09

Citation: 2011 FC 11

Ottawa, Ontario, January 6, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DOUGLAS CAINE

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

APPLICATION

[1] This is an application for judicial review of a decision of Canada Revenue Agency (CRA/Minister) dated June 15, 2009 (Decision) that was a response to the Applicant's request for a discretionary review by CRA of the Applicant's 1997, 1998, 1999 and 2000 taxation years.

[2] In the Decision, CRA decreased professional revenues by \$27,156 for 1997, by \$12,565 for 1999, and by \$34,041 for 2000. The CRA increased professional revenues by \$28,168 for 1998. The

CRA disallowed the Applicant's adjustment requests to increase repair and maintenance expenses by \$9,600 in 1998 and by \$15,000 in 2000. The CRA allowed the deduction of professional fees in 1998 in the amount of \$1,203 but disallowed any further deductions for professional fees in 1999 and 2000.

BACKGROUND

[3] On October 2, 2007, the Applicant filed a T1 Adjustment Request along with supporting documentation for his 1997, 1998, 1999 and 2000 taxation years (First Request).

[4] The CRA communicated to the Applicant by letter dated September 18, 2008, that his adjustment requests for his 1997, 1998, 1999 and 2000 taxation years had been denied with the exception of the allowance of an increase in legal expenses in the amount of \$6,706 for the 1999 taxation year.

[5] By letter dated January 6, 2009 (Second Request), the Applicant, by his counsel, asked the CRA for an independent review of the decision of the CRA. In this letter the Applicant amended his T1 Adjustment Request for the taxation years 1997, 1998, 1999 and 2000 to increase the requested reduction to his professional income for those years.

[6] A Taxpayer Relief Request Report, dated June 8, 2009, was prepared by Mr. Shafik Popat, Auditor, and approved by Mr. Jim Powell, Team Leader, both of the CRA.

[7] In making the decision with respect to the Applicant's Second Request, the following documentation was reviewed and considered by the Minister's delegate, Don Scarcello, Director of the London Tax Services Office:

- a. The Applicant's Second Request, dated January 6, 2009, and attachments;
- b. The Taxpayer Relief Request Report, dated June 8, 2009;
- c. The CRA working papers of Shafik Popat, Auditor, dated March 18, 2009, with attachments; and
- d. CRA Information Circular IC-07-1 "Taxpayer Relief Provisions".

[8] After reviewing the documents set out above and considering the guidelines and factors set out in Information Circular IC-07-1 and the relevant sections of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), the CRA made the decision to allow the Applicant's Second Request in part and allow the following adjustments to his income as follows:

	1997	1998	1999	2000	1997	1998	1999	2000
Business Revenue	\$-53,632	-\$7112	+\$7294	+\$11,971	- \$27,156	+\$28,168	- \$12,565	- \$34,041
Maintenance And Repairs		+\$9600		+\$15,000		Nil		Nil
Legal and Accounting Fees		+\$1203	+\$51,811	+\$25,203		+\$1203	Nil	Nil

[9] The Applicant was advised of the CRA's decision to allow, in part, his Second Request and the reasons for that decision by letter dated June 15, 2009.

[10] By Notice of Application dated July 15, 2009, the Applicant brought an application in the Federal Court for judicial review of the Decision of the Minister dated June 15, 2009.

[11] Shafik Popat of the CRA was the auditor responsible for processing the adjustments to the Applicant's 1997, 1998, 1999 and 2000 taxation years provided for in the June 15, 2009 Decision of the Minister. Mr. Popat learned on March 26, 2010 that the adjustments to the Applicant's 1997 and 1998 taxation years could not be processed, as the request for the adjustments was made on January 6, 2009, more than ten calendar years after the end of the 1997 and 1998 taxation years.

[12] Mr. Popat informed the Applicant by letter dated May 18, 2010, that no adjustments to his 1997 and 1998 taxation year could be made because of the operation of the ten-year limitation in subsection 152(4.2) of the Act.

[13] The Applicant practised dentistry with Dr. Sears at premises known as 175 Albert Street, London, Ontario, from February 2, 1987.

[14] The building at 175 Albert Street was purchased in December 1986 by Dr. Sears and the Applicant but subsequently, in 1991, title to 175 Albert Street was transferred to Seca Management Inc., the shares of which were owned 50/50 by the Applicant's spouse and Dr. Sears's spouse.

[15] Problems developed in the relationship between the Applicant and Dr. Sears with the resulting departure of Dr. Sears from 175 Albert Street on November 19, 1999.

[16] Following the departure of Dr. Sears from 175 Albert Street, Dr. and Mrs. Sears commenced legal proceedings against Seca Management Inc., the Applicant and the Applicant's spouse, Mrs. Caine.

[17] The Applicant incurred significant legal and accounting expenses due to the legal proceedings brought by Dr. and Mrs. Sears.

[18] In addition, the Applicant incurred expenses for repairs and maintenance to the property at 175 Albert Street, which he says were necessary to allow him to operate his dental practice from those premises, and which expenses he says he had to incur personally due to Dr. Sears's refusal to contribute to them.

[19] These legal and accounting expenses and repairs and maintenance expenses have been disallowed by CRA as confirmed by the Decision, which is the subject matter of this Application for judicial review.

THE DECISION

[20] The Decision of June 15, 2009 notes that its review of the Applicant's tax returns for 1997, 1998, 1999 and 2000 was undertaken independent of the prior reviews. All matters requested in the Applicant's submissions were reviewed and considered, and the Decision was based on the findings arising from the review and on paragraphs 18(1)(a) and 18(1)(h) of the Act.

[21] The CRA made adjustments to the Applicant's professional revenue for the period in question.

[22] The CRA then considered the requested increase for repairs and maintenance for 1998 and 2000 under paragraph 18(1)(a) of the Act. It acknowledged the Applicant's evidence that:

1. the expenses were paid by the Applicant;
2. he incurred these expenses to keep the property safe for business operations;
3. the expenses of the building were to be shared by the Applicant and Dr. Sears; and
4. Dr. Sears was unwilling to contribute to the expenses in question.

[23] The CRA stated that, as part of its review, it must determine whether a reasonable person at arm's length would have undertaken the same repairs to continue the business or whether that person would have looked to the landlord to effect the repairs. To that end, it considered, among others, the following facts:

1. In 1998 the property was owned by Seca Management Inc.;
2. The shareholders of Seca Management Inc. were the Applicant's spouse (50%) and the spouse of Dr. Sears (50%);
3. Under the Act, the relationship between the Applicant and his spouse is considered to be at non-arms length;
4. There was no leasing agreement between the Applicant, Dr. Sears and Seca Management Inc., which makes it impossible to review the responsibilities of each party in the matter of such repairs;

5. The repairs were related to interior and exterior beautification or to overall repairs of the building;
6. There are other apartments in the building;
7. The repairs undertaken were material in amount.

[24] The CRA found that the nature of the total repairs was not related to the Applicant's business operations, and that the Applicant paid for the repairs due to his relationship with the shareholder of Seca Management Inc. (his spouse). Absent a relationship with the shareholder, a reasonable person would not have undertaken the material amount of repairs as noted and would in most circumstances have looked to the landlord to undertake these repairs. Therefore, the CRA concluded that the amount was not directly related to the Applicant's business and therefore not incurred to earn income as required under paragraph 18(1)(a) of the Act.

[25] Finally, the CRA turned its attention to the requested increase for professional fees for 1998, 1999 and 2000. Some amounts claimed were allowed under paragraph 18(1)(a) of the Act, and others were not. The CRA noted that the claimed amounts mostly related to legal and accounting services provided regarding litigation between Dr. Sears and Seca Management Inc. It also acknowledged the Applicant's arguments that failure to obtain these legal or accounting services would have resulted in a negative impact upon his business.

[26] The CRA stated that the deductibility of any expenses under paragraph 18(1)(a) is determined by the activity that results in a claim made and the connection of this activity to the

business activity. In the Applicant's case, the legal proceedings were related to matters with Seca Management Inc. and not because of any matter related to the operation of the Applicant's business. Even if he had not been engaged in his professional activities he would nonetheless have paid legal fees to defend himself against the charges made by Dr. Sears and therefore the expenses would not have been deductible under the Act.

[27] Moreover, the fees do not constitute expenses normally incurred by other dentists. The eventual impact on his dental practice in the event of a loss in the legal dispute or of no defence to the claim in the future is too remote to justify the requested deduction. There was no material risk directly related to the Applicant's business, as it appears that the fees incurred by the Applicant were on behalf the Seca Management Inc. and his spouse.

ISSUES RAISED

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

- a. What is the standard of review?
- b. Should the Decision be set aside because it is unreasonable?

RELEVANT STATUTORY PROVISIONS

[29] The following provisions of the *Income Tax Act* are applicable in these proceedings:

18. (1) In computing the income of a taxpayer from a business or property no

18. (1) Dans le calcul du revenu du contribuable tiré d'une entreprise ou d'un bien,

deduction shall be made in respect of

les éléments suivants ne sont pas déductibles :

(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

a) les dépenses, sauf dans la mesure où elles ont été engagées ou effectuées par le contribuable en vue de tirer un revenu de l'entreprise ou du bien;

(b) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part;

b) une dépense en capital, une perte en capital ou un remplacement de capital, un paiement à titre de capital ou une provision pour amortissement, désuétude ou épuisement, sauf ce qui est expressément permis par la présente partie;

...

...

(h) personal or living expenses of the taxpayer, other than travel expenses incurred by the taxpayer while away from home in the course of carrying on the taxpayer's business;

h) le montant des frais personnels ou de subsistance du contribuable — à l'exception des frais de déplacement engagés par celui-ci dans le cadre de l'exploitation de son entreprise pendant qu'il était absent de chez lui;

...

...

152. (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the

152. (4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier, autre qu'une fiducie, ou fiducie testamentaire — pour une année d'imposition le

<p>taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,</p>	<p>remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :</p>
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<p>(a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and</p>	<p>a) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;</p>
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<p>(b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.</p>	<p>b) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.</p>
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[30] The following provisions of the *Federal Courts Act* are applicable to these proceedings:

<p>18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied</p>	<p>18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est</p>
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that the federal board, commission or other tribunal	convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrépassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

STANDARD OF REVIEW

[31] Both sides agree that the standard of review applicable in this case is reasonableness. I concur.

[32] Subsection 152(4.2) of the Act gives the Minister discretion to reassess tax, interest or penalties beyond the normal three-year reassessment period if a taxpayer requests the Minister make such a determination within ten years after the end of the taxation year in question.

[33] Subsection 152(4.2) of the Act forms part of the taxpayer relief provisions, formerly referred to as the fairness provisions. The Minister's discretion is broad under the relief provisions. The Act and its regulations are silent as to what criteria are to be used by the Minister in exercising his discretion. In these circumstances, the Minister may use any criteria he chooses, as long as he abides by a general duty to act fairly in accordance with the rules of procedural fairness as developed in administrative law.

The Fairness Guidelines

[34] The Minister has created guidelines to facilitate the exercise of his discretion under subsection 152(4.2) of the Act. These guidelines are entitled IC-07-1 "Taxpayer Relief Provisions". Although the Minister can formulate these general policy guidelines, he cannot fetter his discretion by treating the guidelines as binding and excluding all other relevant reasons for exercising his discretion. Each fairness request is considered on its merits.

[35] Part IV of IC-07-1 is entitled "Guidelines for Refunds or Reduction in Amounts Payable Beyond the Normal Three-Year Period" and sets out some of the factors that are considered by the CRA in deciding whether to reassess a taxation year beyond the three-year limitation period.

[36] The Guidelines provide that the CRA will reassess to issue a refund or reduce the amount owing under subsection 152(4.2) of the Act if it is satisfied that:

- a. The refund or reduction would have been made if the return or request had been filed or made on time;
- b. The requested assessment is correct in law; and
- c. The refund or reduction has not been previously allowed.

The Grounds of Review

[37] The grounds for judicial review are set out in subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[38] A reviewing court should consider whether the discretion was "... exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere." See *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pages 7-8.

[39] The Court's review in this case is limited to the manner in which the CRA exercised its discretion. The reviewing Court is not called upon to exercise the discretion conferred upon the Minister or to substitute its own decision for that of the Minister. The Court should not say that the Minister is wrong merely because the Court would have exercised the discretion differently.

The Standard of Review

[40] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, held that a 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.

[41] The Federal Court of Appeal has previously determined that the applicable standard of review for a discretionary decision of the Minister under the taxpayer relief provisions is reasonableness. See *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153 at paragraphs 6-7.

[42] In light of the Supreme Court of Canada's decision in *Dunsmuir*, above, and the previous jurisprudence of this Court, I find the standard of review applicable to the issues raised by the Applicant 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. See *Dunsmuir*, above, at paragraph 47. Put another way, the Court should intervene only 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.”

ARGUMENTS

[43] The Applicant incurred significant legal and accounting expenses due to the legal proceedings brought by Dr. and Mrs. Sears.

[44] In addition, the Applicant incurred expenses for repairs and maintenance to 175 Albert Street, which expenses were necessary to allow him to operate his dental practice from those premises and which expenses the Applicant says he had to incur personally due to Dr. Sears’s refusal to contribute to them.

[45] These legal and accounting expenses and repairs and maintenance expenses have been disallowed by CRA as confirmed by the Decision, which is the subject matter of this application for judicial review.

[46] The Applicant says that, in rendering its Decision to deny the deductibility of the professional fees and repair and maintenance expenses, CRA has failed to consider or to give sufficient weight to relevant facts, including the significance of maintaining the Applicant’s practice and the detrimental impact that moving the practice at 175 Albert Street would have had upon the Applicant’s income.

[47] The Applicant says that the CRA's failure to consider, or to give sufficient weight to, relevant evidence is plainly seen and therefore unreasonable, leaving no doubt that the Decision is defective. Specifically, the CRA in considering whether to allow the professional fee expenses and repairs and maintenance expenses failed to consider relevant criteria, including: the importance of staying at 175 Albert Street in order to avoid incurring the significant costs of moving and jeopardizing the established dental business that the Applicant created; the excellent location with free parking for patients; the Applicant's significant leasehold improvements; the naming of the Applicant in the Notice of Application brought by Gerald and Jocelyn Sears against Seca Management Inc., the Applicant and Mrs. Caine; and the Applicant's need to defend himself in this Application, given that his dental business was firmly established at its present location and that part of the relief requested included the sale of the building at 175 Albert Street, which would have significantly impacted on the Applicant's dental business.

The Respondent

The Decision Is Reasonable

[48] The Respondent says that the Decision was entirely reasonable and the Applicant's record discloses no evidence that would suggest otherwise.

[49] In reaching its Decision, the CRA completed a detailed review of the Applicant's request for T1 adjustments to his 1997 to 2000 taxation years and of the documents and submissions that the Applicant provided in support of his fairness request.

[50] The CRA can grant an adjustment to a taxpayer's tax return and tax payable if the requested assessment is correct in law. After a thorough review of all materials and submissions made by the Applicant, and a review of the relevant sections of the Act, the CRA determined that the expenses the Applicant wished to deduct were not expenses of the business but were personal expenses and therefore would not have been deductible under the Act.

[51] The CRA's Decision, as contained in the letter dated June 15, 2009, provided a detailed explanation as to why only partial adjustments to the Applicant's 1997 to 2000 taxation years would be allowed.

[52] The Respondent says that it was entirely reasonable for the CRA to deny the Applicant's request, given that the expenses that the Applicant requested to deduct from business income were not expenses of his business and would not have been allowed by the CRA had the Applicant made the deductions in his original T1 returns for the years 1997 to 2000.

The Minister Observed the Principles of Natural Justice and Procedural Fairness

[53] 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.

[54] The Applicant's record provides no evidence of bad faith nor evidence that the Minister based his decision on irrelevant facts or erred in law.

[55] In addition, the Applicant's record provides no evidence that the Minister failed to follow CRA's procedural guidelines.

[56] The Minister did not fetter his discretion by considering himself bound by his own guidelines and policy. He 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.

Adjustment Requested for 1997 and 1998 Taxation Years Made After the Ten-Year Deadline

[57] Pursuant to subsection 152(4.2) of the Act, the CRA is not permitted to reassess taxation years where the request to do so is made on or before the day that is ten calendar years after the end of that taxation year. The Applicant's request for the adjustments to his 1997 and 1998 taxation years was made on January 6, 2009, more than ten calendar years after the end of the 1997 and 1998 taxation years. Therefore, the CRA's amendment to his Decision contained in the May 18, 2010 letter to the Applicant was reasonable and correct in law.

Conclusion

[58] The Respondent contends that there is no evidence that the CRA made the Decision in bad faith, ignored relevant facts or considered irrelevant facts. The CRA acted fairly and reasonably, considering all of the submissions made by the Applicant and all of the relevant factors before him.

The CRA acted reasonably in only partially reassessing the Applicant's taxation years beyond the normal reassessment period.

[59] The Applicant has failed to demonstrate that the Decision of the CRA meets any of the grounds set out in subsection 18.1(4) of the *Federal Courts Act* that would justify intervention by this Court, and therefore the application should be dismissed.

ANALYSIS

[60] The Applicant argues that, in denying the deductibility of professional fees and repair and maintenance expenses, the CRA “has failed to consider, or to give sufficient weight to relevant facts ...”.

[61] The facts which the Applicant says the CRA either overlooked or failed to weigh appropriately are as follows:

Specifically, the Minister in considering whether to allow the professional fee expenses and repairs and maintenance expenses failed to consider relevant criteria, including the importance of staying at 175 Albert Street in order to avoid significant costs of moving and jeopardizing the established dental business that [the Applicant] created; that the location is an excellent location with free parking for patients; that [the Applicant] made significant leasehold improvements; that [the Applicant] had been named in the Notice of Application brought by Gerald and Jocelyn Sears against Seca Management Inc., [the Applicant] and Mrs. Caine; and that [the Applicant] needed to defend himself in this Application given that his dental business was firmly established there and part of the relief requested included that the building at 175 Albert Street be sold

which would have significantly impacted on [the Applicant's] dental business.

[62] There is nothing in the Decision to suggest that the CRA overlooked the factors specified by the Applicant in the application before me. The CRA completed a detailed review of the Applicant's request for T1 adjustments for the 1997, 1998, 1999 and 2000 taxation years as well as the documentation and submissions provided by the Applicant in support of his fairness application. The Decision itself also makes clear that the CRA understood the Applicant's situation and had sympathy for the predicament in which he had found himself with regard to Dr. Sears.

[63] At the heart of the dispute between the parties is the CRA's contention that, as regards the repairs and maintenance expenses to 175 Albert Street, what the Applicant did was incur expenses on behalf of the landlord. The argument is that a taxpayer cannot obtain tax deductions in a situation where a reasonable person, dealing at arms length with a landlord, would not have incurred those expenses. If the landlord fails to make the repairs, the taxpayer should not seek a tax deduction instead of seeking to recover expenses against the landlord. Expenses incurred on behalf of a landlord are not allowable as deductions under the Act. In other words, the CRA says that the Applicant was simply asking the CRA, and is now asking the Court, to ignore the existence of the management company that was set up by the Applicant and Dr. Sears as a way of structuring their business.

[64] The Applicant, on the other hand, says that the CRA overlooked the reality of what he faced when his relationship with Dr. Sears broke down and he had to take action to repair and maintain the building at 175 Albert Street.

[65] Neither party has provided the Court with any guiding authority on this point.

[66] The CRA states that it was the obligation of the corporation, as landlord, to pay for these repairs. Whatever Dr. Caine's reasons for paying for the repairs – whether because they needed to be effected in a timely manner and, due to the ongoing Seca Management litigation, a speedy resolution of the matter was unlikely; or because, as the CRA found, the Applicant is married to a 50 percent shareholder of the corporate landlord – he chose to take on that expense despite the fact that it rightly belonged to someone else.

[67] My own review of the case law suggests that the CRA's Decision embodies the right approach. There is a long line of cases that warn courts against drawing aside, or "lifting," the corporate veil. *Steven G. Meredith v. Her Majesty the Queen*, 2002 DTC 7190 at paragraphs 11 and 12, Justice Robert Déary of the Federal Court of Appeal found that the lower court had erred in looking "beyond the corporate entity itself to assess the applicant's actions." He observed:

[12] Lifting the corporate veil is contrary to long-established principles of corporate law. Absent an allegation that the corporation constitutes a 'sham' or a vehicle for wrongdoing on the part of putative shareholders, or statutory authorisation to do so, a court must respect the legal relationships created by a taxpayer (see *Salomon v. Salomon & Co.*, [1897] A.C. 22; *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2). A court cannot re-characterize the bona fide relationships on the basis of

what it deems to be the economic realities underlying those relationships (see *Continental Bank Leasing Corp. v. The Queen* [98 DTC 6505] , [1998] 2 S.C.R. 298; *Shell Canada Ltd. v. The Queen* [99 DTC 5669], [1999] 3 S.C.R. 622; *Ludco Enterprises Limited v. the Queen* [2001 DTC 5505] , 2001 SCC 62 at para. 51). It follows, therefore, that the Judge erred in law by inquiring into the economic realities of the relationship as between Stem and Meredith, when he was not authorised by statute or common law to do so. [my emphasis]

[68] The CRA found that the relationship between the Applicant and one of the shareholders of Seca Management was not arms length since the Applicant's spouse holds 50 percent of the shares in the corporation. As Justice Arthur Stone observed in the Federal Court of Appeal decision in *Wishing Star Fishing Co. v. B.C. Baron*, [1988] 2 F.C. 325, [1987] F.C.J. No. 1149 (QL) at paragraph 14, where relationships are close:

[It is] tempting ... to disregard separate corporate existence and to analyze an act in terms of the individual. In the day-to-day business affairs of a corporation, that way of proceeding may create no difficulty. The same cannot be said, however, as a matter of strict law. The individual and the corporation are separate and distinct legal persons (*Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.)), and any failure to appreciate that distinction can only lead to confusion and to unforeseen legal consequences."

[69] In my view, this quotation describes quite well the somewhat fluid business arrangement between Drs. Caine and Sears and their relationship with Seca Management with respect to sharing expenses and day-to-day business affairs. That is perhaps because the parties did not fully realize and respect the corporation as a separate legal person.

[70] In the instant case, the Applicant established a corporation for the benefits it would provide him. Later, when the burdens outweighed the benefits, he chose to disregard the corporate structure,

believing that, given the economic realities of his dilemma, his actions were justified. He asks this Court to recognize these economic realities and find in his favour. However, as the Federal Court of Appeal has said, “a court cannot re-characterize the bona fide relationships on the basis of what it deems to be the economic realities underlying those relationships.” The Applicant has provided no authority for doing so. He must take the burdens with the benefits. Based on my review of the jurisprudence, the CRA Decision falls within the acceptable range as defined by *Dunsmuir*.

[71] What the Applicant is really asking the Court to do in this application is to re-weigh the evidence and reach a conclusion that favours the Applicant. The Court cannot do this.

[72] The Court cannot exercise its own discretion and substitute its opinion for that of the CRA, even if the Court would have exercised its discretion differently. See *Maple Lodge Farms*, above, at paragraphs 5-7.

[73] The Decision provides the “justification, transparency and intelligibility” demanded by *Dunsmuir*, above, and it “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[74] The CRA decided that the repair and maintenance expenses which the Applicant wished to deduct for 1998 were not expenses of his dental business but were personal expenses that were not deductible under the Act. They were, in fact, expenses incurred on behalf of the landlord.

[75] This may seem counter-intuitive to the Applicant, but the reasons clearly provide the justification. As regards the repairs and maintenance to the building at 175 Albert Street, the CRA concluded that “the repairs were related to the interior and exterior beautification or to overall repairs of the building including the loft and the attic,” there were “other apartments in the building,” the Applicant “paid for the repairs due to [his] relationship with the shareholder ([his] spouse) of SECA Management Inc.,” and a “reasonable person would not have undertaken the material amount of repairs as noted and would in most circumstances have looked to the landlord to undertake these repairs.” In other words, looking at the documentation and findings, it was reasonable to conclude that “the amount was not directly related to your business and therefore not incurred to earn income as required under S 18(1)(a) of the I.T.A.”

[76] As regards the year 2000, a similar justification supports the CRA’s conclusions that “the amount of repairs undertaken is material in nature and they are not only confined to the operations of the business under your control.” In addition, the CRA found it “reasonable to conclude that an arm’s length person would not undertake repairs of such a nature and would have looked to the landlord for repairs of this nature.”

[77] As regards the professional fees, the evidence showed that the amounts claimed by the Applicant “mostly relate to legal and accounting services provided regarding litigation between Dr. Sears and Seca Management Inc.”

[78] These expenses were disallowed because the Applicant was

mentioned in the claim due to [his] spousal relationship with the shareholder of Seca Management Inc. or because of arrangements between [the Applicant] and Dr. Sears in matters related to the operations of Seca Management Inc. and not because of any matter related to the operation of your business. It therefore appears that the focus of the dispute in the claim is on Seca Management Inc.

[79] The expenses would not have been deductible pursuant to paragraph 18(1)(b) of the Act because, even if the Applicant had not been engaged in running his dental business, he would have had to pay the legal and accounting fees to defend himself against the charges made by Dr. Sears. As regards paragraph 18(1)(a) of the Act, the fees were not of a nature to constitute expenses normally incurred by others involved in a similar profession and the “eventual impact on your dental practice in the event of a loss in the dispute or of no defence to the claim in the future is too remote to justify deduction under S 18(1)(a) of the I.T.A..”

[80] While it is possible to argue and disagree with these conclusions, as the Applicant has, I do not think that they fall outside of the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above.

[81] Once again, the Applicant says that, notwithstanding the nature of the claim made by Dr. Sears, he was named as a party to the application and he had to pay professional fees to defend himself in a situation where one of the remedies requested was the winding up of the management company and the distribution of the property on the building at 175 Albert Street. He says that the CRA overlooked the fact that it was crucial to the Applicant’s business that he retain his dental

practice in the building. However, I do not think this fact was overlooked. I think the Applicant is asking the Court to re-weigh evidence and the factors that were examined.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is dismissed with costs to the Respondent.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1150-09

STYLE OF CAUSE: DOUGLAS CAINE

- and - Applicant

CANADA REVENUE AGENCY

Respondent

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 13, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

DATED: January 6, 2011

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