Federal Court

Cour fédérale

Date: 20240711

Docket: T-1163-21

Citation: 2024 FC 1090

Ottawa, Ontario, July 11, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

3533158 CANADA INC.

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

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JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review in the nature of *mandamus* compelling the Minister of National Revenue [Minister], acting through the Canada Revenue Agency [CRA], to refund the Applicant's input tax credits [ITC] under Part IX of the *Excise Tax Act*, RSC 1985, c E-15 [*ETA*] in respect of three GST/HST reporting periods.

[2] The application follows a decision of the Minister, made on or about November 7, 2017, to deny the Applicant's request for a refund of ITCs, for the reporting periods of August 1, 2012, to October 31, 2012; November 1, 2012, to January 31, 2013; and February 1, 2013, to April 30, 2013 [first three reporting periods].

[3] For the reasons that follow, the Applicant did not discharge its burden to demonstrate a clear right to the refund and there is an equitable reason to deny the issuance of a *mandamus*. The application is therefore dismissed.

II. Background Facts

[4] The Applicant is a subsidiary of Amexon Property Management Inc. [Amexon]. An agency relationship existed between Amexon and the Applicant (and between Amexon and another related

corporation) in which Amexon purported to act as agent for the Applicant (and for the other corporation) under the *ETA* and claim the Applicant's ITCs.

[5] Following an audit of Amexon by the CRA for some reporting periods between October 1, 2012 and August 31, 2016, certain ITCs that had been claimed by Amexon were denied under section 177 of the *ETA* on the basis that these ITCs had to be claimed by the Applicant and the other related corporation, and not by Amexon as agent.

[6] There is no allegation that the CRA's decision relating to Amexon, or the conclusion that Amexon erred in claiming the ITCs on behalf of the Applicant, is wrong in fact or in law. The Applicant concedes that the CRA's assessment in that regard is correct. There is also no allegation that the CRA's assessment of Amexon was not made in a timely manner or was otherwise negligent or inappropriate.

[7] In a letter to Amexon dated October 17, 2016, the CRA stated that Amexon's net tax payable for the reporting periods would be reassessed and that the Applicant should file its "…returns for processing under normal procedures keeping in mind the four-year limitation on claiming input tax credits."

[8] In order to claim the ITCs denied to Amexon, the Applicant filed a GST/HST report on October 27, 2016, for all reporting periods that had been denied to Amexon together in one single return [First Return], in which the Applicant claimed the totality of the ITCs denied to Amexon

for the reporting periods between October 1, 2012 to August 31, 2016. The First Return was accompanied by a cover letter and schedules explaining the object of the First Return.

[9] Only the first three reporting periods are relevant for this application, as all others were ultimately refunded to the Applicant. They are :

a) the quarterly reporting period between August 1, 2012 to October 31, 2012 [Period 1];

b) the quarterly reporting period between November 1, 2012 to January 31, 2013 [Period 2]; and

c) the quarterly reporting period between February 1, 2013 to April 30, 2013 [Period 3].

[10] Under paragraph 238(1)(b) of the *ETA*, a GST/HST return must be filed by one month following the reporting period. Moreover, under paragraph 225(4)(b), a registrant has four years to claim an ITC refund for a reporting period, in the case where allowable ITCs would have been discovered after the return had already been filed for that relevant reporting period.

[11] Therefore, in this case, for the first three reporting periods, the time limit to file a return to claim the ITCs were :

a) November 30, 2016, for Period 1, because the return for that reporting period was due on November 30, 2012;

b) February 28, 2017, for Period 2, because the return for that reporting period was due on February 28, 2013; and

c) May 31, 2017, for Period 3, because the return for that reporting period was due on May 31, 2013.

[12] As stated, following the reception of CRA's letter, the Applicant filed the First Return on October 27, 2016. The Applicant was therefore within the four-year deadline to claim its ITCs, had the First Return been appropriate, under paragraph 225(4)(b), for each of the first three reporting periods.

[13] However, the Applicant failed to review whether it was registered under the *ETA* for the first three reporting periods. While the evidence is unclear as to when the Applicant initially registered, the Applicant was registered under the *ETA* for reporting periods following December 1, 2014 – the first three reporting periods relevant to this application are prior to that date.

[14] Moreover, the First Return did not comply with section 245 of the *ETA*, because it was a "global" return for the Applicant's reporting periods from October 1, 2012 to August 31, 2016, in which the Applicant claimed the totality of the ITCs denied to Amexon by the CRA under section 177. Section 245 of the *ETA* requires returns to relate to reporting periods that are monthly, quarterly or yearly, as the case may be. In this case, the Applicant's returns had to be quarterly. The CRA cannot process GST/HST returns that are not filed in compliance with the appropriate reporting periods provided for under section 245 (see Richard Affidavit at paras 11-14, Applicant's Record [AR] at 1269).

[15] On March 30, 2017, the CRA informed the Applicant that it needed to re-file its returns and make quarterly returns, because the First Return represented a reporting period from October 1, 2012 to August 31, 2016 which is a reporting period that is not valid under the *ETA*, and the CRA was not capable of processing the First Return. The Applicant sent new quarterly returns, on

April 3, 2017, including the same information but now identified to each reporting period between August 1, 2012 and October 31, 2016 [Second Return] (note that the First Return related to the period is between October 1, 2012 and August 31, 2016).

[16] On or about April 5, 2017, the Applicant was informed that the CRA could not process the returns for the first three reporting periods filed as part of the Second Return because the first three reporting periods were prior to December 1, 2014, and the Applicant was not registered for GST/HST for reporting periods beginning before that date (see Richard Affidavit at para 18, AR at 1270).

[17] It is important to note that on April 5, 2017, the CRA was in possession of the Applicant's ITC claims for the first three reporting periods, in a proper prescribed form as provided under subsections 238(1) and (4) and for the reporting periods set out under section 245 of the *ETA*, for the first time and for only several days following the filing of the Second Return. Prior to that time, in the First Return, and while the Applicant claimed ITCs for the entire reporting periods between October 1, 2012 to August 31, 2016, it was unclear whether any of the ITCs were actually claimed for a reporting period prior to December 1, 2014. Neither the Applicant nor the CRA had noticed the issue regarding the Applicant's failure to register under the *ETA* for reporting periods prior to December 1, 2014.

[18] The Applicant then proceeded to request that its GST/HST registration date be backdated, which was completed on July 20, 2017, with a retroactive effect to August 1, 2012 (see Richard Affidavit at para 22, AR at 1270). The evidence demonstrates that the registration backdating

process is independent from the processing of GST/HST returns (Answers to the Written Examination on the Richard Affidavit, Answer to Question 8e; AR at 2188).

[19] Following the backdating of the Applicant's GST/HST registration and following communications between the parties, on or about August 9, 2017, the Applicant re-filed its returns for all of its reporting periods from August 1, 2012 to January 31, 2015 in quarterly returns [Third Return] (note that the periods now end on January 31, 2015, and not on August 31, 2016 as in the First Return or October 31, 2016 as in the Second Return). There is no issue as to the adequacy of the Third Return. However, by that time, the Applicant was outside of the deadline to file returns for the first three reporting periods, under paragraph 225(4)(b) (which for example ended on May 31, 2017 for Period 3).

A. *Decision of the Minister*

[20] On or about November 7, 2017, the CRA issued an assessment of the Applicant's returns. The CRA refused to refund the first three reporting periods because the ITC claims for these periods were statute-barred, as the returns had not been filed within the time limit set under paragraph 225(4)(b) of the *ETA*. All other refunds claimed by the Applicant in respect of reporting periods where returns were filed within the four-year time limit for claiming ITCs were paid to the Applicant.

[21] The CRA opined that "[a]ccording to subsection 225(4) of the [*ETA*], we cannot issue a refund for this reporting period because you did not file your return within the time limit for claiming input tax credits (ITCs)" (AR at 26, 30, 34).

[22] In the reasons, the CRA's refusal to issue the refund for the first three reporting periods relied solely on subsection 225(4) of the *ETA*. Later, after the Applicant filed Notices of Objection with the CRA, and later an appeal, the CRA also relied on subsection 296(4) of the *ETA*, limiting the Minister's power to issue a refund to ITC claims that would have been eligible had they been made on the day of the assessment. Because the assessment was on November 7, 2017, had the Applicant's returns been filed on that day, the ITC for the first three reporting periods would not have been allowed because that day was more than four years following the reporting period when the ITC could have been claimed in a periodic return.

III. Issues

[23] The issue is whether the Applicant has satisfied all of the criteria that would allow this Court to issue an order of *mandamus*, compelling the Minister to grant refunds to the Applicant under the *ETA*, in respect of the first three reporting periods.

[24] An application for a writ of *mandamus* does not require a determination of the applicable standard of review (*Hong v Canada (Attorney General)*, 2019 FCA 241 at paras 10–14; *Callaghan v Canada (Chief Electoral Officer)*, 2010 FC 43 at para 64; *Bedard v Canada (Attorney General)*, 2024 FC 570 at paras 22, 24 [*Bedard*]; *Samideh v Canada (Citizenship and Immigration)*, 2023 FC 854 at para 22).

IV. Analysis

A. *The law applicable to an order for mandamus*

[25] There are eight conditions for a *mandamus* to issue:

a) there must be a legal duty to act;

b) the duty must be owed to the applicant;

c) there must be a clear right to performance of that duty;

d) where the duty sought to be enforced is discretionary, certain additional principles apply;

e) no adequate remedy is available to the applicant;

f) the order sought will have some practical value or effect;

g) the Court finds no equitable bar to the relief sought; and

h) on a balance of convenience an order of *mandamus* should be issued.

(*Apotex v Canada (Attorney General)*, [1994] 1 FC 742 (FCA); *Canada (Health) v The Winning Combination Inc.*, 2017 FCA 101 at para 60)

[26] *Mandamus* is a discretionary remedy (*Bedard* at paras 25, 84; *Right to Life Association of Toronto v Canada (Attorney General)*, 2022 FCA 220 at para 17 [*Right to Life Association*]) and the onus of establishing a clear legal right to the performance of a legal duty by a Minister lies on the Applicant (*Shirambere v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 602 at para 48).

[27] A court may grant mandatory orders or *mandamus* where the "evidence can lead only to one result" or in circumstances of extreme maladministration (*D'Errico v Canada (Attorney General)*, 2014 FCA 95 at para 16; *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at para 14; *Doyle v Canada (Attorney General)*, 2022 FCA 56 at paras 6-7; *Right to Life Association* at para 17).

[28] In determining whether a *mandamus* should be issued, and in cases where a decision has normally not been made by the decision maker (and therefore no interpretation of the enabling statute has been made), the court is able to determine the proper interpretation to be applied to the statutory provision. As held by the Federal Court of Appeal in *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at paragraph 17:

> [17] … Except in rare instances where *mandamus* is warranted, this Court, as a reviewing court engaged in reasonableness review, will not develop its own interpretation of the Regulations and use it as a yardstick to see whether the administrative decision-maker's interpretation measures up, nor will it impose its interpretation over that of the administrative decision-maker: *Vavilov* at para. 83, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 NR 171 at para. 28; see also *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 DLR (4th) 556 at paras. 31-33. After all, it is for the administrative decision-maker to decide the merits, including issues of legislative interpretation; the reviewing court reviews the administrative decision, nothing more: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263; 9 Admin LR (6th) 296; *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 and cases cited therein. At most, under reasonableness review, this Court can coach the administrative decision-maker on the methodology of legislative interpretation and how to go about its task. But it cannot tell the administrative decision-maker how the interpretive methodology should play out in a particular case.
>
> [emphasis added] (*Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at para 17).

[29] In this case, the Minister provided reasons why the Applicant's refund could not be issued, and relied on subsection 225(4) of the *ETA*. Later, in defending the Applicant's appeal to the Tax Court of Canada [TCC], the Minister relied on subsection 296(4) of the *ETA*, providing that following the determination of an overpayment after an assessment, a refund can only be made when the ITC claims would have been eligible had they been made on the day of the assessment.

[30] To determine whether the Applicant has a "clear right" to the refund and succeed in obtaining an order for *mandamus*, and therefore the performance of the Minister's duty, the Applicant must demonstrate that the "evidence can lead only to one result" which is that the circumstances of this case are not contemplated by the limitation provided under subsection 296(4) of the *ETA* which prohibits the Minister from issuing a refund in those circumstances. The Court must therefore construe the intent of that provision.

B. *The Excise Tax Act*

[31] The general interpretation and application of the *ETA* provisions (except the scheme set out under section 296 of the *ETA* and that is discussed below) is not contested in this case. The GST/HST collection and refund of ITCs are governed by Part IX of the *ETA*. The collection of tax by every person that makes a taxable supply, and the refund of ITC, is an elaborate scheme set out under the *ETA*.

[32] With certain limited exceptions, every person who is engaged in making commercial supplies in Canada in the course of a commercial activity is required to register for the purposes of the GST/HST (subsection 240(1)). Registrants are required to collect tax on the value of the

consideration received for taxable supplies (subsection 221(1)), and they are generally entitled to ITCs for the tax paid on their purchases to manufacture those taxable supplies (subsection 169(1)).

[33] Registrants are required to file GST/HST returns for each reporting period, which can be monthly, quarterly or yearly (subsection 238(1), section 245). Registrants must file their GST/HST returns in a prescribed form with the Minister within one month after the end of the particular reporting period (paragraph 238(1)(b), subsection 238(4)).

[34] Generally, every registrant filing a GST/HST return must calculate the net tax for the reporting period (subsection 228(1)). The amount of net tax for a particular reporting period is calculated by adding the GST/HST collected during the reporting period and subtracting the ITCs, which correspond to the GST/HST paid on purchases to manufacture the taxable supplies during the particular reporting period (subsection 225(1)). A registrant (as in the case of the Applicant in this case) can only claim ITCs for a particular reporting period if the claim is made within four years of the return filing deadline for that reporting period (paragraph 225(4)(b)).

[35] The amount of net tax that must be remitted to the Receiver General is established under sections 225-229 of the *ETA*. Pursuant to subsection 228(2), when the amount resulting from the application of a set formula is positive during the reporting period, the amount is remitted to the Receiver General (unless an exception applies). When the amount is negative during a reporting period, an “overpayment of net tax” occurred and the Minister shall pay the refund “with all due dispatch” after the return is filed, pursuant to section 229 of the *ETA*, provided that certain conditions are met.

[36] It is important to note that remittance made by a registrant under subsection 228(2), or refunds made by the Minister under section 229 of the *ETA*, do not automatically require an assessment.

[37] The Minister may decide to assess any registrant pursuant to Subdivision D of Division VIII of Part IX of the *ETA* for any reporting period. In doing so, under subsection 296(2), the Minister must do a complete reassessment of the registrant and the particular reporting period, and consider any amount that could have been claimed by the person (but which was omitted), in determining the proper amount of net tax.

[38] Once a determination has been made regarding the assessment, the Minister may claim any tax payable or, where an overpayment occurred, may apply the overpayment on other amounts due by the taxpayer under paragraphs 296(3)(a) and (b) of the *ETA*.

[39] Pursuant to paragraph 296(3)(c) of the *ETA*, if no amount exists on which the Minister may apply the overpayment, the Minister must refund the overpayment for the reporting period.

[40] However, notably for ITCs and a potential refund under paragraph 296(3)(c), there is an exception to the power of the Minister to issue a refund. Paragraph 296(4)(b) of the *ETA* provides that overpayments determined during an assessment may only be refunded under paragraph 296(3)(c) if, <u>on the date of the assessment (and not on the date the ITC was claimed or could have been claimed)</u>, the ITC would have been allowed.

[41] It is therefore important to understand the workings of the system. In the normal course, registrants claim the ITC in the reporting period in which they can be claimed, and have no incentive to wait to claim those ITCs in future reporting periods. However, in the case where registrants have failed to claim their ITCs in the reporting period when they were available, subsection 225(4) allows registrants to claim those ITCs for up to four years in the future (as is the case of the Applicant). To the extent that no assessment is ever made by the Minister, those ITCs will be refunded.

[42] However, if an assessment is made by the Minister (and as conceded during the hearing, when a registrant claims an ITC more than three years after they were eligible, this could raise sufficient concerns for the Minister to proceed with an assessment), that assessment may be completed at a time that remains within the four-year timeline to claim the ITC (in which case the refund will be issued), but there may be situations, such as this case, when the assessment will be completed after the four-year limitation set under subsection 225(4) to claim the ITCs has ended.

[43] Subsection 296(4) therefore limits the power of the Minister to issue a refund under paragraph 296(3)(c) depending on the availability of the ITC on the date of the assessment. The issue is whether, on the date of the assessment, the ITCs remained eligible and would have been allowed under the *ETA*. When there is a restriction on the ability to claim ITCs, such as subsection 225(4) and the four-year limitation, and the date of assessment is following that four-year limitation, the ITC would then not be allowed on the date of assessment, and the Minister is prohibited from issuing a refund under subsection 296(4) of the *ETA*.

[44] In this case, the only issue is whether the Applicant may obtain a *mandamus* compelling the Minister to issue a refund. To do so, the Applicant must demonstrate a "clear right" to a refund on the date of the CRA assessment, in other words that subsection 296(4) of the *ETA* was not intended to apply in its situation.

[45] Alternatively, the Applicant may demonstrate that the "evidence can lead only to one result" or that there is bad faith, wrongdoing, negligence, undue delay or extreme maladministration on the part of the CRA. To do so, the Applicant needs to demonstrate that the CRA ought to have been able to complete the assessment of its ITCs in due course, and within the limitation of four-years set under subsection 225(4), as to not trigger the application of subsection 296(4) of the *ETA*.

C. *The Applicant has not established a "clear right" to a refund and there is an equitable bar to the relief*

(1) The Applicant has not established a "clear right" to the refund

[46] As stated above, in order to succeed, the Applicant needs to demonstrate a "clear right" to a refund on the date of the CRA assessment (or that subsection 296(4) of the *ETA* does not apply), or that the CRA ought to have completed the assessment of its ITCs in order to remain within the four-year limitation period set under subsection 225(4). The first issue is one of statutory interpretation, the second is a factual determination.

(a) *The application of subsection 296(4) of the ETA*

[47] Paragraphs 225(4)(b) and 296(4)(b) of the *ETA* provide:

225 (4) An input tax credit of a person for a particular reporting period of the person shall not be claimed by the person unless it is claimed in a return under this Division filed by the person on or before the day that is … **(b)** where the person is not a specified person during the particular reporting period, the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within four years after the end of the particular reporting period; …	**225 (4)** La personne qui demande un crédit de taxe sur les intrants pour sa période de déclaration donnée doit produire une déclaration aux termes de la présente section au plus tard le jour suivant : […] **(b)** le jour où la déclaration aux termes de la présente section est à produire pour sa dernière période de déclaration se terminant dans les quatre ans suivant la fin de la période donnée; […]
Limitation on refunding overpayments **296 (4)** An overpayment of net tax for a particular reporting period of a person and interest thereon under paragraphs (3)(b) and (c) … **(b)** shall not be refunded under paragraph (3)(c) unless the input tax credit or deduction would have been allowed as an input tax credit or deduction, as the case may be, in determining the net tax for another reporting period of the person if the person had claimed the input tax credit or deduction in a return under Division V filed on the day notice of the assessment is sent to the person.	**Restriction — Paiements en trop** **296 (4)** Un paiement en trop de taxe nette pour la période de déclaration d’une personne et les intérêts y afférents, prévus aux alinéas (3)b) et c) : […] **b)** d’autre part, ne sont remboursés en application de l’alinéa (3)c) que dans le cas où le crédit de taxe sur les intrants ou la déduction aurait été accordé à ce titre dans le calcul de la taxe nette pour une autre période de déclaration de la personne si celle-ci avait demandé le crédit ou la déduction dans une déclaration produite aux termes de la section V le jour où l’avis de cotisation lui est envoyé.

[48] For the Minister to be able to issue a refund of an overpayment of net tax for a particular reporting period under paragraph 296(3)(c) of the *ETA*, the Notice of Assessment must be sent within the four-year limitation for claiming ITCs, which is provided for in paragraph 225(4)(b) of the *ETA*. Otherwise, paragraph 296(4)(b) of the *ETA* precludes the Minister from issuing a refund where the ITCs for that particular reporting period would not have been allowed if the taxpayer had claimed these ITCs <u>on the day the Notice of Assessment is sent to the taxpayer</u>.

[49] In other words, the *ETA* system provides that, in the cases of situations such as that of the Applicant, a registrant has four years to file or make their ITC claims under paragraph 225(4)(b). Those can be paid "with all due dispatch" after the return is filed, under subsection 229(1). However, if an assessment is conducted under section 296, then any "overpayment" (of monies not already refunded under subsection 229(1)) will only be refunded if the assessment itself is completed within the same limitation period within which the ITC ought to have been claimed, in this case within a four-year timeframe.

[50] It is important to note that the Applicant claimed a refund of ITCs for several reporting periods. However, on the date of the assessment, the ITCs for the first three reporting periods only were more than four years before the date of the assessment. Consequently, the ITCs <u>would not have been allowed</u> on the date of the assessment, as they were time-barred, and the Minister was precluded from issuing a refund. That is the basis of the Respondent's argument that the Applicant cannot succeed on its application for a *mandamus*.

[51] At the hearing, the Applicant proposed an interpretation of subsection 296(4) that would restrict the limitation on refunding overpayments under subsection 296(4) only to ITCs that were never claimed by a registrant, and found applicable by the Minister under an assessment pursuant to the scheme established under section 296.

[52] The argument suggests that pursuant to subsection 296(2), in conducting an assessment and determining the net tax for a particular reporting period, the Minister must consider other ITCs for that reporting period that were not claimed by the registrant but that would have been allowed had the registrant made the claims in its return for that particular reporting period. The finding of an allowable ITC by the Minister could result in a diminution of the net tax and, subsequently, perhaps an overpayment.

[53] Pursuant to subsection 296(3), the Minister must then apply any overpayment (that at that point could include a "new" ITC that was not claimed at the outset but found during the assessment) against any outstanding amount owed by the registrant (under paragraphs 296(3)(a) and (b)); and to refund any amount that remains under paragraph 296(3)(c).

[54] Up to this point, the Applicant's description of the assessment process is not contested.

[55] The issue arises in the application of subsection 296(4) and the limitation on refunds. Subsection 296(4) provides a limit to the application or refund of overpayments under paragraphs 296(3)(b) and (c). Only the limit on refunds under paragraph 296(3)(c) is impugned in this case. Subsection 296(4) limits the refund of ITCs, under paragraph 296(3)(c), to claims that would be

allowed <u>when the assessment is completed</u>. In this case, ITCs could be refunded if they could, on the date of assessment, be allowed under subsection 225(4) of the *ETA* (within the four-year limitation period). For the purposes of subsection 296(4), it is not important whether the ITCs were actually claimed or not, but whether on the date of the assessment the claims remain within a period within which they remain eligible.

[56] According to Applicant, and this is the issue that is disputed by the Respondent, the limit to a refund under subsection 296(4) only applies to “new” allowable ITCs found by the Minister during an assessment under subsection 296(2), and not to ITCs that were properly claimed by the registrant before the time limit established under subsection 225(4) of the *ETA* (but not yet refunded). Under this interpretation, when the overpayment exists but consists only in ITCs found by the Minister under subsection 296(2) but that have not been claimed within the four-year limit set out under subsection 225(4), then the Minister cannot issue a refund.

[57] In other words, when the Minister “discovers” ITCs that ought to have been claimed but were not, and resulting in an overpayment of tax following an assessment, the Minister must first apply the overpayment to other amounts owed under paragraphs 296(3)(a) and (b). If the assessment is within the four-year limitation under subsection 225(4), the Minister must refund the outstanding amount, even if the “new” ITCs were never claimed (because the limitation under subsection 296(4) does not apply, the ITCs remaining within the four-year limitation on the date of the assessment).

[58] However, if the date of the assessment is after the four-year limitation under subsection 225(4), then the Minister must still refund ITCs that have been claimed within the four-year limitation period (but not yet refunded), but not the "new" ITCs that a taxpayer failed to claim. In this case, because the Applicant did claim the ITCs before the four-year limitation set under subsection 225(4) (in the First Return), the limitation under subsection 296(4) does not apply and the Minister must refund the overpayment.

[59] With respect, I disagree with the interpretation proposed by the Applicant. While not devoid of merit, the Applicant fails to consider the complete text of section 296 and the scheme as a whole.

[60] Section 296 is a generic scheme on assessment. When an assessment is made, it takes into account the fact that tax was already remitted under subsection 228(2), or any overpayment normally refunded under section 229. In conducting an assessment, Parliament intended that a fulsome and complete examination be made by the Minister of the registrant's reporting period, in order to determine the appropriate amount of net tax. Section 296 requires a complete examination of all the information and essentially re-calculate the net tax under subsection 225(1). The assessment requires the consideration of all the information, and grant the registrant the benefit of any new element that could reduce the tax owing.

[61] In re-calculating and assessing the net tax, the Minister will consider all the information. Indeed, and specifically as provided under subsection 296(2), the Minister is required to conduct a wholesome examination of a registrant's return and, in cases where the Minister finds that a

registrant failed to claim some ITCs that would have been allowable, the Minister must consider those amounts in assessing the net tax of the registrant for the particular reporting period (subsection 296(2)).

[62] The amount established as the ITC that could have been available but was not claimed by the registrant is defined as being an "allowable credit" for the purposes of the section 296 assessment scheme (paragraph 296(2)(a)). The same type of examination applies to rebates, and an amount that would have been payable as a rebate but was not because the registrant failed to claim it must also be considered in determining the net tax for the reporting period, and is defined as an "allowable rebate" under subsection 296(2.1).

[63] When the amount of net tax is established, and there is an amount of tax due (after consideration, and including any "allowable credit" and "allowable rebate"), the Minister may make an additional assessment of tax, and even apply a penalty or interest under subsection 296(1).

[64] However, when an overpayment is determined, pursuant to subsection 296(3), the Minister must set off that amount against other amounts owed by the taxpayer, or issue a refund. At this point, the "<u>overpayment</u>" is inclusive of all ITCs and rebates that were originally claimed by the registrant, as well as those "allowable credits" and "allowable rebates" "discovered" by the Minister during the assessment.

[65] The Minister must then apply the overpayment (again after consideration, and taking into account any "allowable credit" and "allowable rebate") against any amount owed by the registrant

for the particular reporting period (paragraph 296(3)(a)); apply the overpayment that remains after consideration of paragraph 296(3)(a) against any other amount owed (paragraph 296(3)(b)); and refund any amount that remains under paragraph 296(3)(c) (instead of, potentially, apply the overpayment to future net tax amounts that could be owed).

[66] However, paragraph 296(4)(b) then limits the refund of an overpayment resulting from the assessment (again including any "allowable credit," but also any other ITC that has not yet been refunded and that result in an overpayment) to ITCs that would have been allowed had the ITCs been made <u>on the date of the assessment</u>. At that point only, Parliament restricted any potential refund to overpayment that would still have been allowed on the day of the assessment, instead of any other limit existing under the *ETA*.

[67] In this case, when the assessment was completed, an overpayment existed. Had the assessment been completed within the four-year limitation period under subsection 225(4) of the *ETA*, the refund would have been issued, regardless of whether the ITCs were originally claimed, or were "allowable credits" "discovered" by the Minister during the assessment process.

[68] However, while the Applicant's overpayment for most reporting periods remained within the time limit to claim the ITCs as provided under subsection 225(4) of the *ETA*, for the first three reporting periods, that time limitation period had lapsed. Therefore, on the date of the assessment, the first three reporting periods could no longer be claimed under subsection 225(4), and the Minister was therefore precluded from refunding them following the assessment, as provided under paragraph 296(4)(b).

[69] As discussed, it is noteworthy that the "new" ITCs identified and considered by the Minister under paragraph 296(2)(a) are defined as being "allowable credits." Had the Applicant been accurate in its proposed interpretation of the Minister's limitation on refunding overpayments, and that the restriction imposed under subsection 296(4) only applied to "new" "allowable credits" found by the Minister and never claimed by the registrant before (and had not applied to the first three reporting periods because the Applicant in their view did claim the ITCs within the time limit set out under subsection 225(4) of the *ETA* – in the First Return), subsection 296(4) could have been specific and limited overpayment only in relation to the "allowable credits." In other words, paragraph 296(4)(b) could have been drafted in this form:

> (4) An overpayment of net tax for a particular reporting period of a person and interest thereon under [paragraph (3)(c)]:
>
> …
>
> (b) shall not be refunded under paragraph (3)(c) unless the ~~input tax credit~~ [allowable credit] or deduction would have been allowed as an ~~input tax credit~~ [allowable credit] or deduction, as the case may be, in determining the net tax for another reporting period of the person if the person had claimed the ~~input tax credit~~ [allowable credit] or deduction in a return under Division V filed on the day notice of the assessment is sent to the person.

[70] Had paragraph 296(4)(b) been drafted in this form, the limit on overpayments would have applied only to those "new" ITCs (or "allowable credits") "discovered" during the assessment process, but not to all other ITCs claimed within the time limit set under subsection 225(4) of the *ETA*.

[71] However, that is not the case. It is important to note that the term "overpayment" at the outset of subsection 296(4) is the same term used throughout the *ETA* and specifically in subsection

296(3) in determining the net tax following an assessment. The determination of an "overpayment" under subsection 296(3) clearly contemplates including all ITCs claimed in due course when the return was filed for the reporting period, as well as other "new" ITCs ("allowable credits") "discovered" by the Minister during the assessment under subsections 296(2) and (2.1). It is that "overpayment" that is then applied to amounts owed pursuant to paragraphs 296(3)(a) and (b), or refunded under paragraph 296(3)(c). Therefore, the limitation under subsection 296(4) applicable to refunds of "overpayments" under paragraph 296(3)(c) must include all ITCs, and not only those "allowable credits" that were "discovered" during the assessment process under subsection 296(2) as the Applicant submits.

[72] Parliament therefore carved specific limitations to refunds. Under subsection 296(4) of the *ETA*, and for all ITCs which collectively contributed to an overpayment as a result of the assessment under section 296, the CRA cannot consider whether the ITC claims were actually made (or were "discovered" by the Minister following an assessment under subsection 296(2)), but whether they would be allowed <u>on the date of the assessment</u>. Parliament therefore prescribed that the overpayment had to be analyzed as of the date of the assessment, and not of the reporting period.

[73] Therefore, under subsection 296(4), if the ITC is still allowable within the limitation period under subsection 225(4) (regardless of whether it was claimed at the time or "discovered" during the assessment), the ITC can be refunded because it remains eligible at the date of the assessment. However, if on the date of the assessment, the ITCs are no longer allowable, then the Minister cannot refund.

[74] That interpretation is reflected by the technical notes, which refer to the assessment being required to be made within the time limitation to claim ITCs, and not the reporting period to claim them, for the overpayment to be refunded :

> New subsection 296(4) restricts the application or refund of overpayments under subsection 296(3). An overpayment of net tax for a person's reporting period can only be applied against liabilities that arose within the period allowed for claiming input tax credits for that reporting period. Similarly, an overpayment of net tax for a reporting period shall not be refunded unless the assessment for the reporting period is issued before the expiration of the limitation period allowed to the person for claiming input tax credits for that reporting period and, consistent with existing sections 229 and 230, the person is up to date in filing returns.
>
> [emphasis added] (Department of Finance Canada, *Amendments to the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the Income Tax Act, the Debt Servicing and Reduction Account Act and related Acts: Explanatory Notes*, by the Honourable Paul Martin, P.C., M.P. (Ottawa: Department of Finance Canada, July 1997) at 158–159).

[75] In this case, because on the date of the assessment, the first three reporting periods were outside of the limitation period set out under subsection 225(4), Parliament precluded the Minister from issuing a refund. All other reporting periods were refunded.

[76] Even if Parliament may not have contemplated a situation such as in this case, it remains that within the context of an application for a *mandamus*, the Applicant does not have a "clear right" to the performance of a duty by the CRA to issue a refund.

[77] It is important to note that the Applicant's situation is indeed a particular one. Normally, ITCs would have been refunded under section 229 and, following an assessment under section 296, some of those ITCs may be denied, leading to additional tax payable under subsection 296(1).

In other cases, “new” “allowable credits” may be found under subsection 296(2) that will obviously not have been refunded before, as they were never claimed. In those cases, the amount of overpayment may be set off under paragraphs 296(3)(a) and (b), or refunded under paragraph 296(3)(c) (but the limitation on refunding of overpayments under subsection 296(4) applies). Circumstance such as the ones in this case where an ITC claim has been made within the four-year limitation period, but not yet refunded under section 229, and then becomes subject to an assessment under section 296 before the refund, must be rare. When such a situation arises, the ITC claim is not a “new” or “allowable credit” as understood under subsection 296(2), but if an overpayment results from the assessment, that overpayment remains subject to the limitation on refunds under subsection 296(4). In those cases, on the date of the assessment, while there is an overpayment, the ITCs (that have been claimed but never refunded) are not allowed because of the four-year limitation under paragraph 225(4)(b). The Minister cannot therefore issue a refund pursuant to subsection 296(4) of the *ETA*.

[78] The Applicant argues that the CRA interpretation provides for an inconsistent application of the *ETA*. In their words, how can an ITC claim be properly made within the four-year limitation (if the First Return is valid) and be allowable under subsection 225(4), yet no refund is available under subsection 296(4) following an assessment?

[79] The response is that an assessment by the Minister under section 296 is not mandatory. A registrant may file the ITC claim within the four-year limitation provided under subsection 225(4), and that amount may be refunded under section 229 of the *ETA*. Any future assessment under section 296 may change that situation. However, if the refund is not made prior to the assessment,

then the rules applicable to assessments and refunds, including the limitation on refunding overpayments under subsection 296(4), must apply.

[80] When the Minister decides to assess under section 296, then the assessment of the net tax is re-determined, and any overpayment that results from the assessment follows different rules. One of them is that for overpayments, those amounts may offset amounts owed, but if there are no amounts to offset, then a refund is available only if, on the date of the assessment, the ITC would be allowed (section 296(4)).

[81] Subsection 296(4) provides for an element of predictability and finality. It ensures that registrants strive to produce the most precise periodic returns as possible, and also at the end of the particular reporting period. While subsection 225(4) allows a registrant to claim an ITC up to four years later, that should not be encouraged. To the extent that an assessment is made to a reporting period, but that the proper amount of ITCs have been claimed, the assessment should in most situations (1) be completed within the four-year limitation (because the assessment of the reporting period will be made soon following that reporting period and the result will be completed in advance of the four-year limitation to claim an ITC under subsection 225(4)); and (2) if new ITCs are "discovered," the registrant can benefit from the "allowable credit" and be refunded for the overpayment because that ITC would remain allowed on the day of the assessment.

[82] The Applicant also argues that had the CRA interpretation of subsection 296(4) been applied consistently in this case, a fourth reporting period applicable to the Applicant should have been denied. In the Applicant's view, this fact demonstrates that the CRA only applied subsection

225(4) in its case, and the time of the First Return and Second Return become important (see the refund of a fourth period: AR at 347). The Applicant also argues that the CRA's application demonstrates that its interpretation of subsections 296(4) and 225(4) together is preferable, and that it is the date of the filing of the returns that matters for a potential overpayment.

[83] Indeed, for a fourth reporting period between May 1, 2013 and July 30, 2013, the time to file the return ought to have been one month later – August 31, 2013. The four-year deadline applicable under subsection 225(4) means that the deadline to claim the ITC was August 31, 2017 (and no refund was therefore payable after that date according to the CRA's interpretation of subsection 296(4)). Yet, the assessment is dated November 17, 2017, and the CRA still refunded that fourth reporting period.

[84] In my view, while I agree that the CRA reasons denying the refund for the first three reporting periods only rely on subsection 225(4), and the CRA did in fact refund a fourth reporting period that was not eligible for a refund under subsection 296(4), I accept the Respondent's argument that the refund of the fourth reporting period appears to have been made in error.

[85] Most importantly, however, notwithstanding whether or not the refund of the fourth reporting period was an error or not, the Applicant nevertheless does not have a "clear right" to the performance of a duty by the CRA under the principles applicable to a *mandamus* to receive a refund, in light of the wording of subsection 296(4) of the *ETA* specifically stating that overpayments of ITCs can only be refunded if the ITCs would have been allowed (in this case under subsection 225(4) and within the four-year limitation period), and without distinguishing

between an ITC claimed originally in the return for that reporting period, and an “allowable credit” or “new” ITC “discovered” during the assessment under section 296. Subsection 296(4) of the *ETA* specifically prohibits the Minister from issuing a refund for the first three reporting periods on the facts of this case.

[86] Therefore, the fact that the CRA did refund a fourth reporting period that, on the basis of subsection 296(4) perhaps should not have been refunded because that fourth reporting period was also more than four years after the deadline set under subsection 225(4), does not help the Applicant discharge its onus to demonstrate that it has a “clear right” to the performance of the Minister’s duty to refund the first three reporting periods.

[87] In other words, for the first three reporting periods that are applicable to this application for a *mandamus*, the fact that the CRA failed to deny a refund for this fourth reporting period is not indicative that the Applicant’s interpretation of subsection 296(4) is accurate, nor that it has a “clear right,” in the circumstances of this case, to a *mandamus* requiring the refund.

[88] Finally, the fact that the Notices of Assessment do not contain a specific reference to subsection 296(4) of the *ETA* does not invalidate the assessment nor provide a “clear right” to the Applicant to compel the Minister to issue a refund in this case that would be contrary to the terms set out pursuant to subsection 296(4) of the *ETA* (*Majoca Inc. v The Queen*, 1997 CanLII 201 (TCC) at para 15; *Pawlak v The Queen*, 2012 TCC 355; see also *3735851 Canada Inc. v The Queen*, 2010 TCC 24).

(b) *The CRA properly assessed the Applicant's ITC claims*

[89] As stated, even if the CRA's interpretation of subsection 296(4) is accurate, the Applicant may still succeed if it can demonstrate that the CRA failed to complete its assessment in due course. In other words, if the Applicant can demonstrate bad faith, wrongdoing, negligence, undue delay or extreme maladministration on the part of the CRA, which caused the Applicant to miss the four-year limitation under subsection 225(4), the Applicant may have a recourse.

[90] The Applicant's main argument is that by October 27, 2016, the CRA had all the information it required to process all of its ITC periodic returns, and that the CRA recognizes that the ITC amounts claimed in this case are accurate. Therefore, in its view, the CRA should issue the refund.

[91] With respect, I cannot accept the Applicant's characterization of the facts completely.

[92] First, the First Return did not comply with section 238 and section 245 of the *ETA*. Sections 238 and 245 require that registrants file a GST/HST return, in the prescribed form, for each reporting period, which can be monthly, quarterly or yearly, within one month after the end of the reporting period (quarterly in the case of the Applicant).

[93] The Applicant argues, relying on section 32 of the *Interpretation Act*, RSC 1985, c I-21, that the First Return contained all the necessary information and that the CRA's refusal to process

it favours form over substance. I disagree. In this case, the defect is substantive, not merely procedural or to form.

[94] The First Return is problematic from a substantive standpoint because it did not provide sufficient information or detail to allow the CRA to process the information. In the First Return, the Applicant filed information relating to a reporting period from October 1, 2012 to August 31, 2016. While it may be true that the CRA was globally in possession of all of the required information, the Applicant did not explain, detail or distill the information in a sufficiently clear manner to allow the CRA to be able to attribute the ITCs claimed by the Applicant to each quarterly reporting period, as required under the *ETA*. That issue also played a role in the CRA finding that the Applicant was not registered for periods before December 1, 2014, as discussed below (with the information contained in the First Return, it is not clear that some ITCs related to a reporting period prior to December 1, 2014).

[95] It is important to note that the onus of the adequacy and clarity of the return falls on the registrant. It is not incumbent on the CRA to parse through the information sent by the Applicant and re-apply the information to relevant quarterly reporting periods. I therefore accept the CRA's evidence that it was unable to process nor to assess GST/HST returns that were not filed on a monthly basis, a quarterly basis, or a yearly basis, as the case may be (see Richard Affidavit at para 14, AR at 1269). That in part explains why the CRA was unable to process the Applicant's First Return. The First Return was therefore invalid.

[96] The Applicant also states that by October 27, 2016, the information was sent to the CRA auditor affected to Amexon's audit, as well as the Toronto Center Tax Services Office. The Applicant then states having not received any communication from CRA until about March 30, 2017, about five months later, to notify the Applicant as to any issues with the First Return. The Applicant submits that had CRA processed its returns quicker, it would have been able to amend them in due course and would have been able to file the Second (or even Third) Return before the four-year limitation applicable under subsection 225(4) of the *ETA*. In other words, the CRA's delay cannot be opposed to the Applicant's right to a refund.

[97] Again, a careful review of the evidence disputes that position. The CRA did write Amexon on October 17, 2016, informing Amexon that it improperly claimed ITCs that could only be claimed by the Applicant and another related company. The CRA advised Amexon that the Applicant and the other entity were not under audit and to "[p]lease file their respective returns for processing under normal procedures keeping in mind the four-year limitation on claiming input tax credits" [emphasis added] (AR at 160).

[98] The CRA auditor for Amexon was therefore not responsible for the analysis of the Applicant's First Return (the Applicant was not under an audit) and that explains why the Applicant did not receive a response from that auditor.

[99] There is also no evidence that a five-month timeline is unreasonable "for processing under normal procedures," and there is no evidence of bad faith, wrongdoing, negligence, undue delay or extreme maladministration against the CRA in that regard. Had that First Return complied with

the *ETA*, and the Applicant properly been registered under the *ETA* as of August 1, 2012 when the First Return was filed on October 27, 2016, the CRA could potentially have had sufficient time to complete the assessment in time to refund the first three reporting periods (albeit it only had about one month for Period 1 to be eligible to a refund under subsection 296(4), until November 30, 2016; after that date, the ITCs were statute-barred under subsection 245(4) for Period 1 and could not be refunded under subsection 296(4)). Perhaps that even in the best of scenarios, the Minister still would not have been in a position to refund Period 1, depending on when the assessment could be completed in due course.

[100] Second, it was incumbent on the Applicant to ensure not only that the returns met the requirements of section 238 and section 245 of the *ETA*, but also that it was properly registered under the *ETA* for the reporting periods that it was claiming. Under subsection 169(1) of the *ETA*, ITCs can only be claimed for reporting periods during which a person is a "registrant," as defined under section 123 of the *ETA* (*Vert-Dure Plus 1991 Inc. v The Queen*, 2007 TCC 379 at para 18).

[101] The Applicant argues that it was always "deemed" to have been registered as of August 1, 2012, even if the "official" registration was dated December 1, 2014 and had to be backdated. The Applicant relies on the phrase "or who is required to be registered" of the definition of the term "registrant" under subsection 123(1) of the *ETA*. However, other than to state that it ought to be "deemed" a registrant, the Applicant adduced no evidence that it was "required" to register for the first three reporting periods and, on the other hand, reported nil amounts of sales and other revenue and total GST/HST in its returns for the first three reporting periods which would rather indicate that it did not need to be registered for those reporting periods. Moreover, the Applicant provided

no evidence as to why it ought to have been "deemed" to be a registrant back to August 1, 2012, and not another date. While the backdating of the registration was later accepted, there is no reliable evidence as to why or how the Applicant could be "deemed" to be registered for the first three reporting periods before the CRA found the issue on April 5, 2017 – and the statements made by Mr. Azouri and Mr. Di Giovani in their affidavits are not conclusive on that issue (AR at 122, 937).

[102] In any event, even if the Applicant could be "deemed" to be registered, this implicit registration was not sufficient for the CRA and I accept the CRA's evidence that it could not process nor assess the Applicant's GST/HST returns for the first three reporting periods because the Applicant was not initially registered for reporting periods prior to December 1, 2014 (see Richard Affidavit at paras 16–19, AR at 1268–1270).

[103] I also accept the evidence that the Applicant and the CRA worked together to "backdate" the Applicant's registration to August 1, 2012 in April 2017 and thereafter, culminating on July 20, 2017 (see Richard Affidavit at paras 17–22, AR at 1270). While the Applicant may have been "deemed" to be a registrant before July 20, 2017, the CRA could still not process the returns before the registration backdating was indeed completed. Moreover, the GST/HST registration backdating process is independent from the processing of GST/HST returns (Answers to the Written Examination on the Richard Affidavit, Answer to Question 8e), AR at 2188). This further explains why there was a delay in the processing of the Applicant's claims in this case.

[104] Proper registration under the *ETA* is an obligation that falls on the Applicant, and not on the CRA. While the issue was manageable and eventually solved by July 20, 2017, the issue did delay the process leading to the assessment of the Minister. Had the Applicant ensured that its registration was adequate in October 2016, and provided a First Return that was valid, perhaps the CRA would have been able to assess it in time to refund all reporting periods. Therefore, regardless of whether the First Return was valid or not, the evidence remains clear that the Applicant was not registered at that time for the reporting periods prior to December 1, 2014, and would not have been registered had the CRA not alerted the Applicant of the issue in April 2017.

[105] Consequently, I find that the process leading to the assessment of the Applicant properly ran its course. There is no bad faith, wrongdoing, negligence, undue delay or extreme maladministration on the part of the CRA. The CRA followed its process and when it found issues with the Applicant's filings, it notified the Applicant and helped to remedy them. When the process followed its course after the beginning of April 2017, the Applicant was able to backdate the date of registration but, unfortunately, by that time, the CRA's assessment could not be made in time to allow a refund of the first three reporting periods, as a result of the application of subsection 296(4) of the *ETA*.

[106] In the end, in my view, the issue of the validity and the date of filing of the First Return and the Second Return are not determinative. Even if the First Return had been valid, the Applicant's recourse would not succeed. The Applicant's failure to ensure that it was properly registered under the *ETA* is in my view the most problematic issue. That issue precluded any processing of the Returns for the first three reporting periods until it was properly addressed, which

was July 20, 2017. At that point, even if the Second Return is valid, the first three reporting periods could not be refunded.

[107] Unfortunately, the Applicant never ensured that it was properly registered for the periods prior to December 1, 2014, and the CRA was not able to process the reporting periods before the Second Return in order to signal the issue to the Applicant. The CRA could not process the First Return because it was not divided in quarterly reporting periods and there were no clear indications up to that point that the December 1, 2014 registration date was problematic. A stated above, because the First Return set out a period between October 1, 2012 to August 31, 2016, the information did not clearly allow the CRA to attribute the ITCs to each quarterly reporting period, and the CRA could not conclusively determine that some ITCs related to periods when the Applicant was not registered. That only became possible for the CRA to determine after the filing of the Second Return.

[108] The issues relating to the unclear First Return, as well as the registration period of December 1, 2014, both of which were under the responsibility of the Applicant, caused a part of the delay resulting in the assessment being issued too late for the first three reporting periods to be refunded under subsection 296(4).

[109] In any event, the issue in this case is whether the Applicant has discharged its onus to be granted a *mandamus* and receive a refund. In order to discharge their burden, the Applicant must have "clear right" to the performance of the duty. Demonstration of a "clear right" in this case requires to Court to go around the limit set out under subsection 296(4), which in turn requires the

Court to find bad faith, wrongdoing, negligence, undue delay or extreme maladministration created by the CRA in its assessment process. I cannot conclude in any CRA bad faith, wrongdoing, negligence, undue delay or extreme maladministration on the facts of this case that would lead me to conclude that the CRA ought to have completed its assessment in a manner sufficient for the Applicant to have a "clear right" to a refund for the first three reporting periods, notwithstanding subsection 296(4) of the *ETA*.

[110] It is also important to note that the Applicant agrees with the CRA assessment of Amexon and that the CRA's conclusion that Amexon could not claim the Applicant's ITCs is not contested. There is also no allegation that the CRA assessment of Amexon was either wrongly processed or too slow. In other words, Amexon made a mistake in its interpretation of the *ETA* with what most would agree is a very complicated legislative scheme. In the end, the result is that Amexon made an error, which was only corrected following an assessment by the Minister. Unfortunately, by the time the error was discovered, there only remained several weeks or months for the Applicant to claim its ITCs for the three reporting periods.

(2) There is an equitable bar for relief

[111] The Respondent argues that the Minister issued its decision to deny the refunds on November 7, 2017, but the Applicant did not bring its application for judicial review until July 14, 2021. In other words, there is a delay of three and a half years.

[112] However, it is important to note that the Applicant did file Notices of Objection and later an appeal to the TCC.

[113] In my view, on the facts of this case, the Applicant's appeal to the TCC, while erroneous, should not present an equitable bar for relief. The jurisdiction of the TCC has been unclear on issues relating to the Minister's discretion (*Iris Technologies Inc. v Canada*, 2024 SCC 24; *Dow Chemical Canada ULC v Canada*, 2024 SCC 23), and the TCC has even, in some cases, discussed the application of subsection 225(4) without clearly articulating that it did not have jurisdiction (*Byrnes v The Queen*, 2008 TCC 57; *Layte v The Queen*, 2010 TCC 281; *Lacroix v The Queen*, 2010 TCC 160). Moreover, the fact that an appeal was brought was a clear signal that the Applicant disagreed with the decision and intended to appeal or seek judicial review, at the outset.

[114] The Respondent also argues that the Applicant cannot challenge the Minister's earlier decisions to refuse to process the First Return and the Second Return. In the Respondent's view, the Applicant never sought judicial review of these decisions and to allow the Applicant to review these decisions in an application for a *mandamus* would be contrary to Rule 302 of the *Federal Courts Rules*, SOR/98-106.

[115] In my view, the Minister's refusals to process the First Return and the Second Return are not "decisions" which the Applicant had to contest by way of judicial review within the time prescribed under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*]. The facts in this case demonstrate that the CRA and the Applicant were in constant communication in relation to the steps that were required by the Applicant to properly file their quarterly returns (including the backdating of its *ETA* registration). The "decisions" to refuse to process the First Return and the Second Return were also communicated orally, which is another indication that in doing so, the CRA was not purporting to make a "decision" under its powers pursuant to the *ETA*

that could be subject to judicial review at that time. In my view, the CRA's and the Applicant's communications in this case were all in the context of the Applicant's ITC claims which culminated in the assessments of November 7, 2017, which are the subject of this application. Moreover, the ongoing administrative process followed its course, as the parties were still communicating on the matter, and an internal and adequate recourse continued to exist and was pursued as required by the Federal Court of Appeal in *C.B. Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at paragraphs 30–33.

[116] However, as argued by the Respondent, I am satisfied that there is an equitable bar to the relief.

[117] The Applicant filed Notices of Objection of the Minister's decision on February 2, 2018. On February 15, 2018, the Applicant was notified by the CRA that its Objection was invalid, as the issue was not part of the assessment of tax penalties and/or interest, and that therefore the Objection would be closed without further review (AR at 852).

[118] The Applicant therefore had to either appeal that decision in due course before the TCC (if that was its understanding of the appeal process), or seek judicial review before the Federal Court within 30 days as required under section 18.1 of the *Federal Courts Act*.

[119] However, the Applicant did neither.

[120] Instead, the Applicant waited until May 10, 2019, to file an *Application for an Extension of Time Within Which an Appeal may be Instituted* and a *Notice of Appeal* to the TCC.

[121] There is no evidence on record explaining this delay of over one year.

[122] In reply, the Applicant noted that along with its *Notice of Appeal* to the TCC filed on May 10, 2019, it also filed an application for an extension of time, and that an Order on consent was endorsed by Justice Favreau of the TCC. In this Order, the parties agreed that an appeal could be filed under paragraph 306(b) of the *ETA* and that the application for an extension of time was withdrawn (AR at 2173-2174). The Applicant argues that this is indicative of the fact that the Respondent consented to the extension of time.

[123] In my view, the Order is inconclusive and does not indicate that the Respondent consented to the request for an extension of time, which was specifically withdrawn. Moreover, the Order on its own does not set out any reason why the Applicant in this case took more than one year to pursue its recourses.

[124] I therefore agree with the Respondent that in the absence of any evidence in the Applicant's affidavits explaining the delay in filing a recourse against the assessment (even if it was ultimately the wrong one), the Applicant's failure to explain over one year of inactivity on the file creates an equitable bar to the issuance of an order of *mandamus* in this case.

V. Conclusion

[125] As stated above, had there been evidence of bad faith, wrongdoing, negligence, undue delay or extreme maladministration in the CRA's assessment of the Applicant's returns, a finding could have been made that the CRA failed to act with dispatch, meet its obligations, and assess the Applicant's returns in due course. That evidence could have been conclusive and led the Court to grant a *mandamus*, in those limited circumstances, to remedy the harm resulting from the CRA's failure to process the assessment in a timely manner.

[126] However, on the facts of this case, the Court finds that there was no CRA bad faith, wrongdoing, negligence, undue delay or extreme maladministration in relation to the Applicant's assessment. In fact, some of the delay is attributable to the Applicant who failed to produce the First Return in compliance with section 238 and section 245 of the *ETA*, and to verify their registration under the *ETA* along with the backdating necessary. Indeed, it is the CRA that discovered the issue, notified the Applicant and identified the necessary remedy – which was eventually accomplished in July 2017, only four months before the assessment. As the Applicant was not registered for the first three reporting periods before July 20, 2017, no assessment could have been completed by the CRA for the first three reporting periods before that date. When the CRA finally was able to complete the assessment, the first three reporting periods could not be refunded under subsection 296(4).

[127] In the end, the CRA refunded the Applicant for all the amounts claimed, except for the first three reporting periods, because when the CRA issued its assessment, subsection 296(4) precluded

any refund on the basis that on November 7, 2017, the date of the assessment, the ITCs for the first three reporting periods were no longer allowable under subsection 225(4).

[128] Consequently, the Applicant cannot establish, on the facts of this case, a “clear right” to the performance of a duty by the CRA to make the refunds requested.

[129] The application for a *mandamus* must therefore be dismissed, with costs set at the middle of Column III of Tariff B, along with recovery of all reasonable and necessary disbursements.

JUDGMENT in T-1163-21

THIS COURT'S JUDGMENT is that:

1. The application for a *mandamus* is dismissed.
2. Costs are granted in favour of the Respondent, set at the middle of Column III of Tariff B, along with recovery of all reasonable and necessary disbursements.

"Guy Régimbald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1163-21
STYLE OF CAUSE:	3533158 CANADA INC. v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL (QUÉBEC)
DATE OF HEARING:	MAY 21, 2024
JUDGMENT AND REASONS:	RÉGIMBALD J.
DATED:	JULY 11, 2024

APPEARANCES:

Me Frédéric Delisle and Phillipe Brunelle	FOR THE APPLICANT
Me Julien Wohlhuter and Jonathan Bachir-Legault	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Spiegel Sohmer Inc. Barristers & Solicitors Montréal (Québec)	FOR THE APPLICANT
Attorney General of Canada Montréal (Québec)	FOR THE RESPONDENT