Federal Court  Cour fédérale

Date: 20130227

Docket: T-830-08

Citation: 2013 FC 197

Ottawa, Ontario, February 27, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

CHARLES O'HARA

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review of a Tax Payer Relief Review Decision dated April 28, 2008. The Applicant, Mr. Charles O'Hara, had filed a request for tax payer relief pursuant to sections 281.1(1) and (2) of the *Excise Tax Act*, RSC 1985, c E-15 (*ETA*).

[2] While the Canada Revenue Agency (the CRA) determined interest that was charged in respect of Mr. O'Hara's Director's Liability Assessment No. 06692 from July 7, 1997 to August

23, 2005 was to be cancelled, as well as the accrual of interest charged on the assessment from December 5, 2006 to the date of the letter, the CRA held the penalties charged in respect of the original assessment would not be waived.

[3] I conclude the CRA decision is unreasonable for reasons that follow.

Background

[4] The Applicant, Charles O'Hara, was an officer and director of 819636 Ontario Inc. (the "Corporation"). The other officer and director of the Corporation was Nicola DiLorenzo.

[5] The Applicant and DiLorenzo planned the construction of a senior citizens home in Ajax, Ontario through the Corporation. The Applicant and DiLorenzo hired Philip Weinstein (Weinstein), a chartered accountant, to administer the total financial area of the project.

[6] Financing of the project was arranged through Royal Life Insurance Company for which Zurich Indemnity Company (Zurich) was the surety or guarantor. Pursuant to its contractual rights, Zurich appointed monitors to take over the project's finances and took control of the Corporation's bank accounts on April 26, 1991.

[7] The monitors received all of the advances to the Corporation from this date and retained control throughout the assessed period, to the exclusion of the Applicant, DiLorenzo and Weinstein. From July 1992, no cheques issued by the Corporation were signed by the Applicant,

nor did he have the authority to do so. Both the Applicant and DiLorenzo transferred their ownership of the Corporation to Zurich.

[8] The Corporation passed a Banking Resolution in June, 1992 approving Zurich's appointment of a monitor to be the only signing authority with respect to all banking. During the relevant periods, Weinstein continued to do the accounting for the project and made the requests to Ajax Municipal Housing Corporation for the progress advances or draws. Weinstein calculated the amount of draws including the requisite amount for GST. The draw proceeds would go into the bank account over which Zurich, through the monitor, had complete control. The last deposit from the project to the Corporation's account was in September, 1993.

[9] In 1993 and 1994, the Corporation failed to properly remit net tax within the meaning of the ETA. The Applicant alleges the monitors failed to pay the remittances, although they were on occasion asked to do so by Weinstein.

[10] The Applicant and DiLorenzo had abandoned the Corporation's construction contract with Ajax Municipal Housing Corporation in December, 1993, before its completion. Both the Applicant and DiLorenzo were no longer involved with the project after December 1993. The first indication DiLorenzo had that GST had not been paid was in 1996.

[11] On or about June 25, 1997, a Notice of Assessment was issued to the Corporation for the following periods and amounts:

1. The period April 1, 1993 to June 30, 1993 for the amount of $30,333.43 of which $19,498.37 was principal and the balance penalty and interest.

2. The period January 1, 1994 to March 31, 1994 for the amount of $36,832.39 of which $22,745.45 was principal and the balance penalty and interest.

[12] The total amount of the Notice of Assessment was $67,165.82.

[13] DiLorenzo challenged the Notice of Assessment to the Tax Court of Canada [TCC]. On May 16, 2001, the TCC released its decision in *DiLorenzo v Her Majesty the Queen*, [2001] GSTC 67, 2001 GTC 457 [DiLorenzo]. The TCC found that DiLorenzo was not liable for the amount claimed in the Notice of Assessment. The TCC held that DiLorenzo had exercised sufficient due diligence so as to be able to apply the exemption in subsection 323(3) of the *ETA*. During the trial, the Applicant gave evidence as a witness.

[14] The Applicant believed the TCC decision was determinative of his assessment since he and Mr. DiLorenzo were in the same position as directions of the corporation. Since the Applicant had not independently appealed his Notice of Assessment, he was assessed personally as a director of the corporation for the failure to remit GST notwithstanding the TCC decision. The Applicant became aware of the outstanding balance still claimed by the CRA when he called the CRA to follow up on a hold that it had put on his Income Tax refund. The Applicant requested that the Minister waive the interest and penalties that had been assessed pursuant to the assessment. The CRA denied his request.

[15] The Applicant requested an administrative review of the CRA's decision not to grant him relief. The CRA considered the Applicant's request and by letter dated April 28, 2008 advised

the Applicant that CRA was granting him partial interest relief but otherwise denied the Applicant's request that the Minister waive the interest and penalties owing in respect of the assessment.

[16] It is this decision which is the subject of the current judicial review application.

Decision Under Review

[17] The decision under review consists of the letter dated April 28, 2008 from Hank Koudsi, the Assistant Director of Revenue Collections. The Taxpayer Relief Report [TPR] forms a part of the reasons for decision. The TPR is an initial review of an application for Taxpayer Relief and was conducted by a designated officer, Elizabeth Costa.

[18] The TPR begins with a synopsis of the request made by counsel for the Applicant. The TPR notes the request reiterates three of the extenuating circumstances addressed in the first level review and notes the circumstances in the submissions as:

A. *Ignorance of the Law* – Lack of awareness.

B. *Obligation To Inform* – CRA Counsel did not advise during Tax Court proceedings

C. *Debt Would Not Exist* – [Applicant] would have been included in the Tax Court Appeal

[19] The TPR indicates that the outstanding balance pertained to quarterly returns filed for 93-06-30 and 94-03-31. The TPR shows that the company was incorporated on February 8, 1989

and the charter was surrendered on June 26, 1995. The TPR states that the company suffered large losses when real estate prices dropped and contracts fell through.

[20] The debt at issue was certified and the assessments were raised against the Applicant and Nicola DiLorenzo on June 25, 1997. The TPR notes that director Nick DiLorenzo appealed the assessment successfully at the Tax Court of Canada and his assessment was vacated. The TPR states that there was no reply from the Applicant with regards to the assessment.

[21] The TPR indicates that while the assessment against DiLorenzo was vacated by the court, the assessment against the Applicant remained valid. The TPR notes that the assessment was raised for the full amount of the unremitted GST plus penalties and interest at the time of the assessment and that therefore the full amount of the current liability should be collectible from the Applicant.

[22] The TPR then addressed the three circumstances raised in the Applicant's submissions:

Ignorance of the Law – Lack of awareness

[23] The TPR states that ignorance of the law does not constitute an extenuating circumstance that would warrant relief. The TPR notes the onus remained with the directors of a company to ensure trust funds are filed and remitted regardless of appointing a third party to handle these duties.

[24] The TPR also indicates that the Applicant confirmed that he acknowledged receipt of the notice of assessment and states that a copy of the Acknowledgment of Receipt dated July 9, 1997 with the Applicant's signature was included in the docket.

[25] The TPR shows that the Applicant argues that he was unaware that he had to respond to the assessment and thought hat the matter was being dealt with through his co-director. The TPR states that as the Applicant was present at the hearing of the co-director and had an opportunity to review the pleadings or hear the submissions and this would have disclosed only the co-director's name as an appellant. The TPR also states that the Applicant would have had the opportunity to ask the co-director's counsel who could have dispelled any misunderstanding that his assessment was also under appeal.

Obligation to Inform – CRA Counsel did not advise during Tax Court proceedings

[26] The TPR indicates that the Applicant's current counsel was not an authorized representative of the Applicant at the time the co-director was appealing the assessment. The TPR indicates that confidentiality protocol dictated the appropriate actions taken by the Agency.

[27] The TPR states that the onus was on the Applicant to inform himself of the steps to be taken to object or appeal the assessment and there was no evidence submitted that disclosed the Applicant was prevented from taking those steps or that CRA provided misguided information.

Debt Would not Exist – [Applicant] would have been included in the Tax Court Appeal

[28] The TPR indicates that while the Agency had considered the judgment in favour of the co-director, the fact remained that the Applicant was not a co-appellant. The TPR states that under the legislation, directors of a corporation are jointly and severally liable along with the corporation to remit trust funds. The TPR states that as a director, it would be incumbent on the Applicant to be aware of the responsibilities pertaining to trust funds and also be aware of the consequences for non-compliance. The TPR asserts that the Agency acted accordingly under legislation and allowed the Applicant the opportunity to appeal his assessment.

[29] The TPR concluded that the TPR guidelines dictate that the extenuating circumstances must be "beyond the taxpayers control". The TPR found that the submissions failed to demonstrate how the circumstances described were factors beyond the Applicant's control.

[30] The TPR did recommend granting partial relief due to a delay by collections in contacting the Applicant. The TPR found that relief was warranted from July 9, 1997 to August 23, 2005. The TPR noted that the Applicant received and signed for the assessment, but CRA did not collect on it. The TPR stated that the Applicant became aware the outstanding balance was still collectable in August of 2005 when he called about a refund hold on his T1 account.

[31] The TPR also found that due to the delay in review of the administrative request, accrual of interest was recommended from December 5, 2006 to the date of the decision.

The Decision Letter

[32] The Decision Letter dated April 28, 2008 from Mr. Hank Koudsi stated that the Applicant had failed to demonstrate that he was prevented from complying with CRA's requirements due to factors beyond his control. The letter indicates that it was the responsibility of the Applicant to object to or appeal the assessment.

[33] The Decision Letter acknowledges the delay on the part of the CRA in informing the Applicant of the accruing balance on the account, and as such, the accrual of interest charged on the assessment from July 9, 1997 to August 23, 2005 would be cancelled.

[34] The Letter also acknowledges the delay on the part of the CRA to complete the administrative review, and therefore, the accrual of interest charged on the assessment from December 5, 2006 to the date of the letter (April, 28, 2008) would also be cancelled.

[35] The Decision Letter concludes by providing the review process for challenging the decision to the Federal Court.

Relevant Legislation

[36] The *Excise Tax Act*, RSC 1985, c E-15 provides:

280. (1) Subject to this section and section 281, if a person	280. (1) Sous réserve du présent article et de l'article

fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay interest at the prescribed rate on the amount, computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

281, la personne qui ne verse pas ou ne paie pas un montant au receveur général dans le délai prévu par la présente partie est tenue de payer des intérêts sur ce montant, calculés au taux réglementaire pour la période commençant le lendemain de l'expiration du délai et se terminant le jour du versement ou du paiement.

…

…

281.1 (1) The Minister may, on or before the day that is 10 calendar years after the end of a reporting period of a person, or on application by the person on or before that day, waive or cancel interest payable by the person under section 280 on an amount that is required to be remitted or paid by the person under this Part in respect of the reporting period.

281.1 (1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin d'une période de déclaration d'une personne ou sur demande de la personne présentée au plus tard ce jour-là, annuler les intérêts payables par la personne en application de l'article 280 sur tout montant qu'elle est tenue de verser ou de payer en vertu de la présente partie relativement à la période de déclaration, ou y renoncer.

(2) The Minister may, on or before the day that is 10 calendar years after the end of a reporting period of a person, or on application by the person on or before that day, waive or cancel all or any portion of any

(a) penalty that became payable by the person under section 280 before April 1, 2007, in respect of the reporting period; and

(b) penalty payable by the person under section 280.1, 280.11 or 284.01 in respect of a return for the reporting

(2) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin d'une période de déclaration d'une personne ou sur demande de la personne présentée au plus tard ce jour-là, annuler tout ou partie des pénalités ci-après, ou y renoncer :

a) toute pénalité devenue payable par la personne en application de l'article 280 avant le 1er avril 2007 relativement à la période de

period.

déclaration;

b) toute pénalité payable par la personne en application des articles 280.1, 280.11 ou 284.01 relativement à une déclaration pour la période de déclaration.

…

…

323. (1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

323. (1) Les administrateurs d'une personne morale au moment où elle était tenue de verser, comme l'exigent les paragraphes 228(2) ou (2.3), un montant de taxe nette ou, comme l'exige l'article 230.1, un montant au titre d'un remboursement de taxe nette qui lui a été payé ou qui a été déduit d'une somme dont elle est redevable, sont, en cas de défaut par la personne morale, solidairement tenus, avec cette dernière, de payer le montant ainsi que les intérêts et pénalités afférents.

(3) A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

(3) L'administrateur n'encourt pas de responsabilité s'il a agi avec autant de soin, de diligence et de compétence pour prévenir le manquement visé au paragraphe (1) que ne l'aurait fait une personne raisonnablement prudente dans les mêmes circonstances.

[emphasis added]

Issues

[37] The determinative issue arising in this application for judicial review is: Did the decision-maker error in finding that the Applicant had failed to demonstrate that he was prevented from complying with CRA's requirements due to factors beyond his control?

Standard of Review

[38] The Supreme Court of Canada held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. *Dunsmuir* at paras 50 and 53.The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at para 62

[39] In *Litmar Ltd. v Minister of National Revenue*, 2006 FC 635 [*Litmar*] Gauthier J. discussed the standard of review for decisions made under sections 281.1(1) and (2) of the ETA and found that the appropriate standard of review is that of reasonableness. *Litmar* at paras 18-21

Arguments of the Parties

[40] The Applicant submits the decision-maker erred in finding that the Applicant failed to demonstrate that he was prevented from complying with the CRA's requirements due to factors beyond his control.

[41] The Applicant argues that the decision-maker failed to apply the proper test when exercising the discretion provided under the *ETA* to waive penalties and interest, which is afforded under sections 280(1), 281.1(1) and (2). The Applicant submits the decision-maker failed to exercise his statutory discretion in good faith and/or in accordance with the principles of natural justice, and relied upon considerations irrelevant or extraneous to the statutory purpose. The Applicant submits that the decision-maker, by not taking into consideration the forgoing principles, rendered a decision that was unreasonable.

[42] The Respondent submits the Applicant has not identified any actual issues related to a denial of natural justice or procedural fairness. The Respondent submits that the Applicant's position is similar to that of the applicant in *Litmar* which held that a review of decision made under sections 281.1(1) and (2) is to be made on a reasonableness standard.

[43] The Respondent submits that the Applicant alleged that he had no notice of his assessment liability and that the decision in *DiLorenzo* showed that he had acted with due diligence. The Respondent argues that the CRA's decision not to accept the Applicant's allegation that he had had no notice of his assessment liability was reasonable as it had a copy of his signed Acknowledgement of Receipt in its possession. The Respondent also argues that there was no evidence before the decision-maker as to what would have prevented the Applicant from objecting to the assessment.

[44] The Respondent submits the CRA's decision not to waive penalties and further interest on the basis of the *DiLorenzo* decision was reasonable as the Applicant was not a party to that

litigation and the decision was highly fact specific. The Respondent submits the decision was irrelevant to the Applicant's liability to pay interest and penalties as and when required by the *ETA*.

[45] The Respondent notes that the CRA was bound by the deeming provisions found in subsections 299(3) and (4), as well as 323(4) of the *ETA*. These provisions deem an assessment to be valid unless it is vacated by the Minister or the TCC on appeals or objections. The Respondent submits that, in light of the deemed validity of the assessment, the CRA acted reasonably in not accepting the Applicant's request for further interest and penalty relief on the basis of an alleged underlying defect in the assessment. The Respondent submits that if that were the case, the Applicant should have objected to the assessment.

[46] The Respondent submits that although the Applicant has not put this at issue, the CRA also acted reasonably in concluding that it had failed to notify the Applicant of his accruing outstanding balance. The Respondent notes the decision-maker granted the Applicant full relief in respect of the interest that had accrued from the date on which he acknowledged receipt of the notice of assessment to the date he was notified of his outstanding balance. The Respondent submits the CRA also acted reasonably in granting the Applicant additional interest relief in light of its delay in dealing with his request for taxpayer relief.

[47] Finally, the Respondent submits that even if the standard of review in this matter is correctness, the April 28, 2008 decision should still withstand judicial scrutiny. The Respondent submits the CRA has no discretion as to whether to charge interest on outstanding balances. The

Respondent submits that pursuant to s. 280 of the *ETA* a taxpayer must pay the interest at the prescribed rate on any amount they have failed to remit as and when due. The Respondent notes that the assessment is deemed to be valid and the Applicant cannot dispute that he should have remitted his outstanding balance. In light of this, the Respondent submits, the CRA was correct in refusing to waive the interest and penalties levied on a valid assessment just because a taxpayer alleges that if they had objected they may have been successful on a due diligence defence.

Analysis

[48] First, it must be kept in mind that this Court is being asked to determine whether the decision dated April 28, 2008 was reasonable. This Court should not be determining whether the underlying assessment at the heart of this matter is valid or not. As Gauthier J. stated in *Litmar*, this Court has no jurisdiction to judicially review decisions that can be appealed to the TCC, whether or not they have in fact been appealed. *Litmar* at para 17

[49] The Applicant appears to contest the validity of the assessment on the basis that he, like DiLorenzo, was duly diligent. This is a defence pursuant to s. 323 of the ETA. However, it is not up to this Court to determine whether the Applicant exercised due diligence, as his co-director was found to have done. Instead, what this Court is tasked with is determining whether the decision maker failed to observe a principle of natural justice or procedural fairness or whether the decision-maker based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[50] Second, the evidentiary record before this Court is rather sparse. For example, no evidence has been submitted to provide the guidelines or basis upon which the decision-maker was to rely. At page 27 of the Respondent's Record, the Respondent states:

> From March 14, 1994 until January, 2009 the CRA's guidelines in respect of how it would exercise [the discretion to waive or cancel interest or penalties payable pursuant to s. 280 of the ETA] on behalf of the Minister were set out in GST Memorandum 500-3-2-1.

This GST Memorandum 500-3-2-1 has not been provided. As such, the decision itself will guide the analysis of whether the decision-maker considered the appropriate submissions made by the Applicant.

Did the decision-maker error in finding that the Applicant had failed to demonstrate that he was prevented from complying with CRA's requirements due to factors beyond his control?

[51] As a preliminary matter, I am in agreement with the Respondent that the appropriate standard of review is that of reasonableness. I base this on the standard of review analysis conducted by Gauthier J. in *Litmar*.

[52] In the TPR Reasons, the officer concluded the analysis by stating:

> The TPR guidelines dictate that the extenuating circumstances must be "beyond the taxpayers control". The administrative submission has failed to demonstrate how the circumstances described were factors beyond the director's control.

[53] The decision-maker adopted these findings in his Decision Letter:

> After considering all the circumstances of your case, and the information provided, the administrative submission has failed to demonstrate that Mr. O'Hara was prevented from complying with the Canada Revenue Agency's requirements due to factors beyond his control. It was the responsibility of Mr. O'Hara to object or appeal the assessment.

[54] Essentially, the CRA found that the Applicant had not demonstrated the existence of extenuating circumstances beyond the Applicant's control which prevented him from complying with CRA requirements. The Applicant made submissions which the TPR considered under the following three headings: ignorance of the law; obligation to inform; and debt would not exist. In order to determine whether the TPR and the decision-maker, which relied on the TPR reasons, made a reasonable decision, I turn to the Applicant's submissions on the three TPR characterizations and the findings by the CRA.

Ignorance of the Law – Lack of Awareness

[55] The TPR noted that ignorance of the law does not constitute an extenuating circumstance that would warrant relief and that the onus remains with the directors of a corporation to ensure trust funds are filed and remitted regardless of appointing a third party to handle these duties.

[56] While I agree with the TPR's general comments on this matter, this does not take into account the submissions of the Applicant. The Applicant submitted the *DiLorenzo* decision as part of its submissions. In that decision, McArthur J.T.C.C. stated the following:

> All draws from the Ajax Project went into a bank account over which the Appellant had no control – only the monitors had signing authority. The advances were inclusive of GST yet the GST was not paid. The monitors paid the amounts necessary to keep the construction producing advances and paid its own fees. Now the Appellant is being called upon to pay Revenue Canada the GST which was collected but not remitted. I believe a strong argument can be made to the effect that the GST component over which the monitors had control is trust money that cannot be paid to anyone other than Revenue Canada. Be that as it may, the monitor had no legal obligation to remit the GST collected. A monitor, Mr. Doughtery, stated no one told them to remit the GST to Revenue Canada, yet the agreement under which they were working stipulated that the monitor was to pay taxes. I agree that the monitor is not the subject of the assessment and I should not be side-tracked into blaming the monitor. The question is whether the Appellant acted reasonably to assure that GST collected was remitted as envisaged in subsection 323(3). There is no evidence that the Appellant was made aware that there was a GST problem. What proactive steps were undertaken by the Appellant to take him out of the totally passive mode? The Appellant's answer was "I'm not a paper man, I relied absolutely on my chartered accountant, Mr. Weinstein".
>
> Is this due diligence? I believe it is. What more could have been done? He had hired a highly experience [sic] chartered accountant and he had no control over the bank account into which the draws were deposited. In December 1993 when the building was substantially completed, the Appellant and O'Hara notified the Ajax Municipal Housing Corporation that they could no longer honour their contract. There is an assessment for the period from January 1994 to March 1994 when the Appellant no longer was involved in the completion of the Project.
>
> [emphasis added]

[57] While the Applicant was not a party to the *DiLorenzo* case, the Applicant was a director of the Corporation in substantially the same situation as the Appellant DiLorenzo. Some of the facts of the case are specific to DiLorenzo. For example, in considering whether DiLorenzo had

exercised due diligence, the TCC considered DiLorenzo's education and specific role in the Corporation.

[58] However, many of the facts found by the TCC apply equally to both DiLorenzo and the Applicant. The facts surrounding Zurich's control of the Corporation's bank accounts and signing authority would exist just as much for the Applicant as they did for DiLorenzo. The TCC's finding that Weinstein had no control over the bank account into which the draws were deposited applies equally to the Applicant as it did for DiLorenzo.

[59] The TCC found that the monitors in control of the Corporation's accounts did not remit the GST when they ought to have. The TCC also found that this inability to remit the GST was beyond the powers of DiLorenzo. The Applicant submitted that he was in the same situation and that he was unable to comply with CRA requirements as a result.

[60] In my view, the CRA failed to consider these particular facts. The only portion of the TPR Reasons which specifically address the DiLorenzo decision submitted by the Applicant is found in the "Debt would not exist" category:

> While the Agency has considered the Judgement, the fact remains the director was not a co-appellant. Under legislation, the directors of a corporation are jointly and severally liable along with the corporation to remit trust funds. As a director, it would be incumbent upon the director to be aware of the responsibilities pertaining to trust funds and also be aware of the consequences for non-compliance.

[61] The Applicant did not submit that he was unaware of the requirement to pay GST; the Applicant submitted that the *DiLorenzo* decision demonstrated that circumstances beyond his control lead to the taxes not being remitted and ultimately to the assessment made. The CRA had the TCC findings before it when writing the TPR. In my view, the CRA erred by finding that the Applicant had not demonstrated circumstances beyond the Applicant's control which prevented the Applicant from complying with CRA regulations when it did not address the findings made by McArthur J.T.C.C.

[62] This failure to consider the factual findings in *DiLorenzo* equates to an erroneous finding of fact made without regard for the material before it. I would grant the application on this matter alone.

Obligation to Inform – CRA Counsel did not advise during Tax Court Proceedings

[63] I also conclude the CRA erred in its consideration of the Applicant's submission that the CRA ought to have informed the Applicant of the accrued assessment during the TCC proceedings in the DiLorenzo hearings.

[64] In its analysis on this issue, the TPR Reasons state the following:

> The current authorized rep was not an authorized rep when the co-director was appealing the assessment. Confidentiality protocol dictated the appropriate actions taken by the Agency and/or its agents. There is no supporting documentation that would substantiate the current authorized rep. as being on file as an authorized representative for Mr. O'Hara during the Hearings (Apr 17, 19?, Jun 6/00 and Jan 10/01) and the Judgement (May 16/01). The onus is on the director to inform himself of the steps to be

> taken to object or appeal the assessment and there is no evidence submitted that discloses that Mr. O'Hara was prevented from taking those steps or that CRA provided misguided information.

[65] In my view, such a finding, based on the submissions of the Applicant and the TPR Reasons, is unreasonable for the following reasons.

[66] In the TPR reasons, the CRA does not provide why the CRA counsel could not or would not inform the Applicant of the outstanding assessment levied against the Applicant. Instead, the TPR Reasons focus on why the CRA was unable to discuss the matter with the Applicant's current counsel.

[67] My understanding of the Applicant's submissions on this point was that the counsel for the CRA in the DiLorenzo case ought to have informed the Applicant that the assessment against the Applicant was not part and parcel of DiLorenzo's appeal. I am not questioning whether the counsel for the CRA was required to do so or not. That is something that the CRA was asked to determine. However, according to the TPR Reasons, it appears that the CRA misconstrued what was being asked of it. The question was not that whether counsel for the CRA ought to have informed DiLorenzo's counsel, but whether counsel for the CRA ought to have informed the Applicant himself. An analysis along these lines would preclude the necessity of the CRA considering the appropriate confidentiality protocol discussed in the TPR Reasons.

[68] The CRA failed to address the argument submitted by the Applicant and conducted an analysis that did not fit with what ought to have been considered. This is an error and the matter ought to be remitted to be reconsidered.

[69] The above reasons are sufficient to determine this matter and I do not propose to consider the third argument put forth by the Applicant: that the debt would not exist had the applicant been included in appeal. That would be a matter for the TCC.

[70] The Parties are agreed costs of $1,380.00 to be awarded to the successful side.

Conclusion

[71] I conclude the CRA erred in determining that the Applicant had not demonstrated that he was prevented form complying with CRA requirements due to factors beyond his control.

[72] I would send the matter back for re-determination by another decision maker with a direction that the CRA consider the findings in *DiLorenzo* in making the re-determination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The decision under review is quashed and the matter is returned to be re-determined by a different decision maker.
2. The re-determination is to have regard to the findings in the Tax Court decision in *DiLorenzo v Her Majesty the Queen*, [2001] GSTC 67, 2001 GTC 457.
3. Costs are in favour of the Applicant in the amount of $1,380.00, all inclusive.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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DATED:	FEBRUARY 27, 2013

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Mr. Laurent Bartleman	FOR THE RESPONDENT

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