Federal Court  Cour fédérale

Date: 20200310

Docket: T-1787-18

Citation: 2020 FC 360

Ottawa, Ontario, March 10, 2020

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DENSO MANUFACTURING CANADA, INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

Introduction

[1] The Minister refused to exercise the discretionary authority conferred by subparagraph 156(4)(b)(ii) of the *Excise Tax Act*, RSC 1985, c E-15 [the ETA], to accept the late filing of the election made by Denso Manufacturing Canada, Inc. [Denso Manufacturing] and its related corporation Denso Sales Canada, Inc. [Denso Sales], the applicant in related file T-1788-18. That is the decision these companies [collectively the Denso Companies] challenge.

Background

[2] Section 156 of the ETA permits closely related corporations to make a joint election pursuant to which every taxable supply made between them is deemed to be made for nil consideration. Consequently, no GST/HST need be collected on the supplies.

[3] Denso Manufacturing and Denso Sales are related corporations who qualify for the benefit of section 156 of the ETA once they make a joint election.

[4] Before 2015, corporations would elect the benefit of section 156 by completing a GST25 form and keeping it with their records. It was not filed with the Minister of National Revenue. The Denso Companies had done so with an effective date of April 1, 2007.

[5] Section 156 of the ETA was amended in 2014 by the *Economic Action Plan 2014 Act, No. 1*, SC 2014, c 20. The amendment requires that effective January 1, 2015, the election under ETA section 156 be made in the new prescribed form, Form RC4616, and be filed with the Minister of National Revenue.

[6] With respect to 2015, the first year following the amendment requiring that the election be filed, the Minister gave notice that related persons making the election would be permitted to file their RC4616 before January 1, 2016; if so filed, it would cover the entire 2015 calendar year. The Denso Companies did not file their RC4616 before January 1, 2016.

[7] In November 2015, the Denso Companies discovered an internal error in their accounting system data and reported it to Canada Border Services Agency [CBSA]. The error was corrected and additional net GST owing to CBSA was paid. As will be seen below, the Denso Companies submitted to the Minister that their pre-occupation with correcting this error was a consideration the Minister should consider when determining whether to exercise the discretion to accept the election late.

[8] In January 2016, the Canada Revenue Agency's Audit Integrity Unit selected the Denso Companies' returns for November and December 2015, for review. In her affidavit, the Director, Finance and Administration of the Applicant attests that on February 11, 2016, Susan Joseph, the examiner conducting the review, asked for certain documents and "also asked that Denso file a Form RC4616 so that Denso was in compliance with section 156 of the Act." She further attests: "Ms. Joseph did not provide any further instructions in respect of completing or filing Form RC4616."

[9] As at the date of this call, February 11, 2016, the Denso Companies knew that they did not comply with ETA section 156, and that they were required to file Form RC4616.

[10] Six days later the Denso Companies contacted their tax consultants, Ryan Tax Consultants [Ryan], inquiring about their obligation to file RC4616:

> With regards to my voice mail this morning, could you please provide Ryan's opinion for an election for "Nil consideration for GST/HST purposes" and completing the form RC4616.
>
> …

> Please correct my understanding that the form completed below in 2007 remain valid and effective until it is revoked. However, I was informed by CRA that DCMN and the other party should file the RC4616 in January 2016 for Nil Consideration.
>
> RC4616 form indicated that "*Parties to an existing election with an effective date before January 1, 2015, that is still in effect on January 1, 2015 will be required to file the election form. However, they will be required to file the election form after 2014 and before January 1, 20*16."
>
> Was there any changes in the GCT/HST ruling on the Election for Nil Consideration for GST/HST purposes after our filing in 2007? Do we have to file RC4616? If we are required to file the RC4616, what are the consequences of not filing the RC4616 on or before January 1, 2016? Does this mean that we need to collect GST/HST for January, 2016 sales and remit GST/HST collected to CRA? Do we need to amend our GST/HST return filed in January, 2016? Would there a penalty on this? [*sic*]
>
> Please advise if we have to file RC4616 every reporting calendar year beginning January 1, 2016.

[11] This message shows that the Denso Companies knew they had missed the filing deadline and that they had reviewed Form RC4616. A part of the "General Information" on the reverse side of the form was quoted in the message. Relevant passages in that General Information, include the following:

> What is the effect of the election?
>
> When all of the eligibility requirements are met and a specified member of a qualifying group elects, at any time on or after January 1, 2015, jointly with another specified member of the group, certain taxable supplies made between them are considered to have been made for no consideration. <u>The election is effective on the day specified in Part B of this form.</u>
>
> When all of the eligibility requirements continue to be met and parties to an existing election with an effective date before January 1, 2015, that is still in effect on January 1, 2015, <u>continue to elect jointly with each other</u>, certain taxable supplies made between

> them after 2014 are considered to have been made for no consideration.
>
> …
>
> Parties to an existing election with an effective date before January 1, 2015, that is still in effect on January 1, 2015, are also required to file the election form. However, they were required to file the election form after 2014 and before January 1, 2016.
>
> [emphasis added]

[12] In response to the questions asked, Ryan responded on February 18, 2016, as follows:

> As a follow-up to our conversation yesterday, I was not able to find anything published by Canada Revenue Agency that speaks to the consequences of missing the deadline for the new RC4616.
>
> However, the following commentary is included in David Sherman's (commodity tax guru) Notes on section 156 of the *Excise Tax Act*:
>
> > Since Jan. 1, 2015, the election must be filed with the CRA on Form RC4616 to be valid. Pre-2015 elections on Form GST25 are valid during 2015, and must be replaced with an RC4616 filed by the end of 2015 to continue to be valid. If the election is overlooked or unavailable, the intercompany charges may qualify as "wash transactions" for which interest … can be reduced to a flat 4% of the unremitted GST/HST. [emphasis added]
>
> Based on this commentary, it appears the transactions occurring during the current audit periods of November and December are safe. Your only exposure would be the transactions occurring during the month of January if you are not able to file the election by the end of this month with your GST/HST return covering the month of January.

[13] On February 22, 2016, the Denso Companies faxed Form RC4616 to the CRA. In the box marked "Reporting date (that includes effective date of the election or revocation)" they indicated that the election was effective from January 1, 2016.

[14] Four days earlier, by letter dated February 18, 2016, Susan Joseph had informed Denso Manufacturing that CRA had completed its examination of the GST/HST returns for November and December 2015, and that "no changes will be made to the return filed for the above period." She further informed it that the "examination did not cover the full scope of your operation and it is possible that an audit at some future time could cover the above period."

[15] In fact, a further audit was done by CRA. By letter dated June 7, 2017, Vinesh Bakhru of the CRA Audit Division informed Denso Manufacturing that an audit of its GST/HST returns for the period April 1, 2014 to March 31, 2016 would be done.

[16] The Applicant's Director, Finance and Administration attests that "in the period of September 11-13, 2017, Mr. Vinesh Bakhu visited Denso's office as part of his audit activities … and asked for a copy of Denso's Form RC4616 and indicated that he believed it had been filed late." She says that she then consulted with Deloitte regarding the Form RC4616, and then communicated with CRA by email dated November 8, 2017 (although the letter was dated November 7, 2017), containing a letter and Form RC4616 indicating an effective election date of January 1, 2015. She requested that CRA accept the late filing of the form.

[17] The request letter notes that when Form RC4616 was filed in February 2016, indicating an effective date of January 1, 2016, CRA had not then published its Policy Statement P-255 "Late-filed Section 156 Elections and Revocations" which is dated July 22, 2016 with an effective date of January 1, 2015.

[18] P-255 stipulates that a "request to accept a late-filed section 156 election or revocation of the election will be considered on a case-by-case basis within the context of the following guidelines." The guidelines include the requirement that the "request must provide a clear explanation as to why the specified members have filed the election or revocation late" and "must not have been negligent or careless in complying with the provisions of section 156 of the Act." The policy states: "The request would generally be accepted where the explanation as to why the election was filed late demonstrates that the parties were not negligent or careless in complying with the election provisions."

[19] Denso Manufacturing says in its letter seeking acceptance of the late-filed form that the Denso Companies "had intended to make this election effective January 1, 2015" and offers this explanation why it was not filed in a timely manner:

> Please note Denso Manufacturing and Denso Sales operated under the direction of the CRA in February 2016 and filed the election form with the effective date of January 1, 2016. Had P-255 been available at that time or had there been an indication by CRA in February 2016 that the parties could have filed a late-filed election under subsection 156(4), Denso Manufacturing and Denso Sales would have made the request for a late-filed election with the effective date of January 1, 2015. Unfortunately, Policy Statement P-255 had not been issued at that time, and the CRA did not provide any indication of the parties' ability to file a late-filed election in February 2016. [emphasis added]

[20] I note, contrary to the suggestion in this letter, that at no time did CRA "direct" the Applicant to file Form RC4616 with the effective date of January 1, 2016. I also note that even in the absence of P-255, subsection 156(4) clearly provides that Form RC4616 must be filed on or before the "particular day" described therein "or any day after the particular day that the Minister may allow[,]" making it clear that late-filing may be accepted by the Minister. Thus,

the legislation made it clear that late filing was an alternative to the Denso Companies, provided the Minister exercised discretion to accept it. Lastly, it is noted that while P-255 sets out factors CRA will consider in accepting a late-filed form, the Applicant made no request for late filing after the policy was published in July 2016 until its letter some 14 months later in November 2017.

[21] The explanation the Applicant offered for late-filing was adjusted following a call from Vinesh Bakhru. This more fulsome, and arguably more accurate explanation is contained in an email dated December 4, 2017:

> This is in response to your voice mail today.
>
> 1) The reason for RC4616 not filed on time was that DENSO Manufacturing Canada (DMCN) and DENSO Sales Canada (DSCN) were not aware of the new RC4616 regulation.
>
> 2) The effective date is not 2015 because our consultant Ryan did not advise us that the effective date should be 2015. In February 2016, our consultant was not able to find anything published by Canada Revenue Agency that speaks to the consequences of missing the deadline for the new RC4616. According to them, the only exposure would be the transaction occurring during the month of January 2016 if we are not able to file the election by the end of February 2016 with our GST/HST return covering the month of January. Therefore, DMCN and DSCN executed RC4616 with an effective date of January 1, 2016 and submitted to CRA on February 22, 2016. [emphasis added]

[22] This message makes it clear that the reason that RC4616 was not filed in 2015 was because the then Denso Companies did not know of the requirement that this new form be filed. Apparently, it was unaware of the amendment to section 156 of the ETA. When informed by Susan Joseph in February 2016 that RC4616 had to be filed, it was filed with an effective date of

January 1, 2016, because Ryan did not advise the Denso Companies that it should have January 1, 2015, as the effective date.

[23] Vinesh Bakhru completed his audit and by letter dated April 23, 2018 advised:

> We have carefully reviewed the letter dated November 7, 2017 signed by Michelle Dermody, Director-Finance, requesting that the effective date on the late filed RC4616 election (received February 22, 2016) be amended from January 1, 2016 to January 1, 2015 under section 156(4) of the Excise Tax Act ("ETA"). We have also reviewed your subsequent email dated December 4, 2017 explaining the reasons why the election was not filed on time. It is the position of the Canada Revenue Agency ("CRA") that based on the information and explanation provided related to the late filed RC4616 election by Denso Manufacturing, no extenuating circumstances were present that prevented you from filing the election on time, as per section 156 of the ETA.

Consequently, CRA proposes an adjustment of $30,098,952.56 for Denso Manufacturing and $308,617.34 for Denso Sales, both with interest, for calendar year 2015.

[24] There was subsequent correspondence and meetings between the parties prior to the decision being made by the Minister's Delegate on September 11, 2018, declining to accept the amended Form RC4616, which sought to backdate the effective date of the joint agreement of the Denso Companies to January 1, 2015. The Minister first summarized the position of the Denso Companies:

> 1. Refund integrity (RI) advised Denso of the requirement to file the RC4616 election in February 2016 during the review of the November 2015 credit return. The credit return was approved in full without any changes and Denso believed that the previous election was valid. When RI advised Denso of the requirement to file the election Denso contacted their third party consultants at the time, RYAN, and they advised them "that they thought if the election was filed by the end of February 2016 they would be safe."

2. The CRA GST-HST Audit and Examination Manual dated January 2016 states in subsection 42.1.1.2. in reference to elections, that the normal audit assessment process should be followed where there is no revenue loss.

3. The Denso staff were preoccupied during the fall of 2015 with the preparation of a voluntary disclosure for CBSDA, which constituted an extraordinary circumstance.

4. The potential impact of the assessment on Denso is disproportionate and unfair, particularly in the circumstances.

[25] The Minister's Delegate writes that the explanations offered do not demonstrate that the Denso Companies were not negligent or careless in failing to comply with the election provisions of section 156 of the ETA. He writes that the decision is based on the following:

1. The deadline to file the election was December 31, 2015. The contact by RI [Refund Integrity] and RYAN occurred after the deadline had passed. It should also be noted that RI only conducts a limited scope review and does not perform a comprehensive audit.

2. The audit manual generally only applies to small and medium audits, and the version currently available to the public is dated 2012. HQ is planning to publish and make the 2015 version available to the public this fall, and the 2018 version in 2019.

3. The requirement to file RC4616 was well published in various CRA publications:

   Excise and GST/HST News -Number 91 (May 2014)
   Number 94 (January 2015)
   Number 95 (April 2015)
   GST-HST Notice 290
   (December 2015)

   Nothing precluded Denso from filing the election prior to the fall of 2015, and the preparation of a voluntary disclosure for CBSA does not constitute an extraordinary circumstance.

4. It is imperative that the legislation be applied consistently to all registrants, and in the absence of a valid extraordinary circumstance, it would be unfair to registrants that did exercise

> care and were not negligent in their affairs to not re-assess non-compliant registrants.

Issues

[26] The Denso Companies raise a number of issues in their written memoranda. They focused on three in oral submissions. I propose to address all under two general questions:

1. Was the process afforded the Denso Companies procedurally fair?
2. Was the discretionary decision not to accept the late-filed RC4616 reasonable?

Analysis

1. *Procedural Fairness*

[27] In my view, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] has not changed the law pertaining to procedural fairness; and the standard of review is correctness: *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43, also see *Garces Caceres v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 4 at paragraph 23; *Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89 at paragraph 12; *Ennis v Canada (Attorney General)*, 2020 FC 43 at paragraph 18. Whether a particular process was procedurally fair remains "eminently variable, inherently flexible and context-specific:" *Vavilov* at paragraph 77. This Court will consider whether the process employed was *fair* in the specific context of the decision, having regard to the *Baker* factors: *Vavilov* at paragraph 23; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 40, 54-56.

[28] The Denso Companies acknowledge that they were provided with an opportunity to make written representations to, and to meet with, the Assistant Director and his team prior to the final decision being made. However, they submit that the Minister failed to disclose all relevant documentation necessary for them to understand and coherently respond to the Minister's concerns prior to the decision being rendered. Specifically, they point to an email from a Senior Program Advisor in the GST/HST Large Business Program at CRA Headquarters, wherein the analyst recommended the audit team not proceed with the proposed assessment because the Denso Companies had met the requirements of the P-255 policy. That document was only disclosed in response to the disclosure imposed by Rule 317 of the *Federal Courts Rules*, SOR/98-106 and not because of their previous requests for information.

[29] The Denso Companies further say that the Minister continues to withhold information pertinent to the matter that would help them understand the decision-making process. Despite requests for information from a number of analysts involved in the file and for specific documents, they say they know exist, they say that the Minister has provided only cursory summaries of the information. This has prejudiced their ability to understand the decision making process and to respond accordingly.

[30] I agree with the submissions of the Minister that the process followed was procedurally fair. There was no need to disclose the Senior Analyst's report prior to the decision being rendered. The Senior Analyst was not the final decision maker. The record also shows that he changed his view once all of the facts were considered.

[31] The decision under review was made by the Minister's Delegate, the Assistant Director, Audit on September 11, 2018, and I am satisfied that the Denso Companies had sufficient information to know the CRA's concerns and the case it had to meet. The submissions and correspondence demonstrate they were aware the Minister's concern centred on the fact that the filed February 2016 Form RC4616 did not cover the 2015 calendar year. They had many opportunities to respond to these concerns and explain why they indicated that date on their form. They were also aware of the P-255 Policy and how it might impact their case prior to the final decision being rendered. They had every opportunity to explain how they met the policy by showing that they had been neither careless nor negligent in not filing RC4616 in 2015 with a January 1, 2015, effective date.

[32] Moreover, the Denso Companies have not substantiated their allegations that the Minister has not met the disclosure obligations under Rule 317. Aside from meeting notes, which are merely a summary of a meeting at which the Denso Companies were also present and therefore privy to, they provide no other example of information excluded from the Rule 317 Certificate. Moreover, having reviewed the disclosure provided, it does not appear to me that any relevant information was not included. The onus is on the Applicant to prove such an allegation, an onus the Denso Companies have not met: *Vavilov* at paragraph 100.

2. Reasonableness of the Decision

[33] *Vavilov* teaches that a principled approach to reasonableness review puts the reasons first, "…by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion:" *Vavilov* at

paragraph 84. A reviewing court must avoid substituting its own analysis or preferred decision, and instead consider only whether the applicant has sufficiently demonstrated the decision, taking into account both the rationale and outcome, was unreasonable: *Vavilov* at paragraphs 83, 100, and 116.

[34] Reasonableness is equally concerned with the decision maker's reasoning process and the ultimate outcome: *Vavilov* at paragraphs 83 and 87. Reasons need not be perfect, but they must adequately explain the basis of a decision: *Vavilov* at paragraph 91; *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67 [*CUPW*] at paragraph 30, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 18. For a decision to be "reasonable", it must be internally coherent and justified in light of the factual and legal constraints relevant to the decision, and sufficiently responsive to parties' submissions to demonstrate engagement with the core aspects of the applicants' concerns: *Vavilov* at paragraphs 101-107 and 127-128.

[35] For the reasons given herein, I find that the decision under review was reasonable, and that this application must be dismissed.

[36] I begin by addressing the submission by the Denso Companies that the Minister did exercise discretion to accept the late-filed election in February 2016. I agree with the Minister's submission that on its face, that form was not late-filed. It states that it is effective as at January 1, 2016 and was filed in the month following when the Denso Companies were required to report their January 2016 GST/HST.

[37] The Denso Companies submit that it must have been accepted as applicable to the November and December 2015 audited months as no adjustment was made thereto by the reviewing officer. This is not tenable for two reasons.

[38] First, the reviewing officer issued her report prior to Denso Manufacturing submitting the February 2016 election form. It can logically have had no bearing on her decision. Second, the record does not show that she had authority from the Minister to make any decision to accept a late-filed election. Counsel for the Denso Companies suggested that her superior had such authority. Even if that were so, there is no evidence that in February 2016, the Denso Companies were seeking the exercise of discretion to late-file the form and wished it to be applicable to the 2015 year. The document specifically indicates otherwise. Moreover, Denso Manufacturing, in its email to Vinesh Bakhru of December 4, 2017, writes: "The effective date is not 2015 because our consultant Ryan did not advise us that the effective date should be 2015." It is simply not credible to suggest now that this form filed in February 2016 was an application to accept it as applicable to the 2015 year, or was seen by the Minister as such.

[39] I also reject the submission of counsel for the Denso Companies that if there was no discretion exercised by the Minister in February 2016 to accept the late-filed form, then January 1, 2016 "was a date that was placed there in error, and its unreasonable to refuse to allow the late-filed election that was filed in February 2016."

[40] First, there is no evidence supporting the submission that the date was placed there in error. There is no evidence that in February 2016, the Denso Companies intended the form to

carry the effective date of January 1, 2015. Rather, their own statements reflect that they intended it to be effective on January 1, 2016, as the form indicates. Second, the form filed in February 2016 was not a "late-filed election" as is suggested. It was a timely election filed in February 2016, the month following the January 2016 GST/HST reporting period of the Denso Companies and was stated to be effective January 1, 2016.

[41] The only submission made by the Denso Companies worthy of consideration is their submission that they were not negligent or careless in their compliance obligations, and that it is thus unreasonable to refuse to allow them to late-file the election.

[42] I have found that the Denso Companies were unaware of the amendments to section 156 of the ETA and the election requirements made in 2015. Indeed, in the December 4, 2017 email, it is admitted that they "were not aware of the new RC4616 regulation." Although usually stated in a criminal law context, the maxim *Ignorantia Juris Non Excusat* applies equally in this context. As observed by English jurist John Seldon (1584-1654) in a 1689 book on his sayings called *Table-talk*:

> Ignorance of the law excuses no man. Not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him.

[43] The 2015 amendments were, as the Minister points out, in the decision under review, referenced in a number of CRA publications and in the statute itself.

[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.

[45] This application for judicial review will be dismissed. Contrary to the assertions of the Denso Companies, the Minister offered a procedurally fair decision that was both justifiable and justified on the record.

[46] There was some communication by the parties with the Court following the hearing. Ultimately, it was agreed that the successful party should be awarded its costs of these two applications, fixed at $19,000.00.

[47] A copy of these Reasons and Judgment shall be placed in Court File T-1788-18, the application filed by Denso Sales, which shall also be dismissed.

JUDGMENT IN T-1787-18

THIS COURT'S JUDGMENT is that:

1. This application and the application in T-1788-18 are both dismissed; and

2. The Respondent is awarded its costs in this application and in T-1788-18 jointly in the fixed sum of $19,000.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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