Federal Court  Cour fédérale

Date: 20201103

Docket: T-1042-19

Citation: 2020 FC 1027

Ottawa, Ontario, November 3, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

JOHN MOKRYCKE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Section 23(2) of the *Financial Administration Act*, RSC 1985, c F-11 ("*FAA*"), provides that 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 it "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." When warranted, such remission

may be granted by, among other measures, foregoing the collection of the tax or penalty or repaying monies paid to or recovered by the Receiver General: see *FAA*, section 22(4).

[2] In January 2017, John Mokrycke, the applicant, requested remission of taxes, interest and penalties claimed by the Canada Revenue Agency ("CRA") following a reassessment of his taxes for the 2005 and 2006 taxation years.

[3] In a decision dated May 22, 2019, the Assistant Commissioner, Legislative Policy and Regulatory Affairs Branch, Canada Revenue Agency, concluded that remission could not be recommended.

[4] The applicant, who is self-represented, has applied for judicial review of this decision under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. He submits that the decision was made in breach of the requirements of natural justice and procedural fairness and that the Assistant Commissioner committed reviewable errors.

[5] For the reasons that follow, this application must be allowed. In my view, the Assistant Commissioner's decision lacks the hallmarks of reasonableness – namely justification, transparency, and intelligibility – because it fails to engage meaningfully with the main basis of the applicant's request for remission. While it is therefore not necessary to determine whether the process followed in making the decision met the requirements of natural justice or procedural fairness, there is one aspect of that process that nevertheless warrants comment.

II. PRELIMINARY MATTERS

[6] There are two preliminary matters to address at the outset.

[7] First, with the consent of the parties, the style of cause is amended to reflect the proper respondent, the Attorney General of Canada, in accordance with Rule 303(2) of the *Federal Courts Rules*, SOR/98-106.

[8] Second, the applicant's affidavit in support of this application contains information and documentary exhibits that were not before the Assistant Commissioner when he made the decision at issue. The general rule, subject to exceptions that do not apply here, is that only material that was before the original decision maker is admissible on an application for judicial review: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28; and *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paras 7-9. Consequently, the new information and exhibits found in the applicant's affidavit dated August 7, 2019, cannot be relied upon to impugn the Assistant Commissioner's decision. I have not considered that information or those exhibits in assessing the merits of this application.

III. BACKGROUND

[9] The applicant is an architect who practices in Hamilton, Ontario. During the relevant time, he was the principal and sole proprietor of John Mokrycke Architect. The applicant also

generated income by leasing property through another company, CAMUL Building Corporation, of which he was the sole owner.

[10] In late 2008, the CRA conducted an audit of the applicant's personal income tax returns for the 2005 and 2006 taxation years. After examining the applicant's financial books and records, the CRA auditor identified what he determined to be a number of unsubstantiated business expenses that the applicant had claimed as well as unreported income. The conclusion of the audit was stated in a Notice of Reassessment for each taxation year, both dated May 28, 2009. The CRA determined that for the two taxation years combined, the applicant owed $155,223.56, including tax arrears, interest and penalties ("the 2005/2006 debt").

[11] The CRA's audit and reassessment coincided with several other problems in the applicant's personal and professional life. He was embroiled in child custody and spousal support proceedings, two of his mortgages were facing foreclosure, he was suffering from health challenges, and a major building renovation he was responsible for was literally on the brink of collapse. As a result, the applicant relied on tax professionals to respond to the reassessment on his behalf.

[12] The applicant's accountant at the time ("the first accountant") filed Notices of Objection to the reassessment on August 4, 2009. Soon after, however, the first accountant informed the applicant that he was unable to assist further because he was having personal difficulties of his own.

[13] In September 2009, the applicant retained another accountant ("the second accountant") to contest the reassessments. The second accountant obtained the audit working papers from the CRA. In January 2010, the second accountant provided an opinion to the CRA regarding the soundness of the audit's conclusions but he failed to deliver a promised detailed review of the applicant's finances and he did not take any other steps to pursue the objections. The CRA ultimately set a deadline of July 30, 2010, to finalize the objections to the reassessments. This deadline came and went without any further action by the second accountant.

[14] The CRA issued a Notification of Confirmation on August 30, 2010, in respect of the 2005 and 2006 taxation years confirming the reassessed amounts. The covering letter addressed to the applicant noted that if he disagreed with the decision, he could appeal it to the Tax Court of Canada. Information concerning how to pursue such an appeal was included with the letter. The second accountant did not take any action after the applicant forwarded this letter and the Notification of Confirmation to him.

[15] The applicant then began dealing with CRA himself. He reiterated his request for a review of the 2005/2006 debt in numerous communications with CRA representatives. However, he did not immediately file an appeal with the Tax Court.

[16] The applicant's efforts with the CRA were unsuccessful. Correspondence from the Appeal Division of the CRA dated February 16, 2011, stated that the amounts owing had been confirmed and the applicant's file with the Appeal Division had been closed. The correspondence reiterated that the applicant had a right to appeal the CRA's earlier decision to

the Tax Court within certain time limits and set out those limits. The applicant still did not file an appeal with the Tax Court.

[17] Eventually, in late 2012 the applicant re-engaged the first accountant.

[18] The first accountant's renewed efforts to contest the 2005/2006 debt were also unsuccessful. In November 2013, he refiled a Notice of Objection to the 2005 reassessment but the CRA replied that the objection had already been rejected. Once again, the CRA noted that, within certain time limits, an appeal could be pursued in the Tax Court.

[19] Through much of 2014, the first accountant repeatedly informed the CRA that he was preparing an appeal to the Tax Court but needed more time before it would be ready to file. The appeal (along with a request for an extension of time) was not filed until September 2, 2014.

[20] The Tax Court dismissed the application for an extension of time to file the appeal on June 22, 2015.

[21] In a series of submissions to the CRA beginning in December 2015, the first accountant requested relief under the taxpayer relief provisions of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) on the basis that there were errors in the audit and reassessment. This request was originally made in relation to the 2005 taxation year but the 2006 taxation year was added subsequently. The first accountant provided a variety of materials to support his contention that there were errors in the audit and reassessment with respect to both years.

[22] The Adjustments Section refused the request for taxpayer relief in January 2016. The written refusal noted that the applicant's previous objections to the audit had already been rejected. The letter also noted that it appeared that the applicant had "declined to proceed" with an appeal to the Tax Court.

[23] The applicant then retained a lawyer, John H. Loukidelis, to deal with the CRA on his behalf.

[24] By letter dated February 10, 2016, Mr. Loukidelis asked the CRA to reconsider its decision to refuse administrative relief.

[25] In a letter dated April 19, 2016, denying this request, the CRA suggested that the applicant request that the matter be reviewed by way of a remission order.

[26] On January 17, 2017, Mr. Loukidelis requested a remission order on the applicant's behalf, seeking relief of taxes, interest and penalties related to the 2005 and 2006 taxation years.

[27] Mr. Loukidelis argued (with supporting documentation) that the reassessments were inaccurate because, due to circumstances beyond his control, the applicant had not been able to respond effectively to the concerns raised by the auditor or to contest the reassessed amounts. Specifically, the applicant had relied on tax professionals to deal with the matter for him because he was unable to do so at the time. The applicant's first accountant was unable to respond to the audit and the second accountant inexplicably failed to pursue the matter. The applicant was

therefore requesting relief on the basis that, as a result of these circumstances, "in reality, he did not owe the taxes and penalties imposed by the auditor." Mr. Loukidelis explained:

> If he had been able to respond effectively, he would have been able to show that the income and expenses he reported were as filed. He remains able to show that the income and expenses he reported were as filed and that the Reassessments were incorrect.

[28] Further, again due to the circumstances in which he had found himself, the applicant had been unable to pursue a timely appeal to the Tax Court.

[29] Finally, Mr. Loukidelis requested relief on the basis of the applicant's present personal circumstances, including the financial and health difficulties he was experiencing.

[30] As noted above, this request was refused in a decision dated May 22, 2019.

[31] Finally by way of background, the applicant has paid the full amounts owing for the 2005 and 2006 taxation years.

IV. DECISION UNDER REVIEW

[32] As set out above, only the Governor in Council, on the advice of the appropriate Minister, may grant a request to remit a tax or penalty under section 23(2) of the *FAA*. The issue before the decision maker in the present case was whether to recommend remission. If remission was recommended, the request would continue to move forward. If it was not recommended, subject to judicial review, that would be the end of the matter.

[33] Before coming to the Assistant Commissioner for a decision, the matter had been reviewed by the CRA Remission Committee. The committee was chaired by a Manager, Remissions and Delegations Section, Legislative Policy Directorate, Legislative Policy and Regulatory Affairs, Canada Revenue Agency. On March 25, 2019, the manager signed a memo to the Remission Committee regarding the applicant's remission request. After reviewing the background to the matter and examining the merits of the request, the memo concluded that remission was "not recommended as none of the criteria apply and there are no other circumstances which would support relief."

[34] (As will be discussed below, a CRA Remission Guide dated October 2014 deals with many aspects of the determination of requests for remission. Notably, the Guide speaks of "guidelines" as opposed to "criteria", the term used by the manager in her briefing memo. To avoid complicating matters unnecessarily, I am prepared to assume that the manager used the term "criteria" as synonymous with "guideline". I will, accordingly, use the two terms interchangeably here. This is not to suggest that, in another case, there could be a material difference between the meanings of these terms.)

[35] After considering the matter on March 27, 2019, the Remission Committee was likewise of the view that remission was not recommended. No reasons for this decision are recorded.

[36] The Assistant Commissioner agreed with the recommendation of the Remission Committee.

[37] In summary, the Assistant Commissioner rejected the applicant's request for the following principal reasons:

- The applicant submitted that, if he had been able to respond effectively to the audit, he would have been able to show that the income and expenses he reported in his original tax returns were accurate; however, information examined during the remission review did not reveal that the CRA made any error at the audit stage or in reassessing the 2005 and 2006 taxation years. The applicant did not provide any representations in response to the audit proposal and, although he filed a Notice of Objection to the reassessments, he did not provide the information required to support his position. The remission review process should not be used as an additional or parallel step to the objection and appeal processes in place under the *Income Tax Act*.

- The applicant had not presented any evidence in connection with his request for remission that his health difficulties would have rendered him incapable of managing his tax obligations relating to the audit and objection process or from making payments towards his debt to mitigate accruing interest.

- The applicant submitted that his former representatives did not take the required actions on his behalf; however, it was his responsibility to ensure that any tax and filing obligations were met. Further, "[w]hen a taxpayer engages the services of a tax professional who makes an error or omission, any delays or failure on the part of the representatives are matters to be settled between those parties and are not considered extenuating circumstances for the purpose of remission."

V. STANDARD OF REVIEW

[38] There is no dispute in the present case that the substance of the Assistant Commissioner's decision is reviewed on a reasonableness standard.

[39] Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 83). 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). Where reasons for the decision have been given, those reasons should be read in light of the record and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-95). When considering whether a decision is reasonable, "the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The reviewing court must be satisfied that any shortcomings or flaws in the decision are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100). The applicant bears the burden of establishing that the decision is unreasonable.

[40] With respect to an allegation that there has been a breach of the requirements of natural justice or procedural fairness, the reviewing court must conduct its own analysis and provide what it judges to be the right answer to the question of whether the process the decision maker

followed satisfied the level of fairness required in all of the circumstances. This is functionally the same as applying the correctness standard of review: see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 34 and 50; *Vavilov* at para 54; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at paras 33-56; and *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31.

VI. ANALYSIS

A. *The CRA Remission Guide*

[41] Before addressing the merits of the applicant's challenge to the Assistant Commissioner's decision, it is necessary to consider the CRA Remission Guide mentioned above.

[42] Among other things, the Guide sets out the legislative framework for remission requests, the responsibilities of various officials and decision makers, and the procedure that is followed in dealing with remission requests.

[43] Most importantly for present purposes, the Guide also sets out guidelines for CRA decision makers to apply in determining whether to recommend remission in a given case.

[44] The introductory paragraphs of Section III – Applying the Remission Guidelines, state the following:

> Each remission request is considered on its own merits to determine whether collection of the tax or enforcement of the penalty is unreasonable or unjust, or if remission is otherwise in the public interest, in accordance with the broad terms set out in

> section 23 of the *FAA*. To assist CRA officials in that assessment, guidelines have been developed, based upon characteristics common to past cases. These are:
>
> - extreme hardship;
> - financial setback coupled with extenuating factors;
> - incorrect action or advice on the part of CRA officials [footnote omitted]; and
> - unintended results of the legislation.
>
> These guidelines provide a framework within which a remission might be supported. However, they do not necessarily pertain to every circumstance, and there might be other valid reasons that would justify granting a remission order. Good judgment must be exercised at all times and all relevant factors of a case should be taken into consideration, e.g. a person's compliance history, credibility, circumstances, age, and health.

[45] The Guide then goes on to discuss in detail each of the four types of case identified in the bullet point list set out in the preceding paragraph.

[46] Although the Assistant Commissioner's decision is not organized in this fashion, the analysis part of the March 25, 2019, memorandum to the Remission Committee is framed in accordance with the Guide. Under separate headings, the memo addresses each of the four types of case identified in the bullet point list. It concludes that none of the criteria applicable to each of the categories are met in the applicant's case. It also concludes that there are no other circumstances that would warrant relief.

[47] Mr. Loukidelis' January 17, 2017, request on behalf of the applicant was not made expressly in accordance with the framework found in the Guide and followed in the

March 25, 2019, background memo. In my view, however, the principal grounds he advanced in effect combine elements of the second and third types of case identified in the Guide. That is to say, while he did not put it exactly this way, Mr. Loukidelis essentially argued that there was incorrect action on the part of CRA officials, the applicant had acted reasonably given the circumstances in which he had found himself, there were specific extenuating circumstances (the errors and omissions by the tax professionals), and the applicant had suffered financial setbacks such that the collection of the 2005/2006 debt (even if it was not calculated incorrectly) would strain his financial resources unduly. Thus, the parts of the Guide dealing with the second and third bullet points set out above are the most pertinent for present purposes and it is not necessary to consider the guidelines applicable to the other two types of case. In particular, while Mr. Loukidelis did rely on financial hardship, it is clear that the applicant's circumstances did not reach the level of hardship discussed by the Guide under the heading "extreme hardship." Nor is it necessary to consider the discussion of incorrect advice on the part of CRA officials in the Guide or unintended results of the legislation since neither was alleged by the applicant.

[48] Looking first at incorrect action on the part of CRA officials, the Guide states the following:

> Remission may be recommended when a person is required to pay additional tax because CRA officials have taken incorrect action or have provided incorrect advice. Remission will be considered if:
>
> - there is no evidence of bad faith on the part of the person requesting the remission;
>
> - the person could not reasonably have been expected to initiate timely actions to avoid or minimize the tax (or collect and remit the tax, or claim a rebate for GST/HST cases);

> - the person requests a remission within a reasonable time period to enable CRA officials to properly investigate the matter; and
>
> - there is written evidence to substantiate the fact that CRA officials have taken incorrect action or given incorrect advice to the person. In the absence of written evidence, the facts may be verified by other acceptable means.
>
> If CRA officials made an error in assessing tax, the error must have been recognizable as such at the time of the assessment (on the assumption that all relevant facts were known), and not in light of subsequent events, such as a court decision that reverses a standard interpretation upon which the assessment is based. When it is established that an assessment is in error, it must also be shown that the person could not reasonably have been expected to file a waiver or Notice of Objection, or provide new information within the required time limits to resolve the problem through the usual channels. Actions or advice on the part of CRA officials, which may have misled or discouraged a person from taking timely or appropriate action, should be taken into account.
>
> [. . .]
>
> 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.

[49] The Guide does not address whether and, if so, when it might be reasonable to have relied on tax professionals who erred in some way.

[50] Turning to financial setback coupled with extenuating factors, in part the Guide states the following:

> Remission may be recommended in situations where an additional tax related debt would strain a person's limited financial resources. "Financial setback" is less severe than "extreme hardship", and involves determining the significance of the amount of tax involved for a particular person.

> A significant financial setback must be present, as well as at least one extenuating factor, for this guideline to apply. If an extenuating factor other than those described below is considered, it must be reasonable in the circumstances and must clearly relate to the particular remission case.
>
> The two main extenuating factors are:
>
> - circumstances beyond a person's control; and
> - taxpayer error.

[51] In pertinent part, the Guide explains the idea of "circumstances beyond a person's control" as follows:

> These are usually circumstances that apply specifically to a remission requester (e.g. serious illness). Conditions that affect the population as a whole, such as a poor economy, or common events, such as the receipt of a retroactive pay increase as a result of collective bargaining or a successful job classification grievance, are usually not accepted as extenuating factors. However, factors such as a person's financial or personal situation may warrant consideration for remission.

[52] The Guide states the following regarding taxpayer error:

> The fact that a taxpayer has made an error which leads to excess tax is usually not in itself considered an extenuating factor. For example, in the context of the remission guidelines, a misapplication of the legislation (in the absence of incorrect advice on the part of CRA officials) or internal accounting, bookkeeping or computer errors that have led to over-remittance of the GST/HST or overpayments of income tax are not considered to be circumstances beyond a taxpayer's control to warrant granting relief.
>
> However, if there is sufficient evidence indicating that CRA officials should have detected and corrected the error, this may be accepted as an extenuating factor.

[53] The Guide does not address whether and, if so, when errors or omissions by a tax professional could constitute an extenuating circumstance.

[54] Finally, as set out above, the Guide notes that the list of the four common types of case in which remission is requested is not exhaustive. The guidelines "do not necessarily pertain to every circumstance, and there might be other valid reasons that would justify granting a remission order." Not surprisingly, the Guide does not attempt to address every possible case. Rather, it emphasizes that "[g]ood judgment must be exercised at all times and all relevant factors of a case should be taken into consideration, e.g. a person's compliance history, credibility, circumstances, age, and health."

B. *Was there a breach of the requirements of natural justice and procedural fairness?*

[55] The grounds for judicial review set out in the applicant's Notice of Application (dated June 27, 2019) include that the Assistant Commissioner "failed to observe a principle of natural justice, procedural fairness or other procedure that he was required by law to observe." The applicant's Memorandum of Argument (dated November 21, 2019), simply repeats this and the other grounds stated in the Notice of Application without further elaboration.

[56] The Certified Tribunal Record ("CTR") prepared by the CRA pursuant to Rule 317 of the *Federal Courts Rules* was filed on July 17, 2019. The CRA Remission Guide is included in the CTR. Notably, the document is marked "For CRA use only."

[57] Despite the fact that the Guide was available to him before he filed his Memorandum of Fact and Law in November 2019, the applicant did not raise any natural justice or procedural fairness concerns connected with it in his written submissions. In particular, the applicant did not suggest that the requirements of natural justice or procedural fairness were not observed because he (or, more accurately, his lawyer at the time) did not have access to the Guide when the request for remission was submitted and, as a result, did not know the criteria CRA would apply in determining his request for remission. Understandably, the respondent did not address this issue (or any other aspect of natural justice or procedural fairness) in its Memorandum of Fact and Law.

[58] The test for whether to remit a tax or penalty is set out in section 23(2) of the *FAA*: the tax or penalty may be remitted if the collection of the tax or the enforcement of the penalty "is unreasonable or unjust" or if it is "otherwise in the public interest" to remit the tax or penalty. As we have seen above, the CRA has developed criteria or guidelines for the application of these highly discretionary concepts to particular cases. Prior to his remission request being submitted, however, it appears that the CRA had disclosed the applicable criteria to the applicant only partially and, even then, only very broadly. Specifically, in the letter dated April 19, 2016, confirming the decision not to grant administrative relief, the CRA stated:

> May we suggest that you request that the matter be reviewed via a remission order.
>
> The taxpayer (or their representative with suitable authorization or power) can address a request for a remission to the Director of their Tax Services Offices. The taxpayer should clearly explain the circumstances of the case and the reason why he or she thinks remission should be recommended. A copy of all relevant documents or correspondence should be attached.

> If the request is based on grounds of financial hardship or setback, the taxpayer's financial information will be required as well as that of his or her family.

[59] The CRA did not provide the applicant with any other information regarding how it decides requests for remission or what other circumstances besides financial hardship or setback it would consider to be relevant to the merits of such a request.

[60] In view of the fact that the applicant is self-represented, prior to the hearing of this application for judicial review, the Court raised the question of whether the applicant had had fair notice of the criteria the CRA would apply in determining his request for remission. The parties were asked to be prepared to address this issue when the matter was heard.

[61] The applicant advised the Court that, when the remission request was prepared, he himself was unaware of the detailed criteria found in the Guide. I am prepared to accept this representation (although to be fair, the applicant did not address what his lawyer knew at the time). The applicant argues that, if he had been aware of the guidelines, he (through his lawyer) would have framed his request for remission differently, although he did not provide any specifics.

[62] As a result of the somewhat unusual way the issue arose, the respondent did not file any evidence to respond to concerns about natural justice or procedural fairness. Nevertheless, at the hearing counsel for the respondent advised the Court that, while the CRA does not proactively provide the criteria it applies to remission requests, they will be provided upon request. I am also prepared to accept this representation concerning the CRA's usual practice.

[63] Since this application is being allowed on other grounds and the matter must be reconsidered, it is not necessary to determine whether the requirements of natural justice and procedural fairness were met in connection with the decision under review. Nevertheless, and strictly by way of *obiter*, I repeat and adopt a comment made nearly a decade ago by Justice Evans in *Waycobah First Nation v Canada (Attorney General)*, 2011 FCA 191, concerning an earlier version of the Guide:

> Incidentally, I note that the cover page of the guidelines relevant to the present case is marked "For CRA use only". It is, in my view, unfortunate if this means that they are not made available to the public. Applicants for remission, as well as the wider public, ought to have access to the bases on which discretion conferred by subsection 23(2) is exercised (at para 29).

C. *Is the decision unreasonable?*

[64] A remission order is an extraordinary measure (*Internorth Ltd v Canada (National Revenue)*, 2019 FC 574 at para 20). The provision authorizing this measure to be taken makes it clear that this is a highly discretionary determination that takes into account a wide range of considerations (*Waycobah First Nation* at para 21).

[65] In *Vavilov*, the Supreme Court "affirm[ed] the need to develop and strengthen a culture of justification in administrative decision making" (at para 2). The majority held that "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (at para 86, emphasis in original). As well, the "principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties" (*Vavilov* at

para 127). A decision maker's "failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128).

[66] A central argument made by the applicant in his request for remission was that the reassessments for the 2005 and 2006 taxations years were incorrect but, due to circumstances beyond his control, he was unable to take advantage of the usual ways to correct the errors – namely, by objecting to the reassessment or appealing to the Tax Court. If he had been able to do so, he would have been able to demonstrate that there were errors in the 2005 and 2006 reassessments. In other words, the applicant contended that there was incorrect action on the part of the CRA (the conclusions of the 2005 and 2006 reassessments), there were extenuating circumstances to explain why he did not act effectively to correct the errors in the usual ways, and in view of those extenuating circumstances he had acted reasonably.

[67] If the applicant could demonstrate sufficiently compelling extenuating circumstances to explain why the reassessments were not challenged in the usual way, and if he could show that in fact the reassessments are incorrect, it is at least arguable that it would be unreasonable or unjust for Revenue Canada to recover the 2005/2006 debt and that this debt should therefore be remitted under section 23(2) of the *FAA*. However, in rejecting the applicant's argument, the Assistant Commissioner simply took as a given the central premise which the applicant contested – namely, that there is no reason to think that the reassessments for the 2005 and 2006 taxation years are incorrect.

[68] It is incontrovertible that, as a general policy, the remission review process (in the words of the Assistant Commissioner) "should not be used as an additional or parallel step to the objection and appeal processes already in place under the Act to establish an assessment or a reassessment." This principle would presumably carry considerable weight in a case where the party seeking remission had invoked the objection and appeal processes and the reassessed amounts were confirmed. But, standing on its own, it is no answer in a case where the party seeking remission did not invoke those processes effectively and points to extenuating circumstances to explain why not.

[69] The Assistant Commissioner was not required to find the applicant's argument convincing but he was required to address it in a meaningful way. It was unreasonable for the Assistant Commissioner to reject the remission request simply on the basis that the information examined during the remission review "did not reveal that the CRA made any error at the audit stage or in reassessing the 2005 and 2006 tax years" when this was the very point in issue. This logical flaw in the Assistant Commissioner's reasoning undermines the internal rationality of the decision (cf. *Vavilov* at para 104).

[70] The respondent submits that the applicant failed to put his best foot forward in his remission request by not substantiating his claim that there are errors in the 2005 and 2006 reassessments. While this may be so, it is only fair to point out that the applicant's previous attempts to bring such information forward after the reassessments were confirmed had been rebuffed by the CRA. As well, given the Assistant Commissioner's view that, on a remission request, the assessed amounts should be taken as correct, it is unlikely that further filings by the

applicant would have made any difference to the outcome. In any event, on reconsideration, it will be incumbent upon the applicant to put his best foot forward with a complete record to support his request. It will be equally incumbent upon the next decision maker to assess the merits of the applicant's request on the basis of the record he presents and in view of all relevant considerations.

[71] Further, one of the principal considerations the applicant relied on was the failure of the tax professionals who acted for him to deal with the audit or to pursue objections to the reassessments effectively. As noted above, this argument wove together elements of two different categories of case identified in the Guide – namely, incorrect action by the CRA and financial setback coupled with extenuating circumstances. It did so by linking incorrect action by the CRA and extenuating circumstances. Specifically, the applicant maintained that he was particularly dependent on the tax professionals because of his personal circumstances at the time of the audit and thereafter. In the circumstances, it was not unreasonable for him to rely on the tax professionals as completely as he did and to fail to take more effective steps himself. In short, he submitted that the failure of the tax professionals to discharge their responsibilities was an extenuating circumstance warranting remission. The Assistant Commissioner dismissed this contention, stating that when a taxpayer "engages the services of a tax professional who makes an error or omission, any delays or failures on the part of the representatives are matters to be settled between those parties and are not considered extenuating circumstances for the purpose of remission."

[72] This appears to be a matter of policy adopted by the CRA. No doubt there are sound reasons to adopt this policy as a general rule. However, it is unreasonable to treat it as an absolute rule that admits of no exceptions in the remission context, particularly given the broad discretion conferred by section 23(2) of the *FAA*. I do not understand the respondent to suggest otherwise. Rather, the respondent contends that the Assistant Commissioner would have understood that exceptions to this rule could be made in appropriate cases but was not satisfied that one should be made in the applicant's case. I cannot agree. Even if this could be what the Assistant Commissioner thought, it is not what he said in his reasons for not recommending remission. Instead, he simply stated the principle that errors or omissions by tax professionals "are not considered extenuating circumstances for the purpose of remission" and then treated it as a complete answer to the applicant's submission.

[73] As the Guide states, to determine whether a taxpayer took reasonable steps to address an alleged error by the CRA, "the person's personal circumstances should be considered." One of the personal circumstances the applicant relied on was his reliance on tax professionals, who failed to discharge the responsibilities he entrusted to them. This was, according to the applicant, an extenuating circumstance that warranted remission. To the extent that the Assistant Commissioner's reasons reveal how he considered this factor, he appears to have dismissed it as irrelevant. Given the importance to the applicant's request of the question of whether any errors or omissions by the tax professionals who assisted the applicant could constitute an extenuating circumstance or, more broadly, made it unreasonable or unjust to recover the 2005/2006 debt, it was essential that the Assistant Commissioner explain why he concluded that they did not. Once again, the Assistant Commissioner was not required to find the applicant's argument convincing

but, if that argument is to be rejected, the reasons given must explain why. The Assistant Commissioner's reasons do not do this. Since the general rule that the errors or omissions of tax professionals are not considered extenuating circumstances for the purpose of remission admits of exceptions, it is insufficient to simply state the rule without also explaining why an exception should not be made in this case. The failure to give this explanation leaves the decision lacking in justification, transparency and intelligibility.

VII. COSTS

[74] As the successful party, the applicant is entitled to his costs. Since he is self-represented, and since this hearing proceeded by way of videoconference, this would not involve anything beyond the applicant's out-of-pocket expenses in preparing and filing his materials for this application.

[75] In order to bring this matter to an expeditious conclusion, I am fixing the applicant's costs at $250.00 inclusive of any applicable taxes.

VIII. CONCLUSION

[76] For these reasons, the application for judicial review is allowed with costs. The decision of the Assistant Commissioner, Legislative Policy and Regulatory Affairs Branch, Canada Revenue Agency, dated May 22, 2019, is set aside, and the matter is remitted for reconsideration by a different decision maker.

JUDGMENT IN T-1042-19

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to name the Attorney General of Canada as the proper respondent.
2. The application for judicial review is allowed.
3. The decision of the Assistant Commissioner, Legislative Policy and Regulatory Affairs Branch, Canada Revenue Agency, dated May 22, 2019, is set aside, and the matter is remitted for reconsideration by a different decision maker.
4. The applicant is awarded costs in the amount of $250.00 inclusive of any applicable taxes.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1042-19
STYLE OF CAUSE:	JOHN MOKRYCKE v ATTORNEY GENERAL OF CANADA

HEARING HELD BY VIDEOCONFERENCE ON AUGUST 31, 2020 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	NORRIS J.
DATED:	NOVEMBER 3, 2020

APPEARANCES:

John Mokrycke	ON HIS OWN BEHALF
Nancy Arnold Angela Shen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT