Federal Court  Cour fédérale

Date: 20210331

Docket: T-79-20

Citation: 2021 FC 279

Ottawa, Ontario, March 31, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

NILKANTH CHOTALIA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Case

[1] Mr. Chotalia has applied for judicial review of a decision made on January 9, 2020 by a Rebates Processing Officer [Officer] at the Canada Revenue Agency (CRA). The Officer denied Mr. Chotalia an extension of time to file three applications under subsection 256.2(7) of the *Excise Tax Act*, RSC 1985, c E-15 [*ETA*] for Goods and Services Tax (GST) rebates [the Decision].

[2] The rebates were sought in relation to three new residential rental properties purchased by Mr. Chotalia in Edmonton in August of 2015.

[3] At the hearing of this application, Mr. Chotalia relied solely upon subsection 281(1) of the *ETA* to say that the Minister has a broad power to extend deadlines. Mr. Chotalia submits that the parliamentary intention contained in subsection 281(1) applies to his facts and provides the necessary discretion to the Minister to extend his filing deadline.

[4] For the reasons that follow, based upon the legislation and the existing jurisprudence, I have determined that while the Minister has discretion under subsection 281(1) she does not possess the discretion under it to waive compliance with subsection 256.2 by extending the time for Mr. Chotalia to file his new residential rental property rebate (NRRPR) applications.

II. **Background Facts**

[5] The right to apply for the rebates at issue is found in section 256.2 of the *ETA*. There is no dispute between the parties that Mr. Chotalia met the criteria to apply for the three rebates.

[6] Mr. Chotalia submitted the NRRPR applications on March 19, 2018. He acknowledges the applications were submitted approximately seven months after the expiry of the two-year statutory deadline found in subparagraph 256.2(7)(a)(iii) of the *ETA*:

Application for rebate and payment of tax	**Demande de remboursement et paiement de taxe**
(7) A rebate shall not be paid to a person under this section unless	

(a) the person files an application for the rebate within two years after	(7) Un remboursement n'est accordé en vertu du présent article que si, à la fois :
[. . .]	a) la personne en fait la demande dans les deux ans suivant la fin du mois ci-après:
(iii) [. . .] the end of the month in which tax first becomes payable by the person, [. . .];	[. . . [
	(iii) [. . .] le mois où la taxe devient payable par elle pour la première fois, [. . .] ;

[7] The Minister received the applications on March 26, 2018. Accompanying the applications was a letter in which Mr. Chotalia described the properties, confirmed that they had been continuously leased from the date of possession and explained the applications were late as neither his realtor, lawyer nor accountant advised him that a rebate was available. On the basis that all the other purchasers of properties under $450,000 in the same building had received rebates, Mr. Chotalia submitted that there was no prejudice to the CRA to allow the late filings and grant the request without going through the objection process.

[8] On April 26 and 27, 2018, the Minister denied the applications because "we did not receive the application within two years of the date tax became payable on purchase . . . as set out under 256.2(7) of the "Excise Tax Act.""

[9] On December 6, 2018 Mr. Chotalia's request for an extension of time was forwarded by the Winnipeg Tax Services Office to the Detailed Enquiries and Complex Assessing Unit (DECA) at the Rebates Division of the Summerside Tax Centre. The forwarding letter indicated

the rebate applications had been disallowed because they were not received within two years of the date the tax became payable.

[10] On January 9, 2020 the Decision was issued. It is brief:

> Subject: Late-Filed New Residential Rental Property Rebates
>
> Dear Nilkanth Chotalia:
>
> In March of 2018, you filed three New Residential Rental Property Rebates which were disallowed as we did not receive the applications within two years of the date tax became payable on the purchase as set out in the Excise Tax Act.
>
> It has come to our attention that you have been enquiring about an extension of time to file the rebates under the Taxpayer Relief Provisions (TRP).
>
> This is to advise you that the GST/HST rebates for which a request can be made under the Taxpayer Relief Provisions can be found in section 256 of the Excise Tax Act and are limited to owner-built, new housing rebate applications (type 4) and the Nova Scotia First Time Home Buyer rebate applications.
>
> The Taxpayer Relief Provisions do not apply to New Residential Rental Property Rebates.

III. **Issue and Standard of Review**

[11] The only issue put forward by the parties is whether the Minister had discretion under section 281 of the *ETA* to extend the time for filing Mr. Chotalia's rebate applications.

[12] Mr. Chotalia does not contest the finding in the Decision that the taxpayer relief provisions in section 256 of the *ETA* do not apply to his rebate applications. This application has proceeded on the basis that the Decision shows the Minister failed to exercise her discretion to extend the time to file the applications and failed to provide any reasons for same.

[13] The Minister concedes that if she did have discretion then this application should be granted and the matter returned for consideration. On the other hand, if it is found that the Minister did not have discretion, then she says this application should be dismissed.

[14] Mr. Chotalia submits that the Minister's finding that she did not have discretion to extend time to file the applications is an error of law which is reviewable on a correctness standard.

[15] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] the Supreme Court extensively reviewed the law of judicial review of administrative decisions. It confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions none of which, on these facts, apply: *Vavilov* at paragraph 23.

[16] In any event, in this instance, the standard of review is academic as there are only two possible outcomes: the Minister either had, or did not have, discretion under subsection 281(1) to extend the time under subsection 256.2(7) for Mr. Chotalia to apply for the GST rebates.

IV. **Analysis**

A. *The Excise Tax Act*

[17] The legislation creating GST was enacted by Parliament in December, 1990, in Part IX of the *Excise Tax Act*, R.S.C., 1985, c. E-15. It received Royal Assent on December 17, 1990 (S.C. 1990, c. 45, s. 12). GST came into effect throughout Canada as of January 1, 1991: *Reference re Goods and Services Tax*, [1992] 2 SCR 445 at page 456 [*GST Reference*].

[18] The purpose of imposing this tax was determined in *GST Reference* at page 468: "[t]he GST Act has no purpose other than to raise revenue for the federal government . . .".

[19] Principles of interpretation specifically applicable to the *ETA* were set out by the Federal Court of Appeal in *Canada v Cheema,* 2018 FCA 45 [*Cheema*] where Mr. Justice Stratas indicated:

> [84] On another occasion, the Supreme Court stated that where a provision in a taxation statute is "clear and unambiguous" its words "must simply be applied" in a way that is not tendentious or result-oriented: *Shell Canada Ltd. v. Canada*, 1999 CanLII 647 (SCC), [1999] 3 S.C.R. 622, 178 D.L.R. (4th) 26 at paras. 39-40.
>
> [85] Overall, "the [*Excise Tax Act*] consists of clear, precise rules to facilitate ease of application, consistency and predictability" and this "underscores the dominance of the plain meaning of the text of the Act in the process of interpreting provisions of the Act": *Quinco Financial* at para. 8.
>
> [86] Where, as here, Parliament grants a rebate in a discrete section for a discrete policy reason, it does not normally express itself in vague terms or require that we undertake a circuitous, serpentine and roundabout tour of various other provisions in the Act to find out when the rebate is available. To understand who may claim a rebate and in what circumstances, normally we need only read the plain language granting the rebate.

[20] In *Cheema* the issue was whether a taxpayer met the legislative criteria to apply for a new housing rebate under subsection 254(2) of the *ETA*.

[21] While the *Cheema* facts are not the same as Mr. Chotalia's, *Cheema* does involve an application for a rebate under the *ETA*. In that respect, the paragraphs from *Cheema* which are set out above are directly applicable to the analysis of Mr. Chotalia's case.

B. *Submissions of the Parties*

(1) Section 281 of the *ETA*

[22] Mr. Chotalia submits that section 281 of the *ETA* provides the Minister with the power to extend the time for filing his rebate applications notwithstanding the wording of paragraph 256.2(7)(a) which establishes the two-year filing deadline for the applications.

[23] Subsection 281(1) provides:

Extension for returns	**Prorogation des délais de production**
281 (1) The Minister may at any time extend in writing the time for filing a return, or providing information, under this Part.	281 (1) Le ministre peut en tout temps proroger, par écrit, le délai de production d'une déclaration ou de communication de renseignements selon la présente partie.

[24] The question before me is whether subsection 281(1) gives the Minister the discretionary power to override the opening words of paragraph 256.2(7) which was previously set out in full:

(7) A rebate shall not be paid to a person under this section unless	(7) Un remboursement n'est accordé en vertu du présent article que si, à la fois:

[25] It is clear that subsection 281(1) provides the Minister with discretion to extend the time for filing a return or providing information. But does an application for a rebate of GST that has already been paid fall within either of these categories? If a rebate application is neither a "return" nor the provision of "information" as that word is used in subsection 281(1), then this subsection does not apply to this matter.

[26] It is acknowledged by the Minister that there is no definition of a return in either the *ETA* or the *Income Tax Act*.

(2) Returns, Rebates and Providing Information

[27] Mr. Chotalia does not directly allege that the applications he filed were returns. Instead, he submits that a "return" encompasses "rebates", as well as the provision of "information". He says that this is because the definition of a "return" has historically been applied in a broad-based manner in both the *ETA* and the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) [*ITA*].

[28] Referring to *Bonnybrook Park Industrial Development Co Ltd v Canada (National Revenue)*, 2018 FCA 136 [*Bonnybrook*] Mr. Chotalia submits that the Federal Court of Appeal found that a provision providing for an extension of time to file a return also applied to a requirement that was essentially a condition. He also notes that in *Bonnybrook* the Court pointed to examples of other instances in which the Minister authorized waivers that are conditions or requirements to obtaining a benefit under the *ITA*.

[29] The Minister in response notes that *Bonnybrook* did not deal with a rebate application. It dealt with the question of whether the Minister could extend the filing deadline for a corporate income tax return.

[30] The Minister also notes that Mr. Chotalia provided no case law to suggest that a rebate application would qualify as a "return".

[31] Mr. Chotalia is following the format of the arguments put forward in *Bonnybrook* in which the Appellant argued that it did not dispute the time period for filing the corporate tax return had been missed thereby preventing the issuance of a partial tax refund. The argument relied upon was that the Minister has authority under subsection 220(3) of the *ITA* to extend the three year filing deadline imposed by subsection 129(1).

[32] The two provisions in question are these:

Dividend refund to private corporation	**Remboursement au titre de dividendes à une société privée**
129 (1) Where a return of a corporation's income under this Part for a taxation year is made within 3 years after the end of the year, the Minister	129 (1) Lorsque la déclaration de revenu d'une société en vertu de la présente partie pour une année d'imposition est faite dans les trois ans suivant la fin de l'année, le ministre :
(a) may, on sending the notice of assessment for the year, refund without application an amount (in this Act referred to as its "dividend refund" for the year) in respect of taxable dividends paid by the corporation on shares of its capital stock in the year, and at a time when it was a private corporation, equal to the total of	a) peut, lors de l'envoi de l'avis de cotisation pour l'année, rembourser, sans que demande en soit faite, une somme (appelée « remboursement au titre de dividendes » dans la présente loi) au titre de dividendes imposables versés par la société sur des actions de son capital-actions au cours de l'année et à un moment où elle était une société privée, égale au total des sommes suivantes :
Extensions for returns	**Prorogations de délais pour les déclarations**
220(3) The Minister may at any time extend the time for making a return under this Act.	220(3) Le ministre peut en tout temps proroger le délai

fixé pour faire une déclaration
en vertu de la présente loi.

[33] The significant factual difference between Mr. Chotalia's case and *Bonnybrook* is that *Bonnybrook* clearly and specifically deals with an income tax "return". Subsections 129(1) and 220(3) both explicitly refer only to a return. The subsections address the filing of a return and the Minister's power to extend the time for making a return.

[34] Mr. Chotalia would like to equate subsection 281(1) of the *ETA* to subsection 220(3) of the *ITA* so that *Bonnybrook* can apply to his facts. I find that the factual difference of a "return" being at issue in *Bonnybrook* and an "application" for a rebate being at issue in Mr. Chotalia's case, coupled with the very clear and specific language differences in each of the provisions, prevents me from finding they are equivalent.

[35] For that reason and as further explained below, I find that *Bonnybrook* is inapplicable to the facts here.

[36] Mr. Chotalia did not provide any reference material to support his position that completing a rebate application by providing the prescribed information means that the application falls within the phrase "providing information" as used in subsection 281(1).

[37] Mr. Chotalia states more generally that if the Court would examine the *ETA* in its entirety, it can be seen that there are various provisions dealing with the administration of the

ETA and the Minister's extensive powers over returns and information. On that basis he asks the Court to find there is a "parliamentary intention" in subsection 281(1).

[38] It appears that to date, no case has specifically considered whether section 281 provides the broad discretion suggested by Mr. Chotalia.

[39] Keeping in mind the summary nature of judicial review and considering that in portable document format (pdf) the *ETA* is over 1100 pages in length, the invitation to examine it in its entirety in order to find support for Mr. Chotalia's position is, respectfully, declined.

C. *The Minister's Submissions*

[40] The Minister submits that if the intended consequence of subsection 281(1) was to enable her to override paragraph 256.2(7)(a) it would have been simpler to insert a specific discretionary power in paragraph 256.2(7)(a) similar to that which is found in paragraph 256(3)(b):

Application for rebate	**Demande de remboursement**
(3) A rebate under this section in respect of a residential complex shall not be paid to an individual unless the individual files an application for the rebate on or before	(3) Les remboursements prévus au présent article ne sont versés que si le particulier en fait la demande au plus tard :
(a) the day (in this subsection referred to as the "due date") that is two years after the earliest of	a) à la date qui suit de deux ans le premier en date des jours suivants :
[. .]	[. . .]
(iii) the day on which construction or substantial	(iii) le jour où la construction ou les rénovations majeures

renovation of the complex is substantially completed; or	de l'immeuble sont achevées en grande partie;
(b) any day after the due date that the Minister may allow.	b) à toute date postérieure à celle prévue à l'alinéa a), fixée par le ministre.
(My emphasis)	(Non souligné dans l'original)

[41] I agree.

D. *Statutory Interpretation of subsection 281(1) and paragraph 256.2(7)(a)*

[42] Section 281 has formed part of the *ETA* since Royal Assent. Section 256.2 containing the NRRPR was introduced to the *ETA* in the 2000 federal budget: David M. Sherman, *Practitioner's Goods and Services Tax Annotated* 2020, 41st ed., page 663.

[43] When parliament added subparagraph 256.2(7)(a)(iii), including the mandatory wording "shall not" to the *ETA*, it did so with full knowledge of the wording of subsection 281(1). It is reasonable to expect that if parliament's intention had been to make paragraph 256.2(7) subject to subsection 281(1) it would have done so either by amending subsection 281(1) or by adding a further subparagraph with clear and unequivocal language as was done with paragraph 256(3)(b).

[44] Subsection 281(1) is a general enactment that provides broad powers to the Minister. Paragraph 256.2(7)(a) is a particular enactment inserted to address a specific issue.

[45] In *Canada (National Revenue) v ConocoPhillips Canada Resources Corp*, 2017 FCA 243, the Federal Court of Appeal applied what is known as the "implied exception" rule.

Madame Justice Woods of the Court of Appeal, who also authored *Bonnybrook*, described the rule this way:

> [47] The relief that ConocoPhillips seeks is to use the general waiver provision in subsection 220(2.1) of the Act in order to engage the objection process without having to comply with its statutory conditions. The effect of the application of subsection 220(2.1) in this manner would give the Minister a power that the Minister has been denied in a detailed provision in subsection 166.1(7).
>
> [48] The general waiver provision cannot be applied in this manner to override a more specific provision. This is referred to as the "implied exception" rule of statutory interpretation in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. at 363-367 (Markham: LexisNexis Canada Inc., 2014).
>
> [49] The principle was described in *James Richardson & Sons, Ltd. v. Minister of National Revenue,* 1984 CanLII 1 (SCC), [1984] 1 S.C.R. 614, 84 D.T.C. 6325 at 6329, where the Court referred to the English decision of *Pretty v. Solly* (1859), 53 E.R. 1032:
>
> > The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.
>
> (My emphasis)

[46] While I view this as the definitive answer to Mr. Chotalia's argument I will also address the existing jurisprudence that has upheld a variety of similar mandatory deadline provisions in the *ETA*.

E. *The Existing Jurisprudence*

[47] There is ample jurisprudence in the Tax Court of Canada [TCC] and some in the Federal Court of Appeal with respect to the various provisions in the *ETA* which impose a mandatory

filing deadline using the same language as is found in paragraph 256.2(7)(a) but without the additional paragraph found in paragraph 256(3)(b) providing discretion to the Minister to extend time.

[48] The universal outcome when such provisions have been considered is that there is no authority possessed by the Minister, the Tax Court, this Court or the Federal Court of Appeal to extend the time limit set out in those subsections. See for example, *Poirier v The Queen*, 2019 TCC 8 at paragraph 10.

[49] Examples of these various statutory provisions and the related jurisprudence follow.

[50] In April, 1997 the Federal Court of Appeal in *Domjancic v Canada*, [1997] GSTC 30 (Fed. C.A.) [*Domjancic*] determined a case on appeal from the Tax Court of Canada. The facts were very similar to Mr. Chotalia's in that the rebate-filer was not aware of the limitation period deadline in subsection 256(3) of the *ETA* until he was informed of it. The Court set out the provisions of subsection 256(3) at that time:

> (3) A rebate shall not be paid under subsection (2) in respect of a residential complex to an individual unless the individual files an application for the rebate within two years after the earlier of . . .

[51] Mr. Justice Stone, writing for the Court, stated in a very brief decision that the application for a rebate under subsection 256(3) was filed after the time limit had already expired. The Court disposed of the matter with one sentence:

> As this Court is, of course, without any jurisdiction to extend the time limit specified in subsection 256(3), the section 28 application will be dismissed.

[52] As previously noted, subsection 281(1), as it currently is written, has been part of the *ETA* since it received Royal Assent. Mr. Justice Stone would have been aware of the very specific wording used in subsection 281(1). Perhaps that is why the phrase "of course" was used in the conclusion.

[53] In *Cairns v The Queen*, 2001 GSTC 52, the Tax Court of Canada considered an argument concerning the late application for a GST rebate. The two-year limitation period in subsection 261(3) was at issue. It had been amended in 1997 to change the time period from four-years to two-years. The Tax Court cited *Domjancic* as authority for the following statement:

> 14. To the foregoing, I must add that there is no provision in the *Act* granting authority to the Minister or providing the Federal Court or this Court with jurisdiction to waive, extend or alter the statutory time periods specified in a subsection such as 261(3).

[54] For overall reference, some of the other provisions in Part IX of the *ETA* containing mandatory deadlines follow.

[55] Section 252.2 states that a rebate shall not be paid under section 252 unless the application for the rebate is filed within one year after certain events occurred.

[56] Section 254.1 contains the requirements for receiving a New Housing Rebate. Subsection 254.1(2) states that "the Minister shall, subject to subsection (3), pay a rebate" followed by a series of qualifiers and the formula to determine the amount to be paid. Subsection (3) contains the limitation that "A rebate under this section in respect of a residential complex shall not be

paid to an individual unless the individual files an application for the rebate within two years after the day possession of the complex is transferred to the individual."

[57] The same limitation period of "within two-years", after a specified event, is also found in subsections 255(3), 256(3), 256.1(2), 256.2(7).

V. **Summary and Conclusion**

[58] I find that the fact that subsection 281(1) is a general enactment and paragraph 265.2(7)(a) is a particular enactment suitably addresses Mr. Chotalia's argument and explains as detailed above, why this application must be dismissed.

[59] However, in the event that I am wrong, and to address the arguments put forward by the parties, I have canvassed them as well.

[60] Mr. Chotalia's argument under subsection 281(1) is largely premised on equating an application for a rebate of the GST paid by him when the rental units were purchased with either a 'return' or 'providing information', being the two instances under which this subsection provides the Minister with discretion to extend time. He put forward no cogent argument as to why that would be, nor did he refer to any jurisprudence, text or other document that might explain how a rebate application can be read in to a section that specifically refers to a "return" and to "providing information".

[61] Statutory drafting is more precise than Mr. Chotalia's argument allows. Statutory interpretation requires the words to be read in context and harmoniously with the scheme of the *ETA*. It also requires words be interpreted consistently within the context of a given Act.

[62] At this point, in addition to the existing jurisprudence, the previous analysis in *Cheema* is relevant:

> [86] Where, as here, Parliament grants a rebate in a discrete section for a discrete policy reason, it does not normally express itself in vague terms or require that we undertake a circuitous, serpentine and roundabout tour of various other provisions in the Act to find out when the rebate is available. To understand who may claim a rebate and in what circumstances, normally we need only read the plain language granting the rebate.
>
> (My emphasis)

[63] The plain language of paragraph 256.2(7)(a) is unequivocal. It is not vague, it is clear and precise. Mr. Chotalia filed his rebate application seven months late. He missed the deadline and does not qualify for a rebate.

[64] Looking at first principles, legislative drafting is concerned with the use of precise words. If the legislative drafters and Parliament had intended that an application for a rebate fall within subsection 281(1) it could have specifically referred to an "application" in addition to a "return" and "providing information". It did not do so. Mr. Chotalia therefore has taken a "a circuitous, serpentine and roundabout tour" in an attempt to turn an application – a very precise word – into a return which is an equally precise, but totally different, word.

[65] On a plain reading of the many provisions found in the *ETA* that are similarly or identically worded to paragraph 256.2(7)(a), I find that Mr. Chotalia's suggested reading of subsection 281(1) cannot live in harmony with the specific limitation period provisions that require rebate applications to be filed within a specified time.

[66] Mr. Chotalia's interpretation that the Minister has the discretion to extend the time within which to file the rebate applications would have the effect of negating the unequivocal provision in paragraph 256.2(7)(a) setting out a mandatory two-year limitation period and all similarly worded provisions in the *ETA*.

[67] In the one instance in which Parliament decided to provide an exception to the mandatory filing deadline, it did not rely on subsection 281(1), it amended subsection 256(3) to add a specific paragraph 256(3)(b) clearly articulating that the Minister may allow a different due date. That would not have been necessary if subsection 281(1) provided the Minister with the necessary discretion.

[68] According to the Finance Technical Notes (Nov 2006) the amendment to subsection 256(3) "recognizes that exceptional circumstances may prevent an owner-builder from filing the rebate application by the due date."

[69] If the Minister were to extend time under subsection 281(1), she would be overriding the clear legislative imperative of subsection 256.2(7) that makes it a condition of obtaining a rebate

that the application be filed within a particular time. She would also be ignoring the binding jurisprudence referred to previously.

[70] For all the foregoing reasons, I find the Minister does not have the discretion to extend the time for Mr. Chotalia to file his rebate applications.

[71] This application is dismissed.

[72] No costs are awarded.

JUDGMENT in T-79-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed, without costs.

2. The Respondent's name in the style of cause is changed to Attorney General of Canada, effective immediately.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-79-20
STYLE OF CAUSE:	NILKANTH CHOTALIA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY ZOOM VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND EDMONTON, ALBERTA
DATE OF HEARING:	OCTOBER 13, 2020
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	MARCH 31, 2021

APPEARANCES:

Shirish Chotalia	FOR THE APPLICANT
Alexander Millman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Pundi & Chotalia Barristers and Solicitors Edmonton, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT