

INCOME TAX

ADMINISTRATION AND ENFORCEMENT

Judicial review of Minister of National Revenue (Minister) decision denying request for re-appropriation of statute-barred credits from applicant's corporate income tax account to debt in harmonized sales tax (HST) account pursuant to *Income Tax Act*, R.S.C., 1985 (5th Supp.), c 1 (Act), s. 221.2(2) — Applicant's failure to file corporate tax returns for 2006-2010 taxation years within time frames required by Act resulting in applicant being assessed taxable income pursuant to Act, s. 152(7) — Canada Revenue Agency (CRA) collecting monies through payments, garnishment, applying these amounts to assessments — Applicant subsequently filing missing corporate tax returns — Notices of reassessment issued resulting in credits to applicant — However, pursuant to Act, s. 164(1), Minister cannot issue a refund unless a return is filed within three years of the applicable tax year-end — Therefore, no refund of credit balance available to applicant for 2006-2008 returns — Meanwhile, CRA also auditing applicant for compliance with HST provisions of *Excise Tax Act*, R.S.C., 1985, c E-15 — Minister advising applicant it was in arrears in its HST account — Applicant requesting Minister exercise her discretion under Act, s. 221.2(2) to re-appropriate statute-barred credit balance from applicant's corporate income tax account to its HST arrears — Minister denying that request — Minister's decision unreasonable — Decision animated entirely, or almost entirely, by consideration of applicant's history of delinquency in its tax filings and whether there were extraordinary circumstances which explained or excused such delinquency — These were not the only considerations that should have been taken into account — Retirement of outstanding tax debts important factor to be taken into account in exercise of Minister's discretion — Applicant's written submissions in support of re-appropriation identifying not only hardship sustained by applicant, principal if re-appropriation refused (including possibility of company bankruptcy), but also resulting possibility that HST liability would not be paid — Minister not considering or weighing any of these factors — While guidelines issued by CRA (User Guide – Re-appropriation of T2 Statute-barred Credits) placing emphasis on consideration of whether there were extraordinary circumstances which prevented the filing of returns within three years from the applicable tax year end, guidelines also stating, under section entitled "other circumstances", that CRA may also apply ministerial discretion if a taxpayer's circumstances do not fall within the situations described above — Minister's failure to consider other circumstances raised by applicant making decision unreasonable, particularly in light of *Cybernius Medical Ltd v. Canada (Attorney General)*, 2017 FC 226 — Application allowed.

POMEROY'S MASONRY LIMITED V. CANADA (ATTORNEY GENERAL) (T-345-17, 2017 FC 952, Southcott J, judgement dated October 26, 2017, 17 pp.)