Federal Court  Cour fédérale

Date: 20231109

Dockets: T-116-21
T-1082-21

Citation: 2023 FC 1496

Ottawa, Ontario, November 9, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

BANK OF AMERICA, NATIONAL ASSOCIATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Preliminary Issue

[1] In accordance with the *Federal Courts Rules*, the style of cause is amended to reflect the Attorney General of Canada as the proper Respondent.

II. **Overview**

[2] The Applicant, Bank of America National Association ("BANA") is a subsidiary of Bank of America Corporation ("BAC") that operates through a Canadian branch. The Applicant seeks judicial review in respect of the decisions (the "Decisions") of the Minister of National Revenue (the "Minister"), made on December 17, 2020, through her delegated officer of the Canada Revenue Agency (the "CRA"), Ms. Gwendolyn Henderson, Assistant Director, Goods and Services Tax/Harmonized Sales Tax ("GST/HST") Audit, Toronto Centre Tax Services Office which denied the late-filed applications pursuant to subparagraph 141.02(19)(b)(ii) of the *Excise Tax Act*, RSC 1985, c E-15, as amended (the "*Act*" or the "*ETA*") for authorization to use a particular input tax credit ("ITC") allocation method (the "RC7216 Applications") as provided by subsection 141.02(18) of the *Act* for the fiscal years 2017-2020 (the "Relevant Period").

[3] For the reasons that follow, this application for judicial review is dismissed.

III. **Background**

[4] An application under subsection 141.02(18) for authorization to use a particular input tax credit is known as an RC7216 application. The *ETA* entitles the Applicant to claim ITCs at a prescribed rate of 12% of the GST paid on the inputs. To use a different rate, the Applicant can file an RC7216 application for pre-approval 180 days prior to the start of the fiscal year to which the method will apply. If this deadline is missed, the Applicant must make a separate application requesting that the Minister exercise her discretion pursuant to subparagraph 141.02(19)(b)(ii) to allow a late-filed method application.

[5] On June 29, 2020, the Applicant filed an RC7216 application for the fiscal years 2019 and 2020 including a late-file request for 2019. The Applicant filed an RC7216 application for fiscal years 2017 and 2018 including a late-file request for both on December 24, 2020. According to the Respondent's calculations the 2017, 2018, 2019 and 2020 applications were filed late by 1269, 1634, 361 and 726 days, respectively.

[6] The Applicant's explanation for the delay is set out in the following paragraphs.

[7] Between March 1998 and 2008, prior to the acquisition of Merrill Lynch by Bank of America on January 1, 2009, the Canada Tax Department consisted of three employees. After the acquisition of Merrill Lynch by the Applicant, the Tax Department expanded to four employees, one of whom assumed responsibility of the Applicant's compliance matter ("Former Employee").

[8] On June 6, 2018, BAC announced it had entered a tax outsourcing arrangement with Ernst & Young (EY). As a result, the Canada Tax Department was reduced to one employee, Joyce Petti. The Former Employee stayed to complete the Applicant's 2017 tax filings and assist with the transition to EY, but left the company in July 2018.

[9] The Former Employee stated to both the Applicant and EY that the Adjusted Tax Credit Amounts (ATCAs) were not expected to exceed $500,000 and that its ATCA had never exceeded $500,000 in any two consecutive fiscal years. The Applicant took the Former

Employee's statement at face value and concluded it was not a Qualifying Institution (QI) and would not be a QI in the upcoming 2019 fiscal year.

[10] In June 2019, the Applicant realized its ATCA had exceeded $500,000 in 2017 and 2018, meaning that it was a QI for the 2019 fiscal year. The Applicant chose to wait until June 2020 to file its applications to determine its QI status "with certainty". During its review of the 2019/2020 late-filing applications, the CRA informed the Applicant that it may have been a QI as early as 2017. The applicant then filed applications for the 2017/2018 fiscal years in December 2020.

[11] All four applications were denied.

IV. **Decision under Review**

[12] On June 29, 2020, the RC7216 Applications for 2019, 2020 were submitted. On December 17, 2020, the applications were denied.

[13] Similarly, on December 24, 2020, the 2017, 2018 applications were submitted and on June 10, 2021, the applications were denied.

[14] The Assistant Director, GST/HST Audit of the Toronto Centre Tax Services office does not agree with the Applicant that the RC7216 application was filed late because of an error made by the now-departed Vice President of Tax for BANA.

[15] The Assistant Director submits that BANA is recognized as a highly sophisticated entity and its consultants, EY, are similarly recognized as being highly reputable thus arguing that a high degree of care and diligence is expected of the Applicant, “From a "care and diligence" perspective, it is expected that BANA (and/or E&Y) would not merely accept a statement from its departing employee that the adjusted tax credit amount was not greater than $500,000 in 2017 when the ITCs claimed for 2017 were in excess of this amount but that it (they) would perform some type of analysis in this regard.”

[16] The Assistant Director further submits that BANA has not demonstrated the requisite degree of care and diligence under the circumstances to warrant relief for a late-filed RC72l6 application.

V. **Issues and Standard of Review**

[17] The Applicant submits that the Respondent erred in law in the following ways:

a. Misinterpreted the purpose of subparagraph 141.02(19)(b)(ii).
b. Relied solely on a due diligence requirement that is not required by law or by administrative guidance.
c. Applied the incorrect standard to the applicant in completing her due diligence analysis.

[18] The Applicant further submits that the Respondent erred in fact in the following ways:

a. Failed to account for the evidence before her.

b. Misapprehended the facts and based her decision on a mere suggestion that the Applicant engaged in “retroactive tax planning”.

[19] With regard to procedural fairness, the Applicant submits the following:

a. The Respondent failed to perform a case-by-case analysis of the individual facts relevant to the Applicant.

b. The Respondent failed to comply with the Minister’s framework as established in its own Internal Guidelines.

c. That there was a reasonable apprehension of bias.

[20] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness*:* *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. While this presumption is rebuttable, no exception to the presumption is present here.

[21] A reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at para 15. Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

[22] Whether the duty of procedural fairness has been met does not require a standard of review analysis, although it is often referred to as a correctness review. The ultimate question to be answered by a reviewing Court is whether the Applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56.

VI. **Analysis**

A. *Erred in law – misinterpreted the purpose of subparagraph 141.02(19)(b)(ii)*

[23] Both parties agree, as do I, that the Minister is granted wide discretion to consider applications under section 141.02. Section 141.02(18) states that a person that is, or is reasonably expected to be, a qualifying institution may apply to the Minister to use particular methods to determine for the fiscal year the operative extent and the procurative extent of each business input of the person.

[24] Justice Walker explained the pre-approval regime in detail recently in *Bank of Montreal v Canada (Attorney General)*, 2020 FC 1014 at paras 16-19 [*BMO*]:

> III. The Pre-approval regime: Section 141.02 of the *ETA*
>
> [16] Parliament amended the ITC regime for Canadian financial institutions in 2008 by enacting what is now section 141.02 of the *ETA*. The section creates two categories of financial institutions. Qualifying institutions (QIs) consist of large Canadian banks, insurers and securities dealers, including the Bank. Non-qualifying institutions are smaller financial institutions and are not subject to the pre-approval regime set out in section 141.02.
>
> [17] An additional set of subsection 141.02(1) definitions is necessary to understanding the dispute between the parties. The subsection requires financial institutions to categorize the inputs

> used in their businesses as: (1) “excluded inputs”, which are typically capital expenditures; (2) “exclusive inputs”, which can be traced exclusively to use in the provision of either taxable or exempt supplies; and (3) “residual inputs”, which are all remaining inputs. In an allocation of residual inputs, the “operative extent” and “procurative extent” of a property or service must be determined. The operative or procurative extent of a property or service is the extent to which the particular property or service is consumed or used (operative extent), or acquired or purchased (procurative extent), for the purpose of making taxable supplies for consideration or for a purpose other than making taxable supplies for consideration. The question posed is what are the various assets and services purchased by the Bank being used for: the making of taxable supplies (the provision of financial services to non-residents of Canada) or the making of exempt supplies (the provision of financial services to Canadian residents)?
>
> [18] Under the section 141.02 regime, QIs are subject to a distinct scheme for the computation of their eligible ITCs. Pursuant to subsection 141.02(18), a QI may apply to the Minister in advance of each fiscal year for approval of their proposed ITC computation method for the year. The Minister may approve or deny the use of the method (subs. 141.02(20)). The Minister’s decision is separate from the audit process and is not subject to appeal to the TCC. If the Minister authorizes the method, that method must be used by the QI to prepare its GST return for the particular fiscal year (subs. 141.02(21)). Any audit of that return is limited to determining whether the approved method was used consistently through the year and applied correctly.
>
> [19] If the Minister denies the application, she must provide reasons for the denial (subs. 141.02(22)) and her decision is subject to review by this Court. The QI cannot use its proposed allocation method and is deemed to have used residual inputs for the purpose of making taxable supplies at a prescribed rate of 12% (subs. 141.02(8)). In its submissions, the Bank highlights the impact to it of the application of the prescribed rate of recovery for residual inputs, stating that it normally recovers a materially higher percentage of its residual GST Costs through ITCs.

[25] Pursuant to subsection 141.02(22), the Minister denied the application and provided reasons for the denial. The Applicant suggests that “a lack of flexibility has resulted in the Minister conflating its clear authority to approve the substance of the ITC methodology, as

provided by this court in BMO, with the discretion she must exercise in determining whether a late filed application should be accepted".

[26] I find no evidence to support the Applicant's view. As they point out, it is true that a Minister's authority to approve the proposed ITC computation method is not limited substantively by the criteria in subsection 141.02(20), or more generally, section 141.02, nor is it limited to a temporal assessment: *BMO* at para 106. However, a temporal assessment is a relevant consideration as the 141.02 scheme is essentially based on pre-approval.

[27] I emphasize that not limiting the criteria for consideration does not mean they are irrelevant for consideration in the overall exercise of discretionary power. A temporal assessment is relevant for the proper functioning of a legislative scheme based on pre-approval. I am most persuaded by the Respondent's argument that section 141.02 allows for institutions like the Applicant, which had not yet ascertained their QI status, to file a method application without any adverse consequences should they ultimately be determined not to be a QI. Though the Minister is granted wide discretion to consider extenuating circumstances and late-filing requests, those who may reasonably be expected to be a QI are encouraged to apply as per the mandatory deadlines prior to the start of the relevant fiscal year. In my view, the Minister's consideration of the Applicant's failure to do so is not an error of law.

B. *Erred in law – relied solely on a due diligence requirement that is not required by law or by administrative guidance*

[28] Justice Zinn held in *Denso* that it is open to the Minister to consider actions that amount to carelessness and negligence in reaching their conclusion: *Denso Manufacturing Canada, Inc. v Canada (National Revenue)*, 2020 FC 360 at para 44 [*Denso*]:

> [44] The Denso Companies say that their actions were not negligent nor careless given they had hired and relied on the advice of tax consultants who provided them erroneous advice. Here, the Minister found reliance on one third-party consultant's advice insufficient to demonstrate a reasonable effort to comply with the *ETA* because the consultant was contacted after a well-published deadline had already passed, and only after the Denso Companies were alerted to the need by the review officer in February 2016. It was open to the Minister to conclude, as was done, that the Denso Companies had not taken adequate precautions to keep abreast of their compliance obligations, actions that amount to carelessness and negligence. This is a reasoned conclusion justified on the record.

[29] The Applicant argues that due diligence was the sole or dominant reason for the denial of their late filing request. The Applicant argues that due diligence is actually only one of the 15 factors listed in the internal guidelines. This is not true. Paragraph 16 of the Affidavit of David Valenta states the considerations in the Internal Guidelines are as follows:

> a. the nature of the Applicant, were reasonable explanations of why the application was late-filed provided in writing?
>
> b. Did the Applicant exercise the same degree of care and diligence that a reasonably prudent person would have in comparable circumstances?
>
> c. Were there unusual or extenuating circumstances beyond the Applicant's control?
>
> d. Was prompt action, without undue delay, taken by the Applicant to rectify the situation?

e. Would the late-filed application result in a neutral GST/HST filing position if accepted?

f. Is there any evidence of retroactive tax planning?

g. Was reasonable care to comply with the law taken? Will unintended tax consequences result if the late-file application is not accepted?

h. Are there adequate books and records?

i. Did CRA provide incorrect information?

j. Has the Applicant consistently operated as if the late-filed application was in effect as of the effective date?

k. What is the Applicant's history of willingness to comply with GST/HST legislative and policy requirements in the development and modification of particular methods?

l. Is the reporting period under the application statute-barred under section 298?

m. What is the Applicant's history of GST/HST compliance? Were all GST/HST returns due filed as of the date of the request? In addition, has the Applicant consistently applied ITC methods as authorized?

n. Is the day set out for acceptance of the late-filed application past the filing date of RC7294 return for the applicable period?

o. Is the day set out for acceptance of the late-filed application reasonable in the circumstances, considering the requested information to be provided and other review work to be done?

[30] The Applicant submits that only one of these factors is whether the Applicant took "reasonable steps to comply with the law" and therefore, due diligence is not listed as a dominant factor in the Internal Guidelines. I cannot agree with the Applicant's characterization of the guidelines. There are a number of factors that relate to the degree of care exercised or, the lack thereof in relation to the late filing. Several of the factors directly or indirectly allude to this contextual consideration. They include consideration of the explanation for the late-filing, the

degree of care and diligence exercised, the presence of unusual or extenuating circumstances beyond the Applicant's control, whether the Applicant took prompt action without undue delay to rectify the situation and finally, whether reasonable care was taken to comply with the law. These are all considerations that relate to the care and diligence demonstrated to the Minister.

[31] The internal guidelines were thoroughly canvassed by the Minister in their late-filing report. The factors were considered one by one with a detailed explanation of the submissions of each party for each factor. Based on my review of this report, I cannot agree that the emphasis on due diligence was misplaced.

C. *Erred in law – applied the incorrect standard to the Applicant in completing its due diligence analysis*

[32] The Applicant distinguishes *Denso* with the case at hand. They state that the Minister was ill-founded to rely on the *Denso* decision and read into the Federal Court's reasoning that an error made by an employee or advisor, notwithstanding the context and the nature of the error, had to be attributable to carelessness and negligence.

[33] I do not agree. In *Denso*, there was indeed ignorance of the law, which was found to have not excused the Applicant's non-compliance with the law. However, that was not all. The Minister concluded that Denso Companies had not taken adequate precautions to keep abreast of their compliance obligations and that these actions amount to carelessness and negligence.

[34] I find that the same was found here. The Applicant had undergone restructuring, a reduction of their tax department and eventually, outsourcing to a third party, EY. The Applicant's failure to take adequate precautions during the period of transition and well after the period, when there were signs that an error had been made by the former employee, are actions that can reasonably be found to amount to carelessness and negligence.

D. *Erred in fact – failed to account for the evidence before her*

[35] The Applicant mischaracterizes the Minister's findings. To be clear, the Internal Guidelines state that one of the relevant factors for consideration is whether there are unusual or extenuating circumstances beyond the Applicant's control. I cannot agree with the Applicant that it was an error of fact for the Minister to find the circumstances did not fall under these criteria. As explained by the affidavit of David Valenta, the CRA considered the reduction of the tax department and the personal difficulties experienced by the employee, but determined that, "BANA, as a corporate entity, must consider the implications of its decisions, such as downsizing staff without setting a proper back-up system and accept the adverse consequences".

[36] In my view, it is reasonable to consider a corporation's management of its own internal affairs, employees and outsourcing arrangements to be entirely within their control. The structural changes were enacted by the Applicant through their own efforts, in accordance with their own timelines, on their own terms. These were not extenuating circumstances beyond their control. The Applicant's concern that the extenuating circumstances were found "not applicable" is unwarranted.

E. *Erred in fact – misapprehended the facts and based her decision on a mere suggestion that the Applicant engaged in "retroactive tax planning"*

[37] This is another mischaracterization of the findings. As stated by the Respondent, the Minister did not conclude that the Applicant engaged in retroactive tax planning, but found that it was in a position to do so because it waited to file the respective method applications until the start of the fiscal years. That is not a misapprehension of the facts.

F. *Procedural Fairness – failed to perform a case-by-case analysis of the individual facts relevant to the Applicant*

[38] The Applicant provides no evidence other than the timing of the final decision to support their allegation that the Minister may have approached the review with a "predetermined mind". Upon reading the Respondent's explanation of how the December 17th target deadline was determined and reached, I find the Applicant's suspicion concerning the timing of the decision to be without merit.

G. *Procedural Fairness – failed to comply with the Minister's framework as established in its own Internal Guidelines*

[39] This is not a procedural fairness argument. Regardless, as noted by the Respondent, they explicitly considered the staffing changes but found this was well within the Applicant's knowledge and control. The adverse consequences that resulted from a reduction of its own department are not an unusual and extenuating circumstance beyond its control.

H. *Procedural Fairness – reasonable apprehension of bias*

[40] The Applicant has failed to point to any evidence to support their accusation of bias. The mere fact that CRA believed, after an initial review of the facts, that a denial was strongly justified and therefore, could withstand judicial review, is not an indication that there was bias at play.

VII. **Conclusion**

[41] After considering the arguments and reviewing the underlying record, I can find no fault with the Decision. It is both reasonable and fair and, it meets the *Vavilov* criteria with respect to both.

[42] Given all of the foregoing, this application for judicial review is dismissed with costs of $4000 to the Respondent as agreed between the parties.

JUDGMENT in T-116-21 and T-1082-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed with costs of $4000 to the Respondent as agreed between the parties.
2. The style of cause is amended to reflect the Attorney General of Canada as the proper Respondent.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-116-21 T-T082-21
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