Federal Court  Cour fédérale

Date: 20220323

Docket: T-1199-18

Citation: 2022 FC 393

Toronto, Ontario, March 23, 2022

PRESENT: Madam Justice Go

BETWEEN:

ONTARIO ADDICTION TREATMENT CENTRES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC JUDGMENT AND REASONS

(Confidential Judgment and Reasons issued March 23, 2022)

I. Preliminary Issue

[1] As a preliminary point, pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], the appropriate respondent in this case is the Attorney General of Canada and

not the Minister of National Revenue [Minister]. The style of cause has accordingly been amended.

II. Overview

[2] The Applicant, the Ontario Addiction Treatment Centres [OATC], was founded in 1995 by Drs. Jeffrey Dalter and Michael Varenbut to provide treatments for opioid and other addictions.

[3] In September 2009, the Applicant requested a ruling from the Canada Revenue Agency [CRA] on whether certain cartridge-based reagents used in drug testing [the test kits] were zero-rated under the *Excise Tax Act* (R.S.C., 1985, c. E-15) [*ETA*], and therefore exempt from GST/HST pursuant to a July 20, 2007 Tax Court of Canada decision, *Centre Hospitalier Le Gardeur v The Queen*, 2007 TCC 425 [*Le Gardeur*]. The Applicant retained KPMG LLP [KPMG] to represent them in their ruling request.

[4] By a letter dated August 5, 2014, the CRA affirmed that the test kits were exempt from GST/HST (or "zero-rated") and that a rebate request could be made within two years after the amount was paid. The two-year limitation effectively barred the Applicant from receiving rebates for any GST/HST paid outside of that period.

[5] On behalf of the Applicant, KPMG submitted a request for remission dated September 10, 2014, for just over $1 million paid in GST/HST between 2007 and 2012 [Remission Request]. The Applicant made the request on the basis of what they argued to be CRA error and

delay, as well as similar circumstances as a remission order granted to the Canadian Heritage Garden Foundation [the Foundation]. The Minister rejected the remission request [the Decision].

[6] The Applicant seeks a judicial review of the Decision under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Applicant argues that the Decision was unreasonable, and that the CRA breached procedural fairness by not allowing the Applicant to comment on proposed factual findings or apparent discrepancies before making the Decision.

[7] Case Management Judge Aalto issued a Confidentiality Order dated December 29, 2020, covering the confidential information regarding the Foundation. At the joint request of the parties, the hearing of this application was held in camera to allow the parties to refer to materials that have been made subject to the Confidentiality Order throughout the hearing.

[8] For the reasons set out below, I dismiss the application, as I find the Decision was reasonable and there was no breach of procedural fairness.

III. Background

A. *Factual Context*

Evolution of the CRA's administrative policy regarding *in vitro* diagnostic products

[9] The test kits in question fall under the CRA's policy regarding *in vitro* diagnostic products. This policy has evolved over time. According to the CRA Report to the Headquarters

Remission Committee dated December 12, 2017 [CRA HQ Remission Report] concerning the Applicant's Remission Request:

> An *in vitro* diagnostic product is a composite product, supplied under a single name, that consists of a number of elements, parts or accessories that are used together to fulfill some or all of the product's intended functions. An example of an *in vitro* diagnostic product is a test kit composed of reagents and/or accessories that is used *in vitro* by medical laboratories and hospitals to conduct specific tests with respect to the collection, preparation and examination of specimens taken from the human body. There are thousands of reagent test kits purchased by medical laboratories and hospitals to examine specimens and collect serologic tests of blood groups.

[10] The CRA HQ Remission Report went on to explain that, depending upon its contents and purpose, an *in vitro* diagnostic product may contain a substance that is listed in Schedule D to the *Food and Drugs Act* [*FDA*], which may in turn be zero-rated under the *ETA*. Health Canada's position with respect to these diagnostic test kits is that they satisfy the definition of "drug" in the *FDA* if one of the components of an *in vitro* diagnostic product is a substance that is listed in Schedule D to the *FDA*, and on that basis Health Canada considers that product to be a Schedule D drug.

[11] Prior to 2000, CRA simply adopted Health Canada's determination of a Schedule D drug and considered that product eligible for the zero-rated status for GST/HST purposes under paragraph 2(a) of Part I of Schedule VI to the *ETA*.

[12] Soon, many medical laboratories and hospitals refused to pay the GST/HST on the basis that the *in vitro* diagnostic products they used were zero-rated. As a result of the "widespread and inconsistent tax treatment in the industry", CRA commenced a review of the tax status of *in*

vitro diagnostic products in August 2000. Following the review, CRA reversed its position and stopped endorsing Health Canada's consideration. Instead, CRA's revised administrative position was that such products were not zero-rated. This new administrative policy was to be applied prospectively after March 28, 2001.

[13] Then *Le Gardeur* came along and upended CRA's policy. The Tax Court sided with a hospital which challenged the CRA policy, and found that the core component of the test kit was a single supply of a Schedule D drug, thus qualifying it for GST/HST exemption. Following that decision, certain *in vitro* diagnostic test kits were zero-rated.

[14] Behind the scenes, the CRA disagreed with *Le Gardeur*, but for reasons beyond its control, did not appeal the Tax Court's decision.

[15] In December 2009, the CRA issued GST/HST Notice 248 [Notice 248] as an administrative response to *Le Gardeur*. As explained in the Decision:

> The notice outlined that, effective July 20, 2017, the supply of an *in vitro* diagnostic kit is zero-rated pursuant to paragraph 2(a) of Part I of Schedule VI to the [*ETA*] if it is for use in the diagnosis of a disease in humans and contains one or more of the following substances: monoclonal and polyclonal antibodies; blood and blood derivatives; snake venom; and micro-organisms that are not antibodies. The notice further indicated that this reflected the CRA's interim administrative position with respect to the tax status of *in vitro* diagnostic test kits.
>
> [emphasis added]

[16] Notice 248 was supposed to be a temporary administrative solution, while CRA continued to further refine its position. Since then, numerous ruling requests regarding the tax

status of *in vitro* diagnostic test kits were sent to the Municipalities and Health Care Services Unit of the CRA.

[17] By October 2011, the CRA's Health Care Services Unit was considering four options in relation to the *Le Gardeur* decision: a) to apply it to all *in vitro* diagnostic products; b) to apply it only to *in vitro* diagnostic products used in the diagnosis of a disease or illness (so that tests for drug abuse would not be zero-rated); c) to determine that *in vitro* diagnostic products were not drugs while clarifying the meaning of "drug" for purposes of the *ETA*; or d) to request a legislative amendment in order to stop these products from being zero-rated.

[18] Between October 2011 and August 2014, the CRA's position was that diagnostic test kits for drug abuse were taxable as they did not diagnose a disease. The CRA position changed in August 2014 when several rulings from the Headquarters Remission Committee found that *in vitro* diagnostic products containing *Le Gardeur* ingredients that tested for drugs of abuse were zero-rated. These rulings also contained the disclaimer that the CRA was still reviewing its policy in this regard.

History of the Applicant's Dealings with the CRA

[19] As noted above, the Applicant retained KPMG to request for a ruling, and subsequently for its Remission Request. The Applicant states that in submitting the ruling request, it expected a response within the Minister's service standard of 45 business days (although at the hearing the Applicant acknowledged that the standard applies mainly to regular matters).

[20] The CRA advised KPMG in April 2010 that this was the first request to follow the *Le Gardeur* decision, that the issue was complex and potentially precedent-setting, and that a timeframe for the ruling could not be provided.

[21] Between January 2010 and July 2014, the Applicant and KPMG made over twenty inquiries to the CRA with respect to the ruling request.

[22] In August 2014, the CRA provided its ruling, determining that the test kits were zero-rated. In the following month, the Applicant submitted its Remission Request.

B. *Decision under Review*

[23] The CRA HQ Remission Report issued in December 2017 advised against recommending remission. On May 25, 2018, Mr. Geoff Trueman, the Assistant Commissioner of the CRA Legislative Policy and Regulatory Affairs branch [Assistant Commissioner], issued the Decision, which advised the Applicant that remission could not be recommended.

[24] The CRA rejected the Applicant's arguments about error and delay on the part of CRA. The Decision also found that the remission order granted to the Foundation was made in circumstances unique to that organization and did not provide a precedent for granting relief to the Applicant.

IV. Issues and Standard of Review

[25] The Applicant argues that the Decision is unreasonable on its face and in light of the record. I have grouped the Applicant's arguments about the merits of the decision into the following three issues:

1) Was the Decision unreasonable as it failed to account for CRA error?
2) Was the Decision unreasonable concerning its finding that the Applicant could have filed protective rebate claims?
3) Was the Decision unreasonable as it failed to treat like cases alike?

[26] The Applicant further argues that the Minister breached procedural fairness by failing to seek further submissions from the Applicant.

[27] The parties agree that the standard of review for the merits of the decision is reasonableness, in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], and that questions of procedural fairness require the Court to conduct its own review and determine whether the process satisfied the level of fairness required in all of the circumstances: *Mokrycke v Canada (Attorney General)*, 2020 FC 1027 [*Mokrycke*] at para 40.

[28] Reasonableness is a deferential, but robust, standard of review: *Vavilov*, at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov*, at para 15. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov*, at para 85. Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov*, at paras 88-90, 94, 133-135.

[29] For a decision to be unreasonable, the Applicant must establish the decision contains flaws that are sufficiently central or significant: *Vavilov*, at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov*, at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep": *Vavilov*, at para 100.

V. Analysis

A. *Relevant Legislative Framework and Guidelines*

[30] The Applicant's request was made under s. 23(3) of the *Financial Administration Act*, RSC 1985, c. F-11 [*FAA*], which gives the Minister broad discretion to recommend remission of tax, as follows:

23 (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.	**23 (2)** Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie la remise.

[31] The jurisprudence establishes that a remission order is an extraordinary remedy, highly discretionary, and entitled to significant deference on judicial review: *Fink v Canada (Attorney General)*, 2019 FCA 276 at para 1; *Escape Trailer Industries Inc v Canada (Attorney General)*, 2020 FCA 54 at para 32; *Matthew v Canada (Attorney General)*, 2017 FC 538 at para 5. A remission request requires the Minister to balance multiple factors, and the reviewing court must normally refuse to reweigh these factors: *Waycobah First Nation v Canada (Attorney General)*, 2011 FCA 191 at para 19 [*Waycobah*]; *Twentieth Century Fox Home Entertainment Canada Limited v. Canada (Attorney General)*, 2012 FC 823 at para 36.

[32] The CRA has developed a *"Guide for the Remission of Income Tax, GST/HST, Excise Tax, Excise Duties or FST under the Financial Administration Act"* (October 2014) [Remission Guide]. While recognizing that remission is discretionary and that each case must be considered on its own facts, the Remission Guide sets out four factors that are typically considered: extreme hardship, financial setback coupled with extenuating factors, incorrect action or advice on the part of CRA officials, and unintended results of the legislation: *Jefferson v Canada (Attorney General)*, 2021 FC 658 at para 34; *Meleca v Canada (Attorney General)*, 2020 FC 1159 at para 9.

Issue 1: Was the Decision unreasonable as it failed to account for CRA error?

[33] The Applicant submits that it had been "misled" by the CRA about the time it would take for a ruling to be issued on whether the test kits were exempt from GST/HST, and that it could not have been reasonably expected to claim a rebate until the ruling was issued. The Applicant submits the Decision unreasonably "absolved the CRA of any wrongdoing, discounted the

extensive period of time taken to issue the Ruling, and failed to reconcile OATC's communications with the CRA about timing for the Ruling within the CRA's records."

[34] I begin my analysis with a review of the Applicant's Remission Request. The Applicant did, and understandably so, feel aggrieved by the almost five years the CRA took to consider their ruling request. The Applicant's Remission Request made clear the impact of the delay on its ability to seek timely rebate. In particular, the Applicant stated as the basis of its Remission Request submitted by KPMG the following:

> This request is being made on the basis that because of incorrect departmental action, OATC did not qualify under section 261 of the *ETA* for a rebate of tax paid in error during the Remission Period.

[35] The Remission Request went on to state the grounds for which remission should be recommended, namely:

- There is no evidence of bad faith on the part of OATC in requesting the remission;
- OATC could not have reasonably been expected to initiate timely actions to claim a rebate for the GST/HST given that the Ruling was not issued by the CRA in a timely manner;
- OATC is requesting the remission within a reasonable time after issuance of the Ruling; and
- There is written evidence to substantiate the fact that CRA officials have taken an incorrect action by not issuing the Ruling in a timely manner.

  [emphasis added]

[36] The Remission Request included the communications log created by KPMG detailing the twenty or so requests it made to CRA for status updates. It then concluded with further submissions that formed the basis for their request. The relevant portions of the submissions dealing with the CRA's "incorrect action" stated as follow:

> OATC first filed the Ruling Request on September 2, 2009 and despite over twenty requests for status updates, the Ruling was not issued until August 5, 2014 (i.e. almost five years after the Ruling Request was made).
>
> KPMG and OATC requested updates from the CAR as to the status of the response over twenty times. CRA repeatedly indicated to KPMG or OATC that the Ruling would be issued shortly or within three months from the date of the discussion. OATC's inability to file a rebate application in respect of the Remission Period is solely due to incorrect action on the part of CRA officials arising from significant delays in the issuance of the Ruling.
>
> If the CRA had issued the Ruling in a timely manner, OATC would have filed a rebate application for tax paid in error immediately in respect of the proceeding two years and consequently have been entitled to tax paid in error during the Remission period.
>
> [emphasis added]

[37] The Remission Request then quoted the Remission Guide, arguing that remission be recommended "because CRA officials have taken incorrect action", and adding that "there is written evidence to substantiate the fact that CRA officials have taken incorrect action to the person (or in the absence of written evidence, the facts may be verified by other acceptable means)." No further written evidence was submitted by the Applicant to substantiate its claim regarding CRA officials having taken incorrect action since the filing of its Remission Request.

[38] In short, the "incorrect action" cited in the Remission Request referred to the "significant delays in the issuance of the Ruling" by the CRA officials. The Decision, in my view, appropriately responded to that allegation.

[39] As noted above at para 14, the Decision dealt with this allegation first of all by explaining the CRA's interim administrative position in Notice 248 issued in December 2009 with regard to the tax status of *in vitro* diagnostic test kits.

[40] The Decision then briefly described the evolving CRA policy on *in vitro* diagnostic tests since *Le Gardeur* in 2009. It also explained that at the time when KPMG submitted the ruling request on behalf of OATC, the CRA did not consider testing for drug use eligible for consideration to be zero-rated for GST/HST purposes and that position only changed in August 2014. Thus, while there was delay in the issuing of the ruling, it was necessitated by the process undertaken by the CRA to develop its policy on *in vitro* diagnostic tests.

[41] Next, the Decision addressed the alleged incorrect action regarding significant delays raised by the Applicant in its Remission Request by stating:

> CRA records indicate that the Headquarters official assigned to OATC's ruling request advised KPMG in April 2010 that he was unable to provide an estimated timeframe to issue a GST/HST ruling, since it was the first ruling request following the Le Gardeur decision, and the issue was extremely complex and possibly precedent-setting.

[42] The Decision then concluded:

> With respect to your remission request, I do not equate the length of time taken to issue OATC's ruling with CRA error. CRA officials did not take an incorrect action or provide incorrect advice that would have prevented

> OATC from initiating another timely action to avoid or minimize tax implications. This would have been the filing of protective rebate claims.

[43] In sum, the Applicant grounded its Remission Request based on "significant delays" as the "incorrect action" of the CRA. The Decision dealt with that allegation by laying out the history of its policy regarding *in vitro* products and by directly responding to the Applicant's allegation. Taken as a whole, the Decision reasonably responded to the basis of the Applicant's Remission Request with regard to the CRA's significant delays.

[44] Further, as I have noted above, the CRA's policy on *in vitro* diagnostic tests has evolved over time – and is still going through review. The Applicant's ruling request, according to the CRA, was the first to be considered by the CRA since *Le Gardeur*. Viewed in this context, I agree with the Respondent that the Minister properly balanced the Applicant's circumstances against the broader policy evolution with respect to test kits after the Tax Court of Canada's decision in *Le Gardeur*.

[45] The Applicant takes issue with the Decision misquoting its own official allegedly saying in April 2010 that he was unable to provide an estimated timeframe to issue a ruling because the issue was "extremely complex", when the official actually said the issue was "complex." This argument appears to be one of semantics. Regardless of whether the word "extremely" was used by the CRA official, it did not render the Decision unreasonable by referencing the complexity of the issue involved and by confirming that the Applicant's request was precedent setting.

[46] The Applicant further argues that while CRA records indicate that a rulings officer was already assigned in January 2010 and the case was already designated as complex, this was not communicated to the Applicant. The Applicant's records indicate that the CRA advised KPMG in July 2010 that a response would likely take another two months, in October 2010 that an administrative policy might have to be developed, and again in December 2011 that a draft response was under review and would likely be issued in the next few months. On the other hand, the Applicant argues the CRA's records indicate that the CRA was aware it was a routine, non-priority workload case and had little to do with being precedent-setting, but that delays were due to significant underfunding in the CRA's Health Care Sectors Unit.

[47] I find these submissions have no merit. The Applicant is asking the Court to re-interpret or reweigh the evidence in a way that suits its argument. That simply is not my role to play. In any event, the evidence, examined as a whole, reveals there were multiple factors at play that prolonged the time it took for the CRA to reach a policy position about *in vitro* diagnostic tests. The under-funding of the Health Care Sectors Unit would appear to be one of those factors, but it was by no means the only one. Further, it is not unreasonable for the Assistant Commissioner to refrain from revealing internal staffing and operational issues as reasons for the delay.

[48] In view of the complex and evolving legislative and jurisprudential history of the treatment of *in vitro* diagnostic tests, the evolution of the CRA's own policy on these products, and in light of the basis of the Applicant's Remission Request and the history of communications between the Applicant and the CRA, I find that the Minister reasonably determined that the

length of time taken in issuing the ruling did not equate to incorrect action or advice on the part of the CRA.

[49] My finding that the Decision was reasonable on this front should not be taken as finding that there was no significant delay in the CRA ruling process. That, with respect, is not an issue within my purview.

Issue 2: Was the Decision unreasonable concerning its finding that the Applicant could have filed protective rebate claims?

[50] The Applicant further argues that the Decision does not provide a basis for its conclusion that the Applicant could have filed protective rebate claims. In particular, the Applicant submits that it did not know it could make a protective rebate claim, and that it was never advised this was possible either by the CRA, its bookkeeper, its accountants, or its advisors at KPMG—nor is it aware of any CRA publication addressing the appropriateness of making a protective claim.

[51] The CRA HQ Remission Report stated that "CRA officials did not take an incorrect action or provide incorrect advice that prevented KPMG from initiating another timely action that would have protected OATC", and the Decision stated that "CRA officials did not take an incorrect action or provide incorrect advice that would have prevented OATC from initiating another timely action to avoid or minimize tax implications." However, the Applicant argues it did not allege that CRA prevented it from filing protective rebate claims. The Applicant further argues that the Decision assumes it could have relied on KPMG to file protective rebate claims,

but KPMG was retained only to assist the Applicant with the request for a ruling and had no awareness of the Applicant's compliance activities or of the tax the Applicant had paid.

[52] I note that the Applicant was represented by KPMG throughout the ruling request and the Remission Request since 2009. Further, according to the Affidavit of Dr. Michael Varenbut, one of the founders of OATC, at no time prior to the making of the ruling request, during the process to obtain the ruling, or immediately before receiving the ruling, did KPMG advise the Applicant to claim a rebate of tax paid in error for the products, protectively or otherwise.

[53] With respect to the reasonableness of the Decision, as the Respondent submits and I agree, nothing indicates that the CRA took any action that in any way advised the Applicant not to pursue a rebate or otherwise induced the Applicant from considering this course of action. The fact that the Applicant was not aware of the two-year limit for requesting a rebate, that it did not take steps to find out what limitations or actions may be available to it, and that it did not receive adequate guidance from its bookkeeper or accountant, do not ground a finding of fault on the part of the Minister.

[54] At the hearing, the Applicant raised the additional argument that its request fits squarely within the Remission Guide, citing in support the examples included in the Remission Guide as to circumstances where remission would be appropriate due to incorrect action or advice on the part of CRA officials. I note, however, both of the examples included in the Remission Guide involve individuals acting on ***actual*** advice given by CRA officials which turn out to be wrong, which is not the case here.

[55] I further note that these examples in the CRA Remission Guide were prefaced with the following statement:

> To determine whether reasonable steps have been taken, the person's personal circumstances should be considered. For instance, our expectations may differ for an elderly, severely ill or unsophisticated person.

[56] The Applicant's argument that the Decision did not specifically state its request was refused because its case did not involve "an elderly, severely ill or unsophisticated person" simply has no merit, as this phrase merely serves to highlight the type of personal circumstances that may be considered by the CRA. More importantly, I find that the Assistant Commissioner did refer to the criteria contained in the Remission Guide including: unintended results of the legislation, incorrect action or advice on the part of CRA officials, extreme hardship, or a significant financial set back coupled with an extenuating factor, and determined that none of them apply to the case. The Assistant Commissioner further indicated that he had considered all relevant factors to determine "whether it would be fair, reasonable or otherwise in the public interest to recommend remission", and decided not to. Given all the circumstances of this case, including the personal circumstances of the Applicant, I see no basis to interfere with the Assistant Commissioner's conclusion.

Issue 3: Was the Decision unreasonable as it failed to treat like cases alike?

[57] In its Remission Request, the Applicant argued that remission had been granted to the Foundation in similar circumstances. The Decision stated that the order granting remission to the Foundation was "made in circumstances unique to that organization" and therefore "does not provide a precedent for granting relief to [the Applicant]."

[58] Certain details about the Foundation's remission proceedings have been designated confidential in light of the Confidentiality Order. The order granting remission to the Foundation, as well as an explanatory note are public. The remission order, dated January 30, 2003, states:

> Her Excellency the Governor General in Council, considering that it is in the public interest to do so, on the recommendation of the Minister of National Revenue, pursuant to subsection 23(2)a(l) of the *Financial Administration Act*, hereby remits to the Canadian Heritage Garden Foundation the amount of $21,861.35, representing a rebate of tax paid under Part IX of the *Excise Tax Act* on supplies, on condition that that amount has not been otherwise rebated, credited or remitted.

[59] The explanatory note to the remission order states:

> This Order remits goods and services tax in the amount of $21,861.35, representing a rebate of tax paid to which the Canadian Heritage Garden Foundation became disentitled after failing to apply therefor in a timeley [*sic*] manner owing to the amount of time required to resolve the tax status of the supplies in question.

[60] The Applicant argues that if the Foundation lost its entitlement to a rebate of tax paid due to the time that it took to resolve the tax status of the goods in question, the same reasoning and outcome should apply to the Applicant in light of the Minister's goal of promoting fairness and consistency in decision-making. The Applicant points out that the Decision provides no specific reasons for distinguishing the Foundation's request from that of the Applicant, arguing that like cases ought to be treated alike according to *Vavilov* at para 129.

[61] The Applicant makes several additional arguments which, on the one hand, attempt to draw similarities between its case and that of the Foundation, and on the other, suggesting that the Foundation may have [redacted]

[62] I reject all of the arguments made by the Applicant as they pertain to the Foundation. Just because another entity receives a remission order for the GST/HST rebates does not mean remission is warranted in the Applicant's case. Both the jurisprudence and the CRA policy confirm that remission orders are extraordinary and highly discretionary, and that each case must be assessed in light of the particular facts, taking into consideration the competing interests to determine whether the collection of the tax would be unreasonable, unjust or otherwise not in the public interest: *Waycobath*, at para 18.

[63] As the passage quoted by the Applicant from *Vavilov* also confirmed, administrative decision makers are not bound by their previous decisions and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: *Vavilov* at para 129.

[64] While not binding on me, I note that Case Management Judge Aalto also commented in his direction dated March 30, 2020 on the production of confidential documents regarding the Foundation as follows: [redacted] I agree.

[65] Unlike the case at hand, the circumstances surrounding the Foundation did not appear to involve complex medical/legal issues that were challenged in court or subject to years of internal policy review by the CRA.

[66] The Applicant argues the Foundation has a less compelling case and yet was granted a remission order. The Applicant points to some of the possible reasons as to why that is the case:

[redacted]

[67] Even if the Applicant's speculation was correct about the reasons why a remission order was granted in favour of the Foundation, even though its circumstances were less compelling, it does not mean the Applicant must therefore be granted remission.

[68] One key difference, in my view, is that [redacted] This brings the Foundation case more in line with the type of "incorrect action" on the part of the CRA to ground a remission request, and I agree with the Respondent that this makes the Foundation case distinct from the case at hand.

[69] The Decision demonstrates that the Minister was aware of the Applicant's submission in respect of the Foundation. However, as the Respondent points out, it did not derogate from the

Remission Guide in distinguishing the Foundation decision, as the Remission Guide states that each decision should be reviewed on its own merits.

[70] The Applicant further submits the Decision lacked transparency because it failed to explain why the circumstances were unique to the Foundation. The Applicant argues that there is nothing in law to prohibit the Minister to provide more reasons. I reject the Applicant's argument.

[71] As *Vavilov* confirmed, the approach to reasonableness should account for "the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt.": *Vavilov*, para 90.

[72] Based solely on the publicly available information about the remission order made with respect to the Foundation and the explanatory note that accompanied the order, the Applicant asked that its case be treated in the same fashion by the Minister. The Applicant acknowledges that it did not have any information about the circumstances of the Foundation, yet asserted in its Remission Request that its case was similar to that of the Foundation. All this was done in the Applicant's full knowledge that remission orders are an "extraordinary remedy", highly discretionary and are based on the "personal circumstances" of those seeking relief.

[73] The Decision dealt with the Applicant's submission appropriately, without revealing any confidential information about a third party, by stating that the Foundation's case was unique to their circumstances. These reasons, in my view, appropriately responded to the Applicant's bald assertion, taking into account the legal constraints that the Minister was acting under.

[74] At the hearing, the Applicant further argued it does not know if the Foundation request should have been allowed or if all remission requests should be treated in the same way, but the Minister should "be honest with the taxpayers, and just say we are changing our approach." With respect, the Minister did do just that, by advising the Applicant that the Foundation case "does not provide a precedent for granting relief to OATC."

[75] The Applicant also submits that the Minister was not provided with accurate and complete information about the Foundation, citing a handwritten notation in the CRA HQ Remission Report made by the Assistant Commissioner, and the missing reference to the Foundation in the Minutes of the HQ Remission Committee of December 18, 2017 [Committee Meeting Minutes].

[76] I note that the Committee Meeting Minutes began by referring the reader to the CRA HQ Remission Report for "complete case details", which in turn contained information about the Foundation. I also note this Court's assertion, in *Frank Arthur Investments Inc. v Minister of National Revenue*, 2014 FC 336 at para 38, that the Assistant Commissioner "was not required to personally review all of the documents in the file", and could avail himself of the reports

prepared by the senior rulings officer who was tasked to investigate the issues and prepared a summary report, which was done in this case.

[77] Based on the facts of this case as compared to those in the Foundation case, and in light of the discretionary nature of a remission order, I find it reasonable for the Decision to conclude that the remission order issued for the Foundation was made in circumstances unique to that organization and does not provide a precedent for granting relief to OATC.

Issue 4: Did the Minister breach procedural fairness by failing to seek further submissions?

[78] The Applicant argues that it should have been afforded at least one opportunity to address any proposed factual findings and to comment on any apparent discrepancies in the Minister's understanding of the case before the Decision was made. The Applicant highlights that it had approximately $1 million at stake.

[79] In particular, the Applicant contends that the Minister made adverse findings with respect to the Applicant's ability to initiate timely action to avoid or minimize tax implications by filing protective rebate claims, without an awareness of the Applicant's circumstances, in particular: the CRA's advice to continue paying tax pending the outcome of the rulings request (this argument was not pursued at the hearing, and wisely so); the nature of the limited engagement between the Applicant and KPMG; the lack of advice given to the Applicant by its bookkeeper, its accountant, KPMG, and the CRA; and the absence of any publication on making protective rebate claims.

[80] I note this Court has reiterated in *Peter Easton v Canada Revenue Agency*, 2017 FC 113 at para 55, and many other cases that the Canadian tax system "is based on self assessment" and the onus "is on the taxpayer to know the law and conduct its financial affairs in accordance with the *Act*".

[81] As the Respondent points out, there is a minimal duty of procedural fairness in a request for remission under the *FAA*: *Desgagnés Transarctik Inc v Canada (Attorney General)*, 2014 FCA 14 [*Desgagnés*] at para 35. As well, the Federal Court of Appeal has found that the duty of procedural fairness will have been fulfilled if the decision maker has a summary of the applicant's representations, and that the applicant was entitled only to an adequate, not the optimum, opportunity to inform the decision maker of their case: *Waycobah*, at para 32.

[82] The Respondent submits that the requirements of procedural fairness do not necessarily mean a right to make additional submissions. Citing *Baker*'s reference to legitimate expectations, the Respondent argues that there was nothing in the Remission Guide or any other published materials that would give rise to a reasonable expectation of making further submissions: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, at para 26. The Respondent also cites *Costabile v CCRA*, 2008 FC 943 [*Costabile*] at para 38, in which the Court found that the CRA was not required to seek further information from an applicant requesting a waiver of penalties and interest. In sum, the Respondent concludes that the Minister complied with the requisite degree of procedural fairness due to the Applicant in the context of a highly discretionary decision-making framework.

[83] As the case law confirms, the procedural fairness requirement in a remission request is minimal: *Desgagnés*, at para 25. As Justice Russell noted in *Costabile*, at para 38: "The Applicant was given the opportunity to submit information and documents when he submitted his fairness request. I do not find that the Minister was required to seek further information, documents, or submissions from the Applicant in this case." The same conclusion, in my view, must be reached in this case.

[84] The Applicant was represented by KPMG throughout the process. It made a request in writing with representation by KPMG. It was fully aware of the Remission Guide and specifically referred to it in its Remission Request. KPMG also represented the Applicant with its ruling request. While waiting for the ruling, KPMG made repeated contacts with the CRA to request status updates and to advocate for the Applicant. There was nothing to prevent the Applicant from taking other measures, or making any further submissions, if any, to protect its interests.

[85] The Applicant cites *Mokrycke*, at para 40, to support its position that the Court must be satisfied that the Minister has done what procedural fairness requires. In my view, *Mokrycke* does not assist the Applicant. To start, *Mokrycke* was not decided on the ground of procedural fairness although Justice Norris commented on the issue as the applicant was self-represented and did not appear to be aware of the Remission Guide. That is not the case here. Ultimately, Justice Norris found the decision to refuse remission unreasonable as it failed to take into account the applicant's circumstances – both personal and professional – as to why he was not

able to respond to the CRA audit on time (including the fact that the two accountants retained by the applicant failed to assist him). None of the circumstances in *Mokrycke* apply in this case.

[86] Just as the Applicant cannot fault the CRA for its decision not to seek advice about the possibility of a protective claim, I find the Minister did not breach procedural fairness by not seeking further submissions from the Applicant on this issue before refusing the remission.

[87] Additionally, the Applicant argues that the Minister did not give it a chance to understand the circumstances of the Foundation that would justify a departure from the remission order granted in that case, even though the Minister was permitted to disclose necessary information pursuant to s. 295(5) of the *ETA*. The Respondent makes no submission on this issue.

[88] Subsection 295(5) provides that an official ***may*** provide certain confidential information to any person as may reasonably be regarded as necessary under certain prescribed circumstances. As the Applicant acknowledges, the disclosure requirement is permissive. It therefore does not impose an obligation on the CRA to do so. As I have already concluded, the Minister's conclusion that the circumstances of the Foundation were unique to that organization was reasonable. Under these circumstances, the Applicant has not satisfied that the disclosure they were seeking falls under s. 295(5) of the *ETA*.

[89] Based on all of the above, I find no basis to interfere with the Decision.

[90] The parties will provide submissions on costs by April 30, 2022.

II. Conclusion

[91] The application for judicial review is dismissed with costs.

[92] The appropriate respondent in this case is the Attorney General of Canada and will be amended as such.

JUDGMENT in T-1199-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed with costs.

2. The parties will provide submissions on costs by April 30, 2022.

3. The Respondent shall be amended to the Attorney General of Canada.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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