

Federal Court



Cour fédérale

**Date: 20230306**

**Docket: T-1965-21**

**Citation: 2023 FC 312**

**Ottawa, Ontario, March 6, 2023**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**BANFF CARIBOU PROPERTIES LTD.**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicant, Banff Caribou Properties Ltd. (“Banff Caribou”), owns and operates hotel and restaurant properties in Banff and Canmore, Alberta. During an audit of the Applicant’s 2017 T2 Corporation Income Tax Return, the Applicant asked the Minister of National Revenue (“the Minister”) to accept amended T2 tax returns. Banff Caribou proposed to amend its T2 tax returns so that it could attach letters electing to treat certain depreciable capital properties as

separate classes of eligible non-residential buildings under subsection 1101(5b.1) of the *Income Tax Regulations*, CRC, c 945 [the *Regulations*]. In effect, Banff Caribou's proposed election letters would allow it to deduct a capital cost allowance at a rate of six per cent (6%) for certain properties, instead of the four per cent (4%) rate it was deducting before 2017.

[2] Banff Caribou's attempt to file an amended tax return amounts to a request for the Canada Revenue Agency [CRA] to accept a late-filed election. The *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [*ITA*] and the *Regulations* prescribe a series of circumstances where late-filed elections are permitted. Banff Caribou accepts that an election under subsection 1101(5b.1) of the *Regulations* is not one of the prescribed provisions where late-filed elections are expressly permitted by the *ITA* and *Regulations*.

[3] Banff Caribou asked the Minister to exercise its discretion to nonetheless allow the late-filed election. Relying on the Federal Court of Appeal's decision in *Canada v Nassau Walnut Investments Inc*, 1996 CanLII 4097 (FCA), [1997] 2 FC 279 [*Nassau Walnut*], Banff Caribou argued the presumption that elections under subsection 1101(5b.1) of the *Regulations* cannot be late filed is rebuttable. Banff Caribou asserts this presumption is rebutted in its particular circumstances because the failure to make the election sooner was an honest mistake and was not indicative of an attempt to engage in retroactive tax planning.

[4] The Minister refused to accept the amended tax returns enclosing Banff Caribou's late-filed election letters. The Minister took the position that the *ITA* and the *Regulations* do not provide it with the discretion to accept late-filed election letters under subsection 1101(5b.1) of

the *Regulations*. The Minister found that, in deciding whether it could accept a late-filed election, it could not rely on considerations such as whether the Applicant made an honest mistake or engaged in retroactive tax planning.

[5] I find the Minister's interpretation of its jurisdiction to be reasonable based on the submissions it received. The Applicant has not cited any case where a late-filed election was permitted outside of the closed list of circumstances expressly set out in the *ITA* and *Regulations*. The courts have consistently held that this list is a closed one. Even if I assume the presumption—that Parliament intended to set out an exhaustive list of circumstances where late elections could be filed—is a rebuttable one, the Applicant's arguments are not persuasive. The Applicant's arguments are not focused on rebutting the relevant presumption. Banff Caribou does not engage with the legislative provision, but instead argues that the presumption is rebutted because of its innocent mistake and because it did not engage in retroactive tax planning. It confuses an individual rebuttable presumption with a statutory one by focusing only on its actions and intentions, rather than on the legislative provision at issue.

[6] Based on the reasons below, the application for judicial review is dismissed.

## II. Background

[7] The parties agree on the facts.

[8] In its 2017 T2 tax return, Banff Caribou reclassified six building it owns from a four per cent (4%) to a six per cent (6%) capital cost allowance deduction. This reclassification allowed

Banff Caribou to claim an additional \$1,591,787.00 capital cost allowance deduction in 2017, which Banff Caribou's new tax advisors explained was permissible because the buildings were separate Class 1 eligible non-residential buildings under subsection 1100(1)(a.2) of the *Regulations*. Banff Caribou had not claimed six per cent (6%) capital cost allowance deductions in previous years because it had not been previously advised of that possibility.

[9] In 2019, the CRA began an audit of Banff Caribou's 2017 tax year. On March 26, 2021, a CRA auditor sent a proposal letter. The auditor proposed to disallow Banff Caribou's additional two per cent (2%) capital cost allowance deduction because it amounted to a late-filed election. CRA took the position that late-filed elections are not permitted in these circumstances.

[10] On May 6, 2021, the Applicant's counsel responded to the auditor's proposal letter. Banff Caribou argued that the CRA should permit the amended returns attaching the election letters because Banff Caribou had made an honest mistake and allowing the amendment would not amount to retroactive tax planning.

[11] On November 24, 2021, the CRA notified the Applicant by telephone that the CRA's position as set out in the March 26, 2021 proposal letter remained unchanged. The CRA denied the Applicant's request to file amended returns. The CRA based its decision on a memorandum dated November 10, 2021 prepared for the CRA auditor by the Technical Applications Section 1. The CRA shared this memorandum with Banff Caribou. The CRA said it did not have discretion to accept late-filed elections under subsection 1101(5b.1) of the *Regulations* because that subsection is not listed in section 600 of the *Regulations*, which enumerates the provisions under

which the Minister may accept late, amended, or revoked elections. Moreover, the CRA found that the circumstances set out by Banff Caribou, namely that it had made an honest mistake and had not engaged in retroactive tax planning, were not the type of considerations assessed when deciding whether to accept a late-filed election.

### III. Preliminary Issue

[12] Banff Caribou initially sought a mandamus order compelling the Minister to accept the amended tax returns with the late election letters. At the hearing of this judicial review, Banff Caribou conceded that mandamus is not an appropriate remedy in this case and agreed that the case would have to be redetermined if its application for judicial review is granted. The Applicant continued to seek a declaration from this Court that the Minister has the discretion to accept late-filed elections under subsection 1101(5b.1) of the *Regulations*.

### IV. Issue and Standard of Review

[13] The determinative issue in this judicial review is whether it was reasonable for the Minister to find that it did not have the discretion to accept a late-filed election under subsection 1101(5b.1) of the *Regulations* where an applicant had made an honest mistake in not filing its election letter earlier and did not engage in retroactive tax planning.

[14] The parties made no submissions on standard of review. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] confirmed that reasonableness is the presumptive standard of review when reviewing administrative

decisions on their merits. This case raises no issue that would justify a departure from that presumption.

[15] Given that I have found that the Minister reasonably determined its jurisdiction, there is no foundation upon which to consider making the declaration being sought by the Applicant.

V. Analysis

A. *Legislative Framework*

[16] At issue in this judicial review is whether Banff Caribou can amend its tax returns to file late elections that reclassify certain buildings in order to benefit from a higher capital cost allowance deduction. Paragraph 1100(1)(a.2) of the *Regulations* allows a taxpayer to deduct up to an additional two per cent (2%) of capital cost allowance if certain criteria are met, specifically:

- a) If the buildings meet the definition of eligible non-residential buildings included in paragraph 1100(1)(a.2); and
- b) A separate class is prescribed for the building through an election under subsection 1101(5b.1) of the *Regulations*, filed in the year of the building's acquisition along with the T2 corporate income tax return.

[17] Subsection 1101(5b.1) of the *Regulations* sets out the specifics of the election that must be filed as follows:

For the purposes of this Part, a separate class is prescribed for each eligible non-residential building (other than an eligible liquefaction building) of a taxpayer in respect of which the taxpayer has (by letter

Pour l'application de la présente partie, est compris dans une catégorie distincte chaque bâtiment non résidentiel admissible d'un contribuable (autre qu'un bâtiment de liquéfaction admissible) à l'égard duquel il

attached to the return of income of the taxpayer filed with the Minister in accordance with section 150 of the Act for the taxation year in which the building is acquired) elected that this subsection apply.

a choisi de se prévaloir du présent paragraphe dans une lettre à cet effet jointe à la déclaration de revenu qu'il présente au ministre conformément à l'article 150 de la Loi pour l'année d'imposition dans laquelle le bâtiment est acquis.

[18] The parties agree that Banff Caribou did not meet the second criteria, as it did not attach an election to the T2 income tax returns it filed with the Minister in accordance with section 150 of the *ITA* for the years of acquisition of the relevant properties.

[19] Subsection 150(1) of the *ITA* sets out the filing deadlines for corporate income tax returns. Specifically, it states:

Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,

Corporations

(a) in the case of a corporation, by or on behalf of the corporation within six months after the end of the year if

(i) at any time in the year the corporation

(A) is resident in Canada...

Sous réserve du paragraphe (1.1), une déclaration de revenu sur le formulaire prescrit et contenant les renseignements prescrits doit être présentée au ministre, sans avis ni mise en demeure, pour chaque année d'imposition d'un contribuable :

Sociétés

a) dans le cas d'une société, par la société, ou en son nom, dans les six mois suivant la fin de l'année si, selon le cas :

(i) au cours de l'année, l'un des faits suivants se vérifie :

(A) la société réside au Canada...

[20] The reference to section 150 of the *ITA* in subsection 1101(5b.1) of the *Regulations* sets a deadline for filing the election as a requirement for claiming the additional capital cost

allowance. There is no ambiguity in subsection 1101(5b.1) regarding either the method of filing the election or the timing. Again, this is not in dispute between the parties.

[21] The Applicant characterizes its request to the CRA as asking the Minister to exercise its discretion to accept amended income tax returns. I agree with the Respondent that the Applicant's request to amend its returns amounts to a request to late-file an election under subsection 1101(5b.1). The Applicant's only proposed amendment to its returns is to attach election letters. In other words, in determining whether the return can be amended, the real issue for the CRA was to determine whether a late election can be permitted in these circumstances. The Tax Court of Canada dealt with a similar issue in *Terminal Norco Inc v R*, 2006 TCC 139 at paragraph 88 [*Terminal Norco*]:

Although the Appellant has framed this issue in terms of whether it is entitled to amend its 1992 tax return, in reality it is seeking to make a late-filed subsection 1103(1) election. The 'correction' which the Appellant claims to make in the amended return is a recalculation of its income based on all of its depreciable property being included in Class 1, which would only be the case if the Appellant had filed a valid subsection 1103(1) election. Therefore, in order to accept the Appellant's argument that it was entitled to file an amended return, I must necessarily determine whether the Appellant has a right to late-file an election.

[22] The same reasoning applies here. The real issue before the CRA was not simply whether an amended return would be permitted, but rather whether Banff Caribou could late-file an election under subsection 1101(5b.1).

[23] The ability to late-file elections is permitted through two separate mechanisms, neither of which applies to the elections at issue in this application. First, certain sections of the *ITA*



explicitly contemplate late-filed elections (*ITA*, ss 83(3), 85(7), 93(5), 96(5)). There is no contemplation of a late-filed election in 1100(1)(a.1) nor 1101(5b.1) of the *Regulations*. Second, subsection 220(3.2) of the *ITA* and section 600 of the *Regulations*, as part of the taxpayer relief provisions, set out circumstances where the Minister could accept a late-filed election.

Subsection 220(3.2) of the *ITA* states:

The Minister may extend the time for making an election or grant permission to amend or revoke an election if

(a) the election was otherwise required to be made by a taxpayer or by a partnership, under a prescribed provision, on or before a day in a taxation year of the taxpayer (or in the case of a partnership, a fiscal period of the partnership); and

(b) the taxpayer or the partnership applies, on or before the day that is ten calendar years after the end of the taxation year or the fiscal period, to the Minister for that extension or permission.

Le ministre peut, en ce qui concerne un choix prévu par une disposition visée par règlement, proroger le délai pour faire le choix ou permettre la modification ou l'annulation du choix si les conditions suivantes sont réunies :

a) le choix devait être fait par ailleurs par un contribuable ou une société de personnes au plus tard un jour donné d'une de ses années d'imposition ou d'un de ses exercices, selon le cas;

b) le contribuable ou la société de personnes demande au ministre, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition ou de l'exercice, de proroger le choix ou d'en permettre la modification ou la révocation.

[24] Subsection 220(3.2) is limited to elections made under a “prescribed provision.” These prescribed provisions are listed in section 600 of the *Regulations* as follows:

For the purposes of paragraphs 220(3.2)(a) and (b) of the Act, the following are prescribed provisions:

(a) section 21 of the Act;

(b) subsections 13(4), (7.4) and (29), 20(24), 44(1) and (6), 45(2) and (3), 50(1), 53(2.1), 56.4(13), 70(6.2), (9.01), (9.11), (9.21) and (9.31), 72(2), 73(1), 80.1(1),

Les dispositions visées aux alinéas 220(3.2)a) et b) de la Loi sont les suivantes :

a) l'article 21 de la Loi;

b) les paragraphes 13(4), (7.4) et (29), 20(24), 44(1) et (6), 45(2) et (3), 50(1), 53(2.1), 56.4(13), 70(6.2), (9.01), (9.11), (9.21) et (9.31), 72(2), 73(1), 80.1(1),

82(3), 83(2), 91(1.4), 104(14), 107(2.001), 143(2), 146.01(7), 146.02(7), 164(6) and (6.1), 184(3), 251.2(6) and 256(9) of the Act;

(c) paragraphs 12(2.2)(b), 66.7(7)(c), (d) and (e) and (8)(c), (d) and (e), 80.01(4)(c), 86.1(2)(f) and 128.1(4)(d), (6)(a) and (c), (7)(d) and (g) and (8)(c) of the Act;

(d) subsections 1103(1), (2) and (2d) and 5907(2.1) of these Regulations.

82(3), 83(2), 91(1.4), 104(14), 107(2.001), 143(2), 146.01(7), 146.02(7), 164(6) et (6.1), 184(3), 251.2(6) et 256(9) de la Loi;

c) les alinéas 12(2.2)b), 66.7(7)c), d) et e) et (8)c), d) et e), 80.01(4)c), 86.1(2)f) et 128.1(4)d), (6)a) et c), (7)d) et g) et (8)c) de la Loi;

d) les paragraphes 1103(1), (2) et (2d) et 5907(2.1) du présent règlement.

[25] The relevant provision in this case, subsection 1101(5b.1), is not listed in section 600 of the *Regulations* as a prescribed provision where the Minister can accept a late-filed election.

B. *The CRA's Decision on Jurisdiction was Reasonable*

[26] The CRA considered the Applicant's submissions asking the Minister to exercise its discretion to accept an amended return with the election letter. The CRA understood the request as being about whether it had the jurisdiction to accept a late-filed election in relation to a provision that was not prescribed in the *ITA* and *Regulations* as a provision that permits late-filed elections. The CRA considered that it had already assessed this issue in an income tax interpretation bulletin (Canada Revenue Agency, Interpretation Bulletin IT 2010-0381311E5, "Non-residential buildings—late election" (18 February 2011)), where it found:

There is no specific late filing provision for the election for eligible non-residential buildings such as the one that is found, for example, in subsections 85(7) to (9) of the Act with respect of elections for section 85 rollovers. While the CRA has the discretion under paragraph 220 (3.2) (a) of the Act to allow some late filed elections, the CRA is only allowed to exercise its discretion in respect of those elections listed in section 600 of the Regulations. Since subsection 1101(5b.1) is not listed in section 600, a subsection 1101(5b.1) election cannot be late filed.

[27] The CRA also explained that the Technical Applications Section addressed this issue and provided a similar response. It noted the limitations in subsection 220(3.2) which permit late-filed elections in relation to proscribed provisions set out in the *Regulations*.

[28] The CRA's determination is consistent with the jurisprudence. The Applicant did not cite any case where a late-filed election was permitted outside of the circumstances expressly provided for in the *ITA* and the *Regulations*. For the same rationale as the CRA's, courts have found that late-filed elections cannot be accepted for provisions not expressly listed in the *ITA* and the *Regulations* as allowing late-filed elections (see *Miller v Minister of National Revenue* (1992), [1993] 1 CTC 269 (FCA); *Hundal v Canada*, (2000) 54 DTC 6520 (FC); *Terminal Norco*; *Advanced Agricultural Testing Inc v R*, 2009 TCC 190).

[29] The CRA also considered the Applicant's argument that this was an innocent mistake and that it did not engage in retroactive tax planning. The CRA found that these are not the sorts of considerations it could take into account when deciding whether to accept a late-filed election.

[30] Banff Caribou argued before me that the CRA failed to consider whether Banff Caribou had rebutted the presumption that the circumstances where late-filed elections could be made had to be expressly provided for in the *ITA* and the *Regulations*. The Applicant relies heavily on its interpretation of the Federal Court of Appeal's decision in *Nassau Walnut*. A similar argument about the application of *Nassau Walnut* was also raised as an alternative argument in *Terminal Norco*. The Tax Court of Canada found in *Terminal Norco* that *Nassau Walnut* was a case about late-filed designations and not elections and that the Federal Court of Appeal specifically

distinguished late-filed elections from designations when it found (*Nassau Walnut* at para 31 cited in *Terminal Norco* at para 89):

In contradistinction to a designation, and as a general proposition, when an election is to be made the taxpayer must make a decision to forego one option in favour of another on the basis of an assessment of tax risks which may or may not materialize depending on uncertain events... the Act itself implicitly recognizes that a designation and an election are not one and the same.

[31] I agree with the Tax Court's reasoning in *Terminal Norco* and find it applicable to Banff Caribou's reliance on *Nassau Walnut* in this case.

[32] The Applicant argued that the Tax Court in *Terminal Norco* failed to deal with what is at the heart of its submissions on this point. Namely, the Applicant claimed that even though *Nassau Walnut* dealt with a late-filed designation, the Federal Court of Appeal explained that there is a rebuttable presumption that Parliament intended to set out an exhaustive list of circumstances where elections or designations could be late filed. In particular, Banff Caribou relies on these sentences at paragraph 33 of *Nassau Walnut*:

Although relief is provided selectively by the Act, it does not necessarily follow that Parliament intended to preclude relief in those situations not specifically addressed by the Act. Rather, the fact that the Act authorizes the late filing of a designation or an election in particular circumstances gives rise only to a rebuttable inference that Parliament did not intend that taxpayers have such a right in other instances.

[33] Even if I were to accept that this is a presumption that could be rebutted, I am not persuaded that Banff Caribou put before the CRA submissions capable of rebutting the presumption at issue, namely that Parliament intended there be an exhaustive list of

circumstances set out in the *ITA* and *Regulations* where a late-filed election may be permitted. The Applicant's argument attempts to rebut a different presumption: that late-filed elections are presumptively an attempt to engage in retroactive tax planning. This is not the presumption at issue. The Applicant's submissions to the CRA and before this Court center on rebutting an irrelevant presumption by focusing on its honest mistake. The Applicant's focus is only on its actions and intentions, rather than on the legislative provision that is at issue (*Nassau Walnut* at para 29). The CRA reasonably found that whether an individual made an honest mistake or engaged in retroactive tax planning are not the circumstances that it considers when deciding whether to accept a late-filed election.

#### VI. Disposition

[34] The application for judicial review is dismissed. At the request of the Respondent and in accordance with Rule 303 of the *Federal Courts Rules*, SOR/98-106, the title of the proceedings shall be amended to name the Attorney General of Canada as the Respondent in this application.

**JUDGMENT IN T-1965-21**

**THIS COURT'S JUDGMENT is that:**

1. The title of proceedings is amended immediately to name the Attorney General of Canada as the Respondent;
2. The application for judicial review is dismissed; and
3. Costs are awarded to the Attorney General of Canada.

"Lobat Sadrehashemi"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1965-21

**STYLE OF CAUSE:** BANFF CARIBOU PROPERTIES LTD. v THE  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** SEPTEMBER 8, 2022

**JUDGMENT AND REASONS:** SADREHASHEMI J.

**DATED:** MARCH 6, 2023

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