

**Date: 20080812**

**Docket: T-700-06**

**Citation: 2008 FC 943**

**Ottawa, Ontario, August 12, 2008**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**BRUNO COSTABILE**

**Applicant**

**and**

**CCRA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of the Canada Revenue Agency (CRA) (formerly, the Canada Customs Revenue Agency), dated March 24, 2006 (Decision), denying the Applicant's request to amend his 1999 and 2000 T1 and T2 income tax returns and for a reassessment of those returns pursuant to subsection 152(4.2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) (Act). The Applicant has represented himself throughout in person.

## **BACKGROUND**

[2] The Applicant, Bruno Costabile, is the sole shareholder of two corporations, which he operates out of his residence. As such, the Applicant was required to file T1 returns for his personal income tax and T2 returns for the corporations. After filing returns in April 2000, the Applicant, realizing he had made a number of errors, and sought to amend his returns and have them reassessed by the CRA. The correspondence that occurred between the Applicant and CRA prior to the Applicant's fairness request is lengthy. Ms. Helen Wong, the Fairness Coordinator, Verification & Enforcement, of the Toronto East Tax Services Office of the CRA has provided a detailed account of this correspondence in her affidavit, which is not materially disputed by the Applicant and which I have adopted, in part, below. As explained in my reasons, the Applicant's T2 corporate returns are statute-barred and the Minister does not have the discretion to reassess them, despite the Applicant's request. Thus, I need not outline the correspondence between the Applicant and the CRA regarding the T2 returns.

### **The Applicant's 1999 and 2000 T1 Personal Returns**

[3] The Applicant's 1999 T1 personal return was filed on May 15, 2000 and assessed on June 5, 2000. The Applicant reported a gross business income of \$68,652.00 and a net business income of \$40,003.00. The Applicant submitted an adjustment request on June 27, 2000. The CRA reassessed his return on September 12, 2000, reducing his net business income from \$40,003.00 to \$12,944.00 and allowing a non-capital loss for other years of \$5,700.00, as requested by the Applicant.

[4] The Applicant's 2000 T1 personal return was filed on April 30, 2001 and assessed on May 25, 2001. The Applicant reported a gross business income of \$99,958.00 and a net business income of \$66,541.00. In August 2001, the Applicant submitted an adjustment request for his 2001 T1 return, reducing his net business income from \$66,541.00 to \$13,971.00, and requesting a non-capital loss for other years of \$5000.00. In response to this request, the CRA Audit section reviewed the Applicant's 1999 and 2000 returns and, by letter dated February 6, 2002, the Auditor, Ms. S. Laurin, requested that the Applicant provide his original receipts, documents and information for his 1999 and 2000 T1 returns. The letter also included a detailed list of the documents and information required by the CRA from the Applicant.

[5] On April 24, 2002, after not receiving the requested materials and despite having granted an extension of time to the Applicant, the Auditor sent a letter to the Applicant proposing that his adjustment request for 2000 would be denied and his 1999 return would be reassessed to reinstate the net business income to the amount reported by the Applicant in the original filing. On April 29, 2002, the CRA received receipts for the 1999 and 2000 tax years. As noted in the Auditor's Memorandum to File, the Applicant did not submit all the documents and information requested (including a breakdown of applicable expenses) and, as a result, the expenses claimed by the Applicant could not be reconciled by the receipts provided. Also, the majority of expenses were supported by credit card statements, and a number of the cash receipts provided were for personal items (such as groceries, diapers, baby wipes, clothing, and personal hygiene products).

[6] On April 30, 2002, the Auditor advised the Applicant that the receipts and documents received could not be reconciled to the statement of business activities and that all requested information had not been provided. She further advised that the documentation provided to support the gross business income was not acceptable proof of earnings. The Applicant was given 30 additional days to re-submit the receipts.

[7] The CRA received additional documents from the Applicant on June 3, 2002. On June 13, 2002, the Auditor sent another request for information, explaining that his submission was inadequate and outlining in detail the information that was required.

[8] The Applicant submitted further documents which were received by the CRA on August 19, 2002. On September 12, 2002, the Auditor sent another letter to the Applicant stating that the documents were insufficient to continue with the review. The Applicant was given an additional 15 days to provide the information.

[9] In a telephone conversation between the CRA and the Applicant on October 21, 2002 and confirmed by letter dated November 12, 2002 from the Auditor, the Applicant advised the Department that he owned and operated a corporation known as Personal Group Realty Incorporated. The Auditor also noted that the Applicant owned a second corporation called Energy Labs Inc., which he operated from his principal residence and that, although Energy Labs claimed rental expenses, the Applicant had not reported rental income. The Auditor reviewed the financial statements for both corporations and advised the Applicant that further information was required to

ensure that there had been no duplication of income and expense between his individual and corporate returns.

[10] By letter dated January 28, 2003, the Auditor informed the Applicant that his request to adjust his business income for 2000 was denied, since a determination of his correct net business income could not be made because the Applicant had failed to provide all documentation and information requested of him. As such, the Applicant's T1 return would be reassessed to reinstate the net business income originally filed. However, the Auditor also advised the Applicant that if all documentation was received at a later date, the Department would review the Applicant's return for a possible adjustment.

[11] The CRA received further documentation from the Applicant on February 12, 2003. He was informed by letter dated February 18, 2003 that the information was still inadequate to support his adjustment request.

[12] Consequentially, on February 27, 2003, the Department issued the Applicant's 1999 and 2000 T1 Reassessments. The Applicant's 1999 return was reassessed to reflect his net business income as \$40,003.00, as originally filed. The Applicant's request to reduce his 2000 T1 net business income was denied, but the \$5000.00 non-capital loss of other years was allowed.

[13] The Applicant did not file Notices of Objection against the 1999 and 2000 Reassessments.

[14] After the CRA issued the Reassessments, the Applicant submitted further documents to CRA including business expenses related to his personal T1 income tax for the 1999 and 2000 tax years. By letter dated May 12, 2003, the Auditor advised the Applicant that, since his corporate income tax returns and personal business were related activities, the CRA was unable to determine the applicable income and expenses related to each return until the Applicant's T2 returns were filed. The Auditor also advised the Applicant that the Department would require additional information and documentation in order to review his requested adjustment. The Auditor set out a list of required information and instructions on how it should be submitted in order to be reviewed.

[15] On June 2, 2004, the CRA received the Applicant's amended 2000 T1 return, dated May 4, 2004, requesting further adjustments to his returns to allow a net business loss of \$26,528.00, employment expenses of \$17,022.00, and "Line 236" net loss of \$43,550.00. The Applicant also requested that \$40,000 of this loss be applied to his 1999 T1 return. The Applicant's June 2, 2004 request for adjustments to his 1999 and 2000 returns was reviewed in November 2004. In a letter dated December 6, 2004, the Applicant was advised that since he had not provided documentation that had been requested in the Auditor's letter dated February 18, 2003, no adjustments would be made to his returns.

[16] In June 2005, the Applicant sent another submission to the CRA, apologizing for the delay and submitting further documents that the CRA had previously requested.

[17] On July 7, 2005, Ms. Janine Menard, Team Leader, Verification & Enforcement, sent a letter to the Applicant regarding his 1999 and 2000 amended T1 returns and his 1999 and 2000 corporate returns for one of his companies. The letter stated, in part, "Upon reviewing this information, we have determined that we cannot adjust these returns at this time, as we have not received all of the receipts and information that was requested from you on numerous occasions starting as far back as February 2002."

[18] On July 12, 2005, in a telephone conversation between Ms. Menard and the Applicant, Ms. Menard advised the Applicant of the documents and materials that were required of him in terms of his reassessment requests and informed the Applicant that, if the expenses were not supported, the original assessments could not be changed. According to Ms. Wong's affidavit, the Applicant stated that he did not want to hire an accountant due to the expense and he did not want to sort the receipts himself because it would take too much time. Ms. Menard advised the Applicant that if the submitted receipts were not in an organized, acceptable format, the CRA would return them to him and not consider any adjustment again. The Applicant requested to meet with someone at CRA and Ms. Menard agreed to send the file to the local CRA office once the Applicant submitted the information as requested.

[19] In August 2005, the Applicant submitted his books and records relating to his T1 returns. By this time, his 1999 and 2000 returns were statute-barred.

### **The First Fairness Review**

[20] The Applicant's amended 1999 and 2000 T1 returns and his books and records were referred for a fairness review. By letter dated December 28, 2005, the Applicant's first fairness relief request was denied by Audit Manager Sauv  of the Toronto East Tax Services Office. The letter notes that the Applicant had submitted several different amended returns for his 1999 and 2000 T1 returns making changes to his self-employment income and expenses. As stated in the letter, the receipts and invoices provided by the Applicant were not itemized to substantiate all expenses claimed by the Applicant against his business incomes and, as a result, the Audit Manager found that CRA was not able to reconcile the receipts submitted with the amounts claimed as business expenses for the 1999 and 2000 taxation years. The Audit Manager also noted that, despite numerous requests for "complete information in an orderly fashion," the Applicant's representations were found to be "unorganized." She concluded that the Applicant had failed to provide sufficient documentation to enable the Department to reassess his 1999 and 2000 T1 returns. With respect to his T2 returns, the Audit Manager stated that the Department could not reassess these returns as such reassessments were statute-barred by the Fairness Legislation and no other provisions under the Income Tax Act allowed for such reassessment.

[21] The Applicant requested a review of the first decision. A second level review was conducted by the Director of the Toronto East Services office, Ms. Deborah Danis (the Director). The Applicant's request to adjust his 1999 and 2000 returns was denied. This is the Decision under



review in the present application.

## **DECISION UNDER REVIEW**

### **Second Fairness Review**

[22] The Director upheld the findings of the first review decision and found that fairness relief was not warranted in the Applicant's circumstances based on the following reasons:

- a) Multiple amendments were filed reflecting substantial changes to the Applicant's individual returns and his corporate returns;
- b) The documentation could not be reconciled to the amounts claimed on the Applicant's individual returns and his corporate returns;
- c) Some of the expenses were estimated and not adequately supported by documentation;
- d) The Applicant's reported income and losses over the previous ten years raised doubts regarding his ability to meet his basic needs for living, and the original net income figures the Applicant filed were more reasonable;
- e) The Applicant's reason of marital breakdown as a cause for failing to file the documents earlier was rejected since the audit was commenced years later and there was no prior mention of the issue in the earlier fairness applications;
- f) It was unclear what aspect of the Applicant's submissions related to the T2 returns and which submissions related to the T1 returns; and

- g) There were doubts as to how the Applicant filed accurate amended T1 and T2 returns but “was unable to sort and organize his books and records in a manner that experienced auditors could reconcile and verify.”

## ISSUE

[23] The issue on this application is whether the Minister failed to observe the principles of procedural fairness or erred in law by denying relief under section 152(4.2) of the Act.

## RELEVANT STATUTORY PROVISIONS

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

(a) the amount of any refund to which the taxpayer is entitled at that time for that year, or

**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 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, sur demande du contribuable:

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;

(b) a reduction of an amount payable under this Part by the taxpayer for that year, the Minister may, if application therefor has been made by the taxpayer,

(c) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year, and

(d) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 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.

**164(1.5)** Notwithstanding subsection 164(1), the Minister may, on or after mailing a notice of assessment for a taxation year, refund all or any portion of any overpayment of a taxpayer for the year

(a) if the taxpayer is an individual (other than a trust) or is a testamentary trust and the taxpayer's return of income under this Part for the year was filed on or before the day that is ten calendar years after the end of the taxation year; or

b) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 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.

**164(1.5)** Malgré le paragraphe (1), le ministre peut, à la date de mise à la poste d'un avis de cotisation d'un contribuable pour une année d'imposition, ou après cette date, rembourser tout ou partie d'un paiement en trop par le contribuable pour l'année si, selon le cas :

a) la déclaration de revenu du contribuable — particulier, autre qu'une fiducie, ou fiducie testamentaire — pour l'année en vertu de la présente partie a été produite au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition;

(b) where an assessment or a redetermination was made under subsection 152(4.2) or 220(3.1) or 220(3.4) in respect of the taxpayer.

b) une cotisation a été établie, ou un montant déterminé de nouveau, en application des paragraphes 152(4.2) ou 220(3.1) ou (3.4), à l'égard du contribuable.

## STANDARD OF REVIEW

[24] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, recently collapsed the patent unreasonableness and reasonableness *simpliciter* standards into one standard of reasonableness, leaving now only two standards of review: reasonableness and correctness. As the Supreme Court also stated in that decision, a full assessment of the four factors comprising the standard of review analysis need not be conducted in every case. Instead, where the applicable standard of review is well-settled by past jurisprudence, the reviewing Court may adopt that standard.

[25] In *Lanno v. Canada (Customs & Revenue Agency)*, 2005 FCA 153 [hereinafter *Lanno*], the Federal Court of Appeal held that the applicable standard of review of a fairness decision of the Minister was reasonableness *simpliciter*. This standard has since been applied by this Court when reviewing the Minister's decisions of this kind. In light of *Dunsmuir*, *Lanno* and past jurisprudence of this Court, I am satisfied that the applicable standard of review is reasonableness. With respect, however, to the Applicant's allegation that he was denied an opportunity to discuss the results of the fairness review with the Department, this issue is one of procedural fairness which is a question of

law reviewable on a standard of correctness (*Dunsmuir, supra*). Where a breach of procedural fairness is found, the decision will be set aside.

## **ANALYSIS**

[26] The Applicant challenges the Minister's Decision denying his request to amend his T1 and T2 returns for the 1999 and 2000 taxation years and for a reassessment by the CRA of these returns. As provided by subsection 152(4.2), one of the taxpayer "relief provisions" contained in the Act, the Minister has the authority to assess or reassess an income tax return to give a refund or to apply a refund to amounts owing beyond the three-year normal reassessment period. However, this relief provision applies only to individuals and testamentary trusts. This is clear from the wording of section 152(4.2), which provides that "Notwithstanding subsections 152(4), 152(4.1) and 152(5), for the purpose of determining, at any time after the expiration of the normal reassessment period for a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year..." [emphasis added]. Not all fairness provisions contained in the Act apply only to individuals (other than a trust) and testamentary trusts. For instance, section 220(3.1) and (3.2) apply to all taxpayers. However, since corporations are not included in the wording of section 152(4.2), a corporation cannot apply for a refund for a taxation year more than three years after it has filed its tax report for that year. The Applicant has provided no authority or rationale that would question or counter this position. Consequently, in my view, the 1999 and 2000 T2 returns at issue in this case are statute-barred and the Minister did not have the authority to reassess these years despite a request for such by the Applicant.

[27] With respect to his T1 returns, the Applicant argues that the CRA did not give consideration to certain expenses. He argues that some receipts were not considered because they were void of any stamp indicating whether they were accepted or denied and, where receipts filed as proof of expenses were missing, other proof of payment (such as credit card and bank statements) were provided but were not considered. According to the Applicant, the reviewing officers did not follow or consider the Department's guidelines on reasonable proof of expenses. He also suggests that the expense receipts he submitted were mismanaged and misfiled by the CRA. Finally, the Applicant argues that he was not given an opportunity to discuss the fairness review with the Department.

[28] The Applicant places particular emphasis upon the fact that he submitted adequate proof of income within the time allowed. The Audit Review Report at page 39 of the Respondent's Application record says that the client "has claimed gross income of \$68,652.00." The Applicant says he provided further information and proof of gross income for 1999 from his employers adjusted to \$37,379.51, yet this was never taken into account by CRA who remained obsessed with expenses. In addition, for the 2000 tax year, he claimed gross income of \$11,700.00 (see p. 40 of Respondent's Application Record) but this was not accepted either and the CRA remained only concerned with expenses.

[29] The Respondent says that the Minister did make some adjustments to income, but that adjustments can only be made if the proper documentation is provided. The Applicant was advised concerning what was required and was given every possible opportunity to provide the documentation required to enable the Minister to make adjustments to income.

[30] Having reviewed the record on this point, it is clear that the Minister did consider the information and documents the Applicant submitted with respect to his claimed gross income. The Auditor's Memorandum to File at pages 39 and 40 states the amounts the Applicant first reported as his gross income. At pages 44 through 47, the Auditor also makes reference to the Applicant's submissions and the conversations that took place between the Department and the Applicant regarding his requests to adjust the income reported. For instance, the Memorandum to File reads:

Oct 9 Documentation not received. We have requested documentation to support gross earnings in our original letter sent to client dated Feb. 6, 2002. It has been over 8 months and the client still has not submitted sufficient documentation to support gross earnings...

Oct 17 ... Client has had sufficient time to provide documentation to support gross income. Per review of information previously submitted, client's expenses would be less than original claim...

[...]

Oct 21 Called client. Client stated that he had a record from REMAX for earnings in the 1999 and 2000 tax year. He stated that the earnings were NIL. Client stated that he owned a private business in which he earned income from real estate sales. The business is known as The Personal Group Realty Inc. Client indicates that he received income from this business as well and he believes this is where the problem was. He incurred a capital loss and the amount should have been excluded from his gross earnings in 2000. Explained to client that income and related expenses incurred by the corporation would be corporation costs. He should report income he was paid by the corporation. Client did not really know what was reported and said he was looking into it with accountant....Client stated that he would fax documents received from REMAX and would obtain documentation relating to office in the home expenses. Told client that I would request corporate returns from our records to determine his other source of income.

[...]

Oct 28 Spoke with J. Menard (resource officer). We should contact client to obtain additional information. Appears some income may relate to corporation and some income relates to personal business. We should ask client to provide breakdown of income related to both business and corporation including source and amounts. We should request 2001 corporate financial statements. We are unable to determine gross or net income based on information provided...

[31] The record is clear, in my view, that the Minister considered the further information and proof of gross income submitted by the Applicant but that, as suggested by the Respondent, the Minister could not conduct a proper assessment because the Applicant failed to provide proper documentation.

[32] The Respondent relies on the Ministerial guidelines set out in archived Information Circular IC-92-3, which states that the Minister will exercise his discretion to extend the normal assessing period for individuals or testamentary trusts where the Minister “is satisfied that such a refund or reduction would have been made if the return or request had been filed or made on time, and provided that the necessary assessment is correct by law and has not been previously allowed.”

[33] The Respondent stresses that the Minister’s decision whether or not to grant fairness relief is a discretionary one requiring deference from the Court and that the Applicant has failed to establish that the decision in this case was unreasonable. The Respondent argues that the Applicant did not provide sufficient financial information in support of his request for an administrative review of the decision to deny fairness relief. The Respondent further submits that the Minister observed the principles of procedural fairness and did not err in law in making the Decision.



[34] In my view, the Applicant has failed to establish that the Minister's Decision was unreasonable and I am not convinced that the Minister failed to consider evidence before him when making his determination.

[35] The essence of the Minister's Decision is that the Minister was unable to conduct a proper assessment of the Applicant's returns because the information and documents submitted were both unorganized and incomplete. As a result, the Minister was left with doubts as to the accuracy of the Applicant's amended T1 and T2 returns and, therefore, denied the Applicant's request to amend his returns and refused to conduct a reassessment.

[36] Given the numerous requests for information and the Applicant's failure to provide the information in a manner that would allow the Department to conduct an assessment, I cannot say that the Minister's Decision was unreasonable. The Minister provided the Applicant with a very detailed request for information in the letter to the Applicant dated November 12, 2002. After having not received this information, the Minister solicited further information and documents from the Applicant on a number of subsequent occasions. However, the Applicant failed to provide all the information and documents required.

[37] Finally, the Applicant has taken issue with the fact that there was no opportunity "to discuss the outcome or the reviewing of the fairness order" and submits that he "attempted to advise the department that the incomes were not accurate – to no avail and to justify expenses." In exercising his discretion under subsections 152(4.2) and 220(3.1) of the Act, the Minister has a duty to act

fairly. Although his powers must be exercised according to the rules of procedural fairness, no specific rules of procedural fairness are set out in the Act with respect to applications for relief brought pursuant to the Act.

[38] I must also reject the Applicant's allegations on this issue. 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. Thus, I do not find, on the facts of this case, that the Minister breached the rules of procedural fairness. As such, I must decline to intervene and dismiss the Applicant's application for judicial review.

### **JUDGMENT**

#### **THIS COURT ORDERS AND ADJUDGES that**

- 1. This application for judicial review is dismissed with costs to the CRA.**

“James Russell”

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Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-700-06

**STYLE OF CAUSE:** Bruno Costabile and CCRA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** July 22, 2008

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

**DATED:** August 12, 2008

**APPEARANCES:**

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