Federal Court  Cour fédérale

Date: 20210915

Docket: T-179-20

Citation: 2021 FC 947

Ottawa, Ontario, September 15, 2021

PRESENT: Madam Justice Walker

BETWEEN:

CASTLE BUILDING GROUP LTD. and COMMERCIAL BUILDERS SUPPLIES INC.

Applicants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] The Applicants are two closely related corporations (parent and wholly owned subsidiary) operating in the building materials industry. They request the Court's review of a decision (Decision) of the Minister of National Revenue to refuse their request to late file an election in reliance on subparagraph 156(4)(b)(ii) of the *Excise Tax Act*, RSC 1985, c E-15 (the ETA). The Applicants filed the election at issue on February 22, 2017 with a requested effective date of January 1, 2015 (the 2017 Election) and the Minister's Decision is dated December 18, 2019.

[2] Subsection 156(2) of the ETA permits closely related corporations to make a joint election pursuant to which taxable supplies made between them are deemed to be made for nil consideration. The result of the election is that no goods and services tax (GST) or harmonized sales tax (HST) must be collected on the supplies. Subsection 156(4) prescribes the form of the election and the date by which it must be filed, subject to any extension the Minister may permit (subparagraph 156(4)(b)(ii)). It is the Minister's refusal to allow the Applicants such an extension that is the subject matter of this application.

[3] For the following detailed reasons, the application for judicial review will be dismissed.

I. Background

The Applicants

[4] Castle Building Centres Group Ltd. (Castle) is and has been registered under the ETA for GST and/or HST purposes since 1991. Castle filed all GST/HST returns as required in the normal course of business.

[5] Commercial Builders Supplies Inc. (CBS) was incorporated in 2001 and is a wholly owned subsidiary of Castle. CBS did not originally register as required under the ETA, nor did it file GST/HST returns. It was not until January 18, 2018 that the corporation filed the required registration documents. Following a revision to the effective date requested by CBS, the CRA granted registration effective December 6, 2013. CBS filed all of its outstanding GST/HST returns by March 26, 2018, all of which were nil returns other than a February 2018 return that claimed a sizeable input tax credit (ITC) due to a CRA audit of the two corporations.

[6] Castle specializes in the purchase of building materials in Canada for resale to retailers and is the exclusive supplier of building materials to CBS, a distributor/wholesaler. Castle also acts as billing agent for and provides management and administrative services to CBS. In its role as billing agent, Castle collects payments from CBS's customers, provides accounting services and remits the GST/HST collectible by CBS to the CRA pursuant to an election (the Billing Agent Election) filed for this purpose under the ETA (subsections 171(1.1) and 1.11)).

Overview of key events and timeline

[7] The event that precipitated the Applicants' need to file the 2017 Election was the amendment of section 156 of the ETA effective January 1, 2015. Prior to that date, closely related corporations would complete a section 156 election and simply retain the election in their books and records. The Applicants had in place a section 156 election effective as of February 17, 2013 (the Original Election).

[8] The January 2015 amendments to section 156 require closely related corporations to complete a new election in prescribed form (RC4616) and file the completed election with the CRA. As parties to a pre-amendment election, the Applicants were required to file a completed RC4616 on or before January 1, 2016, giving them a one-year grace period to comply with the amended section 156.

[9] The Applicants filed two completed RC4616 election forms. The first was filed on December 14, 2016 with an effective date of December 1, 2016 (the 2016 Election). The 2016 Election was returned to Castle by the CRA's Business Registration and Services Section

(BRSS) because “the status of the GST/HST account must be active filing head office as of the effective date”. Nevertheless, the 2016 Election was ultimately accepted in the Decision because it was filed on time. The second completed election is the 2017 Election. The Applicants filed the 2017 Election on February 22, 2017 with a proposed effective date of January 1, 2015. As the 2017 Election was late filed, the Applicants requested that the Minister exercise her discretion and accept the election pursuant to subparagraph 156(4)(b)(ii) of the ETA.

[10] The Minister first refused the 2017 Election on February 11, 2019 (the Original Decision). The Applicants sought judicial review of the Original Decision on March 13, 2019. The application was later discontinued when the Minister agreed to reconsider her refusal of the 2017 Election. Counsel to the Applicants provided submissions in respect of the reconsideration on September 30, 2019 (EY Submissions). The Decision is the result of the Minister’s reconsideration and is the subject of this application for judicial review.

[11] By way of additional background, on July 14, 2016, Castle received notice from Mr. Wilson Yee, a CRA auditor, of the CRA’s intention to audit its GST/HST returns for the reporting period January 1-December 31, 2014. In December 2017, Mr. Yee advised Castle that the CRA would extend the audit to the 2015 and 2016 reporting periods. On January 8, 2018, Mr. Yee sent Castle an audit proposal letter in respect of 2014, disallowing $16 million in ITCs due to what the CRA viewed as an agency relationship between Castle and CBS. CBS was permitted to claim the disallowed ITCs and included an ITC claim in the amount of $16 million in its GST/HST return for the February 2018 reporting period.

[12] For ease of reference, the following timeline sets out the events relevant to this application:

Date	Event
January 1, 2015	Amendment to section 156 of the ETA. The Original Election was no longer effective.
July 14, 2016	Castle received notice from Mr. Yee of the CRA audit of its 2014 GST/HST returns.
December 12/14, 2016	The 2016 Election was completed and filed with the CRA with a December 1, 2016 effective date. Although returned to the Applicants by the BRSS, the Minister accepted the 2016 Election in the Decision.
February 22, 2017	The 2017 Election was completed and filed with the CRA with a January 1, 2015 effective date.
December 15, 2017	Castle was advised that the CRA would extend the GST/HST audit to 2015 and 2016.
January 8, 2018	The audit proposal letter for 2014 was sent to Castle disallowing $l6M in ITCs.
January 18, 2018	CBS filed its ETA registration documentation, which was accepted by the CRA effective December 6, 2013.
Early 2018	CBS filed all outstanding GST/HST returns for the periods prior to 2015.
February 11, 2019	The 2017 Election is refused in the Minister's Original Decision. The Applicants' application for judicial review was later discontinued upon the Minister's agreement to reconsider her refusal.
September 30, 2019	EY Law LLP, counsel to the Applicants, provided the EY Submissions to the Minister, in support of a fresh request for ministerial relief to accept the 2017 Election.
December 18, 2019	The Decision is issued accepting the 2016 Election and refusing the 2017 Election.

The Zou Report

[13] Ms. Ying Zou, a CRA excise tax auditor, prepared a report dated November 15, 2019 (the Zou Report) that summarized the Applicants' request for a fresh review of their 2017 Election, analysed the issues Ms. Zou identified in the request and provided her recommendations. Ms. Zou recommended that the Minister not exercise her discretion pursuant to subparagraph 156(4)(b)(ii) of the ETA to allow the 2017 Election but that the Minister accept the 2016 Election.

[14] The record establishes that the Minister's delegate who authored the Decision, Ms. Gwendolyn Henderson, an assistant director at the CRA, reviewed the Zou Report. I will address the role of the Zou Report in this application and discuss its content in the course of my analysis of the Applicants' submissions.

II. Decision under review

[15] The Decision is brief. The Minister states that they have completed the second review of the Applicants' February 22, 2017 request to late file the 2017 Election and that the request has been denied. The substantive paragraphs of the Decision are:

> CBS, as a specified member of the qualifying group, was not compliant at the time the election was filed on February 22, 2017. CBS had outstanding returns on the date that the election was filed.
>
> With respect to the election dated December 12, 2016 with an effective date of December 1, 2016, we have accepted the election as it was filed on time.

[16] The Decision is signed by Ms. Henderson, as the Minister's delegate.

III. Standard of review

[17] The issue in this application is whether the Minister's Decision to refuse the Applicants' request to file the 2017 Election is reasonable, the presumptive standard of review of an administrative decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 13, 25 (*Vavilov*); *Denso v Canada (National Revenue)*, 2020 FC 360 at para 33 (*Denso*)).

[18] The Supreme Court describes a reasonable decision as "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2). The reasonableness standard requires that a reviewing court defer to such a decision. The Decision, its coherence, transparency and justification, must be reviewed in light of the record before the Minister's delegate, including the Zou Report, the policy guidelines published by the CRA, the evidence before Ms. Henderson, and the EY Submissions (*Vavilov* at para 94; *Jewett v Canada (Attorney General)*, 2020 FCA 187 at para 4; *Veillette v Canada (Revenue Agency)*, 2020 FC 544 at paras 57-59).

IV. Preliminary evidentiary matters

The Minister's failure to file an affidavit

[19] The Applicants note that the Minister chose not to file an affidavit in respect of the application. They argue that she has not produced any facts under oath and has prevented the Applicants from cross-examining her on alleged facts set out in the Certified Tribunal Record

(CTR). In oral submissions in defense of their application record (the Applicants' Record), the Applicants return to this subject and argue that, by omitting to file an affidavit, the Minister has in some way agreed with the facts and documents they have put forward.

[20] I disagree with the Applicants. The failure by the Minister to file an affidavit does not assist the Applicants' arguments regarding their proposed evidentiary record. The Minister is not required to file an affidavit and any affidavit produced by the Minister, the decision maker, would be carefully considered by the Court (*Shahzad v Canada (Citizenship and Immigration)*, 2017 FC 999 at para 19). I agree with the Minister that the documents and information contained in the CTR are properly before the Court and form the basis for my review of the Decision.

The Applicants' Record and written submissions to the Court

[21] The Minister submits that the Applicants' Record, notably their memorandum of fact and law, contains extensive information and documents that were not before the decision maker and are not in the record before the Court. In addition, the Minister argues that the Applicants' Record improperly contains:

- Notes made by CRA auditor, Mr. Yee, that are not in the CTR and were not before Ms. Henderson; and
- The affidavit of Ms. Sarina Kaluzny, Vice President, Finance of Castle, dated July 21, 2020 (the Kaluzny Affidavit) which contains information and exhibits that were not part of the Applicants' EY Submissions and were not before Ms. Henderson.

[22] The Minister states that the memorandum of fact and law relies on facts that are not reflected in the source cited or may be partially reflected but elaborate on the information in the

record. For example, the Applicants' correction to Ms. Kaluzny's evidence in response to undertakings given during her cross-examination is unsworn and hearsay evidence and should not be considered by the Court.

[23] The general rule is that judicial review proceeds on the evidentiary record before the administrative decision maker, the Minister in the present case. Judicial review of a decision is not an opportunity to produce additional evidence that could have been placed before the decision maker.

[24] The rule respects Parliament's decision to entrust the matter in question to the decision maker and not the reviewing court (*Association of Universities and Colleges of Canada v Access Copyright*, 2012 FCA 22 at para 19 (*Access Copyright*); *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28; *'Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at para 7). The decision maker decides the case on its merits based on the evidence before them. The reviewing court reviews the overall legality of the decision in light of that evidence and does not engage in a trial de novo of the questions at issue (*Access Copyright* at paras 17-19).

[25] There are three recognized exceptions to the general rule. They permit the admission of new evidence that: provides general background information; addresses procedural fairness issues; or, highlights the complete absence of evidence before the administrative decision maker (*Access Copyright* at para 20). The exceptions respect the different roles of decision maker and reviewing court and often assist the reviewing court in discharging its review role.

[26] The Applicants submit that they have introduced no new facts in their Record. They state that their memorandum of fact and law is based on facts put forward in the Kaluzny Affidavit.

[27] I have carefully reviewed the Kaluzny Affidavit and exhibits and the Applicants' memorandum against the information and documents in the CTR. I agree with the Minister that the Affidavit and memorandum contain substantive information and documents that were not before Ms. Henderson and that are not admissible in this application. The Minister rightly argues that the Applicants' attempt to correct evidence given by Ms. Kaluzny in the course of cross-examination is inadmissible and is an improper response to the undertaking given. The Applicants' argument that their memorandum of fact and law is based on information in the Kaluzny Affidavit ignores the fact that that information is itself inadmissible.

[28] I find that the Applicants have sought to supplement the record to address issues raised in the Zou Report and to bolster their position that the Decision is unreasonable. In reaching my conclusions in this application, I have ignored the inadmissible information and exhibits introduced by the Applicants and focused my analysis on the information in the CTR.

V. Analysis

1. Statutory and policy context

[29] In order to determine whether the Decision is reasonable, it is first helpful to set out the statutory and policy context within which the Minister's delegate considered the Applicants' 2017 Election. Section 156 of the ETA permits closely related corporations to make a joint election whereby taxable supplies between them are deemed to be made for nil consideration and

the corporations are not required to collect GST/HST on the intra-group supplies. Effective January 1, 2015, amended section 156 requires that the joint election be made using new prescribed Form RC4616 and filed on or before the earliest date on which one of the electing corporations is required to file its GST/HST return for the period that includes the effective date of the election (paragraph 156(4)(a) and subparagraph 156(4)(b)(i)).

[30] Subparagraph 156(4)(b)(ii) provides that the Minister may allow a late-filed election:

Form of election and revocation	**Forme du choix et de la révocation**
(4) An election under subsection (2) made jointly by a particular specified member of a qualifying group and another specified member of the group and a revocation of the election by those specified members shall	(4) Le choix conjoint fait par un membre déterminé donné d'un groupe admissible et un autre membre déterminé du groupe et la révocation du choix par ceux-ci :
(a) be made in prescribed form containing prescribed information and specify the day (in this subsection referred to as the "effective day") on which the election or revocation is to become effective; and	a) d'une part, sont faits en la forme déterminée par le ministre, contiennent les renseignements requis par celui-ci et précisent la date de leur entrée en vigueur (appelée « date d'entrée en vigueur » au présent paragraphe);
(b) be filed with the Minister in prescribed manner on or before	b) d'autre part, sont présentés au ministre, selon les modalités qu'il détermine, au plus tard :
(i) the particular day that is the earlier of	(i) à celle des dates ci-après qui est antérieure à l'autre :
[…]	[…]

or	,
(ii) any day after the particular day that the Minister may allow	(ii) à toute date postérieure que fixe le ministre.

[31] There are a number of important definitions and other sections of the ETA relevant to issues in this application, including the meaning of the term “registrant”. I will return to those definitions and provisions below.

[32] The CRA has adopted administrative guidelines for CRA officials entrusted with assessing requests to late file elections: “Late-filed Section 156 Elections and Revocations”, effective January 1, 2015 (the Guidelines). The Guidelines set out factors the Minister will consider in her review of a late-filed election but cautions that each request will be considered on a case-by-case basis. The Guidelines state that:

- the request must clearly explain why the corporations have filed the election late;
- both corporations must meet all of the conditions for making the election as of the requested effective date;
- also as of the requested effective date, both corporations must have treated the supplies between them as having been made for no consideration. In addition, both corporations must have filed all GST/HST returns as required and must be fully compliant with GST/HST legislation;
- the corporations must not have been negligent or careless in complying with section 156; and
- the corporations must not have filed an objection or appeal to an assessment for a reporting period within the requested retroactive period.

[33] The Guidelines are not binding on the Minister and do not limit the exercise of her discretion (see, e.g., *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 27). As long as the Minister does not fetter her discretion and improperly limit the scope of her analysis, she may rely on the factors identified in the Guidelines in making her decision (*Waycobah First Nation v Canada (Attorney General)*, 2010 FC 1188 at para 43 (*Waycobah*), aff'd 2011 FCA 191).

2. The parties' positions

[34] The Applicants submit that the Decision is unreasonable for two principal reasons:

1. The Minister erred in concluding that CBS was not fully compliant with the ETA on February 22, 2017, the date the 2017 Election was filed. Specifically, she misinterpreted the ETA by imposing a requirement that CBS be registered in order for a subparagraph 156(4)(b)(ii) election to be accepted.

2. The Minister's reasons for refusing the 2017 Election are unreasonable, contain errors of fact and reflect an improper fettering of her discretion. The Applicants argue that (a) mere oversight on their part is sufficient to ground acceptance of the 2017 Election; (b) they are not required to establish circumstances beyond their control for the Minister to accept the 2017 Election; and (c) their request to file the 2017 Election was not an attempt to engage in retroactive tax planning.

[35] The Respondent emphasizes that the Minister has broad discretion under subparagraph 156(4)(b)(ii) to allow or refuse a late-filed election and argues that the Decision is reasonable read in the context of the Guidelines, the EY Submissions and the Zou Report. The Respondent argues that CBS was not compliant with the ETA when the 2017 Election was filed and that it was open to the Minister to base her refusal on that non-compliance.

[36] The Minister's refusal to allow the filing of the 2017 Election is based primarily on CBS's non-compliance with the ETA, specifically its failure to file the GST/HST returns required by subsection 238(1). In the course of making the Decision, Ms. Henderson reviewed and relied on the Zou Report which provides factual background to the 2017 Election, a timeline of the announcement of the 2015 amendments to section 156, and the Applicants' eligibility to make a section 156 election. The Report contains Ms. Zou's assessment of whether the Minister should exercise her discretion to accept the late-filed 2017 Election against three factors identified in the Guidelines: (1) CBS's non-compliance with the ETA at the date of filing the 2017 Election; (2) the presence of a clear explanation in the EY Submissions for the late-filed election and whether mere oversight is sufficient to allow a late-filed election; and (3) the existence of any objection or appeal by the Applicants of a GST/HST assessment and whether the purpose of the 2017 Election was retroactive tax planning related to the 2014-2016 audits.

[37] Ms. Henderson did not fetter her discretion by considering Ms. Zou's analysis and conclusions. The Zou Report was an important element of the record before Ms. Henderson that assists her analysis of the factual, policy and legal constraints within which she was required to exercise her discretion (*Wyse v Canada (National Revenue)*, 2007 FC 535 at paras 88-89; *Jefferson v Canada (National Revenue)*, 2021 FC 658 at para 80).

3. Did the Minister misinterpret the ETA?

[38] The Applicants submit that the Minister unreasonably concluded that CBS was not fully compliant with the ETA on February 22, 2017, the date on which they filed the 2017 Election. The Applicants argue that the Minister misinterpreted the ETA by concluding that a request to

late file an election pursuant to subparagraph 156(4)(b)(ii) is only available to registrants that are registered for GST/HST purposes. They rely on subsection 123(1) of the ETA and their Billing Agent Election made pursuant to subsection 177(1.1) in support of their position. The Applicants also argue that the Minister's decision to restrict the scope of subparagraph 156(4)(b)(ii) to persons registered for GST/HST purposes is contrary to the object, spirit and purpose of the provision as drafted by Parliament.

[39] I do not find the Applicants' arguments persuasive.

[40] The Applicants focus on subsection 123(1) and its definition of a "registrant" as a person who is registered or required to be registered for GST/HST purposes but the starting point in assessing the Applicants' arguments is subsection 240(1) of the ETA. Subsection 240(1) provides that "[e]very person who makes a taxable supply in Canada in the course of a commercial activity engaged in by the person in Canada is required to be registered…", subject to certain exceptions which are not applicable to CBS. Further, subsection 238(1) provides that all registrants (registered or not) "shall file a return with the Minister for each reporting period …". The fact that a registrant may have a nil return does not exempt them from the requirement to file returns.

[41] As of February 22, 2017, CBS was neither registered in accordance with subsection 240(1), nor had it filed all required GST/HST returns pursuant to subsection 238(1). The Applicants do not dispute these facts.

[42] There are three significant issues with the Applicants' argument that the Minister imported into subparagraph 156(4)(b)(ii) a requirement that CBS be registered for the Applicants to access the relief contemplated by the subparagraph.

[43] First, the Decision is not based on the fact that CBS was not registered on February 22, 2017. The Applicants have misstated the Decision. At the risk of repetition, the relevant paragraph from the Decision reads:

> CBS, as a specified member of the qualifying group, was not compliant at the time the election was filed on February 22, 2017. CBS had outstanding returns on the date that the election was filed.

[44] There is no mention in the Decision of CBS's failure to register between 2001 and 2018. This failure is noted in the Zou Report. Ms. Zou stated that CBS was not fully compliant with the ETA until it was both registered on January 18, 2018 and filed all outstanding GST/HST returns on or before March 26, 2018.

[45] Second, the Minister did not misinterpret the term "registrant". Ms. Henderson acknowledges CBS's status as a registrant under the ETA in the first sentence of the Decision cited above in paragraph 43. The definitions of "specified member" and "qualifying group" in subsection 156(1) presuppose that the electing corporations are registrants. A registrant is either registered or required to be registered for GST/HST purposes and there is no suggestion in the Decision or the Zou Report that the Minister misunderstood the dual nature of the definition.

[46] Third, the Applicants' non-compliance with the ETA was one factor, albeit the determinative factor, for the Minister's refusal to allow the late filing of the 2017 Election. It was

not used as a condition precedent or prerequisite to the exercise by the Minister of her discretion. The Minister's reliance on that non-compliance is consistent with the Guidelines. In my opinion, Ms. Henderson committed no reviewable error in considering the Applicants' prolonged non-compliance with the requirements of the ETA as a relevant and important issue.

[47] I conclude that the Minister did not make a reviewable error in concluding that CBS was not compliant with the ETA on February 22, 2017 because it had outstanding returns on that date. She did not misinterpret the definition of "registrant" in the ETA, its application to CBS's eligibility to file a section 156 election jointly with Castle, or the scope of her discretion under subparagraph 156(4)(b)(ii).

[48] The Applicants take issue with the Minister's reliance on the date of filing of the 2017 Election as the critical date for her determination of CBS's compliance with the ETA. The Applicants argue that by December 18, 2019, the date of the Decision, CBS was compliant and that the Minister's refusal of the 2017 Election is unreasonable.

[49] Section 4 of the Guidelines states that, "[a]s of the requested effective date for the election", both electing parties must have treated the applicable supplies between them as having been made for no consideration and must have completed their returns accordingly. The section then sets out additional requirements, including the fact that all GST/HST returns for the parties must have been filed as required and the parties must be fully compliant with the ETA.

[50] The Guidelines focus on the requested effective date for the 2017 Election (January 1, 2015); the Minister relies on the date of filing of the 2017 Election (February 22, 2017); and the Applicants argue that the determinative date should be the date of the Decision (December 18, 2019).

[51] I find that it was open to the Minister to consider CBS's failure to comply with the ETA as at the date of filing of the 2017 Election. It is on that date that the Applicants requested discretionary relief from the provisions of the ETA. Accordingly, the date of filing is not an unreasonable date for the Minister to have selected. The Minister's decision to accept or reject a request to late file an election is owed deference by the Court as long as her assessment of the facts and circumstances surrounding the request is logical and justified. I find no basis on which the Court should intervene in the Minister's selection of the date of filing to consider CBS's non-compliance with its statutory obligations.

[52] The Applicant states that the Minister admitted that CBS had "no obligation to collect, report or remit net tax", citing the Zou Report. The statement is a gloss on Ms. Zou's analysis of the EY Submissions. Ms. Zou acknowledged the Billing Agent Election and the fact that CBS had nil tax to remit and stated:

> […] As such, for the relevant report periods, CBS was not registered and did not file GST/HST returns. However the [Applicants] agree that CBS was required to be registered further to subsection 240(1) of the ETA as it made taxable supplies in Canada in a commercial activity […].

[53] In any event, the Minister did not base the Decision on any failure by CBS or Castle to remit, nor did Ms. Zou misstate the facts or misinterpret the relevant ETA provisions.

[54] The Applicants refer to the Billing Agent Election and argue that they were fully compliant with their GST/HST remitting obligations. Again, the Minister does not state otherwise. The fact that CBS had no obligation to remit any net GST/HST owing does not undermine the Minister's conclusion that CBS was not compliant with its reporting obligations on the date of filing of the 2017 Election.

[55] The Applicants also rely on the wording of subsection 177(1.1) of the ETA and the Billing Agent Election to argue that the Minister's Decision is inconsistent with the object, spirit and purpose of the ETA.

[56] Subsection 171(1.1) provides that, where a registrant acts as agent in making a supply on behalf of a person who is required to collect tax in respect of the supply, the registrant and the person may jointly elect to have the registrant act as billing agent for the person. The "person" who is otherwise required to collect GST/HST need not be a registrant.

[57] The Applicants emphasize Parliament's use of broad language in subsection 177(1.1) to allow a billing agent election to be jointly filed by a registrant and a person who may not be a registrant and who, it follows, is not registered. From this they argue that the Minister's conclusion that CBS was not compliant with the ETA is unreasonable because it was incorrect and "failed to properly consider the definition of 'registrant' and the Billing Agent Election".

[58] I disagree. There is no dispute between the parties that CBS was a registrant. The Minister was under no misunderstanding in this regard. The filing of the Billing Agent Election

and the assumption by Castle of the administrative tasks of collection, reporting and remittance of CBS's GST/HST does not affect the status of CBS as the supplier of the goods and services in respect of which the tax is collectible. Subsection 177(1.1) does not deem Castle to be the supplier, it states only that all GST/HST exigible on supplies made by CBS is "deemed to be collectible, charged and collected" by Castle. Therefore, the existence of the Billing Agent Election did not negate CBS's obligation under subsection 238(1) of the ETA to file returns or its obligation to register in accordance with subsection 240(1). Parliament's use of broad language in subsection 171(1.1) does not require an equally broad interpretation of section 156. There is no obvious or implied overlap between the two sections. Parliament's use of different terminology to establish the availability of section 156 must be given effect.

[59] Finally, the Applicants raised an additional argument in their oral submissions. They submit that there was one election before the Minister and that she erred in considering the 2016 and 2017 Elections as distinct elections and in accepting only the 2016 Election effective December 1, 2016. The Applicants state that the February 22, 2017 filing was a fresh request that made no mention of the 2016 Election. In their opinion, the Minister effectively accepted the 2017 Election but with a December 1, 2016 effective date, resulting in a decision that is not authorized by section 156 and that was unreasonable. The Applicants argue that subparagraph 156(4)(b)(ii) permits the Minister to allow or reject a late-filed election. It does not permit her to amend the election and accept the amended election.

[60] The 2016 Election was completed and filed with the CRA on December 12, 2016 but was returned to the Applicants by the BRSS because CBS's GST/HST account was not active as of

the requested effective date. The Minister and Ms. Zou treated the 2016 Election as a stand-alone election on the basis that the reason given by the BRSS for refusing it was not consistent with section 156 of the ETA. The Zou Report explained the reasoning as follows:

> Section 156 of the ETA requires the members that made the joint election to be GST/HST registrants. Section 123 of the ETA defines "Registrant" as a person who is registered, or who is required to be registered, under Subdivision D of Division V. CBS is a person who is required to be registered under subsection 240(1) of the ETA; therefore CBS is a registrant under the ETA.

[61] Ms. Zou concluded that Castle and CBS met the requirements for a section 156 election on December 12, 2016 and that the Minister should accept the 2016 Election with an effective date of December 1, 2016 "even though CBS was not registered for GST/HST".

[62] I find no reviewable error in the Minister's decision to treat the 2016 and 2017 Elections as discrete elections. Ms. Zou's explanation is consistent with the ETA and with the Applicants' position that CBS is and was a registrant for purposes of the ETA. The 2016 Election should have been accepted when filed regardless of CBS's account status because it was filed on time and Castle and CBS met the eligibility requirements of subsection 156(2). I find that (1) Ms. Zou's analysis and Ms. Henderson's acceptance of the 2016 Election demonstrate their understanding of the meaning of the term "registrant" in the ETA; and (2) the acceptance of the 2016 Election and rejection of the 2017 Election are not inconsistent decisions. The Minister had no discretion to refuse the 2016 Election. Conversely, the rejection of the 2017 Election due to CBS's non-compliance with its filing obligations is consistent with the Guidelines and the reasonable exercise of the Minister's discretion.

4. Were the Minister's reasons for refusing the 2017 Election unreasonable, and did they contain errors of fact and reflect an improper fettering of her discretion?

[63] The Applicants make a number of submissions in arguing that the Minister unreasonably denied their request that she accept the 2017 Election. I will address each submission in turn.

Mere Oversight/Lack of awareness

[64] The Applicants submit that mere oversight is sufficient reason for acceptance of the 2017 Election and that the Minister acted unreasonably in concluding otherwise. They state that the Minister fettered her discretion by finding that a late-filed election due to oversight by the parties could not be accepted. The Applicants also submit that the Minister erred in finding that they had professional staff and access to GST/HST intermediaries to assist in the administration of their tax affairs.

[65] The Respondent submits that the Decision was based primarily on CBS's failure to comply with its ETA obligations and that the Minister's consideration of the issues of oversight and awareness of the amendments to section 156 does not indicate any fettering of her discretion (*Waycobah* at para 43).

[66] The Zou Report considered whether mere oversight or lack of awareness of the obligation to make and file an election following the section 156 amendments were sufficient to warrant the exercise of the Minister's discretion. Ms. Zou's analysis responded to the requirement in the Guidelines that the Applicants' request to file the 2017 Election provide a clear explanation of

why the election had not been filed on time. The Applicants' explanation in the EY Submissions was:

> Prior to the revised legislation, the [Applicants] had the original election in place in accordance with the ETA. However, due to an oversight regarding a legislative amendment, the [Applicants] did not comply with the relevant legislation. The [Applicants] are in good standing with the CRA otherwise and have sought to rectify this matter in a timely manner. The [Applicants] have not been negligent and/or careless in complying with the provisions of the ETA.

[67] Ms. Zou acknowledged that the Applicants are not sophisticated taxpayers and that they have a very lean operation and management team. However, she noted that Castle employs professional staff and has a sales tax accountant who provides advice on an ongoing basis, notably through Castle's 2011 and 2012 sales tax audits (completed in mid-2014) and the 2014-2016 sales tax audits that continued to 2018.

[68] The Zou Report also contains a timeline of the public announcement of the amendments to section 156, the first of which was in February 2014. Ms. Zou cites Excise and GST/ HST news bulletins issued in 2014 and 2015 and GST/HST Notice No. 290 issued in December 2015 (December 2015 Filing Deadline - Reminder to File Form RC4616 before January 1, 2016 for Existing Section 156 Elections).

[69] Based on the public announcements and Castle's reliance on professional advisors, Ms. Zou concluded that oversight and the Applicants' lack of awareness of the amended legislation was not an excuse for the late filing of the 2017 Election. She stated that "the

consultant should have had the knowledge of the new requirement of the RC4616 [election] in 2015 and advised Castle of the obligations to file the RC4616 on time".

[70] Ms. Zou's assessment of the Applicants' sophistication and her conclusion that they ought to have known or been informed of their filing obligations are accurate, clearly explained and reasonable based on the EY Submissions and the record. To the extent Ms. Henderson relied on the Applicants' prolonged lack of awareness of the amendments, I find she committed no reviewable error. The fact that the amendments to section 156 were communicated publicly beginning in 2014 is an important fact given the Applicants' access to and use of professional tax advisors (*Denso Manufacturing Canada, Inc. v Canada (National Revenue)*, 2021 FC 360 at para 43 (*Denso*)).

[71] The Applicants argue at length that Ms. Zou's statement that they have professional GST/HST assistance available to them was unreasonable. I caution that the Applicants' argument is substantially based on information and submissions that were not before the decision maker and are inadmissible. As stated above, I have ignored that new evidence and base my assessment of their argument on the information and submissions contained in the CTR. Ms. Zou did not err in stating that the Applicants employ professional staff to assist them in the administration of their GST/HST affairs.

[72] The Applicants' position that Ms. Zou's analysis of the issue of oversight was unreasonable and her conclusion incorrect is a request to the Court to reweigh the EY Submissions and evidence. They have identified no factual or analytical error in the Zou Report

or in the Decision. The Applicants argue that their lack of awareness of the amended filing obligation cannot be equated to carelessness or negligence, terms that are used in the Guidelines. The reason for Ms. Zou's focus on the issue of oversight was the Applicants' very brief explanation for the late filing. They stated only that they missed the filing deadline "due to an oversight regarding a legislative amendment". The one reference to the absence of negligence or carelessness in the EY Submissions was an opinion and not an explanation for the Applicants' conduct.

[73] The Applicants distinguish the Court's decision in *Denso* on the basis that their circumstances are factually different. I agree that the applicant in that case was part of a group of significantly larger and better resourced corporations and that the facts surrounding its failure to comply with section 156 were materially different. I also recognize that, at the date of this Decision, the *Denso* decision is under appeal to the Federal Court of Appeal. I have referred to the decision solely for its reasoning regarding the publication of legislative amendments to the ETA that were reasonably available and known to the business community and GST/HST professionals.

[74] To the extent the Applicants' oversight and awareness submissions rest on the premise that Ms. Henderson fettered her discretion by considering this aspect of the Zou Report, the submissions are without merit. Neither Ms. Zou nor Ms. Henderson concluded that a late-filed section 156 election that is the result of mere oversight cannot be allowed. The issue of oversight was one factor in the assessment of the EY Submissions. The record does not suggest that this issue was, in the words of Justice de Montigny, then of this Court, "elevated to the status of a

general rule that results in the pursuit of consistency at the expense of the merits of individual cases" (*Waycobah* at para 43).

Circumstances beyond the Applicants' control

[75] The Applicants submit that the Minister improperly imposed an additional requirement that is not found in the ETA or Guidelines by justifying her Decision on the basis that there were no circumstances beyond their control that prevented the filing of the 2017 Election on time.

[76] I find that Ms. Henderson did not justify her Decision on the basis of the absence of circumstances beyond the Applicants' control. Further, the Minister's discretion pursuant to subparagraph 156(4)(b)(ii) is not limited to the factors referenced in the Guidelines. She is required to consider each case on its merits and cannot fetter her discretion by treating those factors as mandatory and exclusive.

[77] Ms. Zou's recommendation to the Minister at the conclusion of the Zou Report must be read in the context of the record and her analysis. The reasons for Ms. Zou's recommendation that the Minister not exercise her discretion to allow the 2017 Election were (1) the Applicants' non-compliance with GST/HST legislation at the date they filed the 2017 Election; and (2) her finding that their oversight or lack of awareness of the amendments to section 156 were not sufficient reasons for the late filing based on their professional tax resources. Ms. Henderson cites the first reason in the Decision.

[78] Ms. Zou summarized her two reasons for the negative recommendation by stating that there were no circumstances beyond the Applicants' control to justify the late filing. The statement was not the result of a stand-alone analysis, nor does it indicate that Ms. Zou, or Ms. Henderson, added a prerequisite to the availability of subparagraph 156(4)(b)(ii) relief.

Retroactive tax planning

[79] The Applicants submit that the Minister's conclusion that the purpose of their request to file the 2017 Election was to engage in retroactive tax planning is unreasonable. They state:

> The Minister's assertion that the avoidance of unfavourable audit results precluded her from exercising her discretion to allow the request is unreasonable and cannot stand.

[80] The Applicants' submission is not persuasive because I find that neither Ms. Henderson as the Minister's delegate nor Ms. Zou based their ultimate conclusion on a finding that the purpose of the Applicants' request to late file the 2017 Election was to engage in retroactive tax planning. In addition, there is no assertion in the Decision or the Zou Report that the avoidance of an unfavourable audit result, a phrase used by Ms. Zou, was or would be a bar to the exercise of discretion pursuant to subparagraph 156(4)(b)(ii).

[81] The Applicants' written submissions are based in part on references to evidence that was not before Ms. Henderson and that is not before the Court. Those submissions do not factor in my findings.

[82] The Zou Report refers to section 8 of the Guidelines which states that the parties requesting a late-filed election must not have filed an objection or appeal relating to an assessment for a reporting period that is within the requested retroactive period. Ms. Zou addressed section 8 by asking whether the purpose of the 2017 Election was retroactive tax planning related to the 2014-2016 audits. She summarized the Applicants' position, noting that the 2017 Election was sent on February 22, 2017 when the CRA was only beginning to audit the 2014 reporting period. On that date, there was no indication that the CRA would audit the 2015-2016 reporting periods. Ms. Zou acknowledged that Castle originally submitted an election in December 2016 (the 2016 Election) and accepted that filing as evidence of the Applicants' intention to comply with the amendments to section 156. She continued:

> […] CRA informed Castle for the sales tax audit of Castle for 2014 in July 2016. In December 2016, the 2014 audit was in the beginning stage. The start of 2014 audit may remind Castle to look into RC4616 election in case the issue comes up in the future 2015 and 2016 audits, but we can't say that the Election is a reaction to the audit adjustment. In December 2016, no audit adjustments were informed to Castle yet. Although the Election was not a direct result of the audit adjustments, the unfavourable audit result was anticipated without a RC4616 Election if CRA decided to conduct a future audit for 2015 and 2016.

[83] Ms. Zou's comment led her to conclude that the Applicants' purpose in attempting to file the precursor to the 2017 Election in December 2016 was twofold. They intended to comply with the legislation and to avoid future unfavourable audit results. However, Ms. Zou's recommendation that the Minister not exercise her discretion was based on CBS's non-compliance with the ETA until March 2018 and her refusal to accept that the Applicants' lack of awareness of the amendments to section 156 was sufficient to justify a late filing. There is no reference to retroactive tax planning or to the avoidance of unfavourable audit results in the

Decision. The Applicants have not established any material reliance by Ms. Henderson on Ms. Zou's analysis of possible retroactive tax planning.

Additional Submission

[84] The Applicants submit that the Minister erred in relying on three cases referred to in the Zou Report as a basis for the Decision. They argue that the cases did not involve section 156 elections and that the underlying facts, requirements and elections at issue in those cases are not sufficiently comparable.

[85] I find that the Applicants have overstated the importance of the three cases to the Decision and have ignored the caution given by Ms. Zou that recognized the different facts and legislative framework of the three cases. Ms. Zou analyzed the cases in response to the reference in the EY Submissions to *Kutlu v Canada*, 1997 CanLII 5990 (FC), a case that involved a request to extend a deadline pursuant to subsection 220(3) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (ITA).

[86] At the date of the Zou Report, there were no issued decisions interpreting subsection 156(4) and the question of late-filed elections. The Minister does not commit a reviewable error in considering jurisprudence that addresses similar ITA or ETA provisions as long as she recognizes the factual and statutory differences between that jurisprudence and the case before her (*Vavilov* at para 112). Ms. Zou informed Ms. Henderson that the cases cited may not involve comparable situations but were good references for the grounds on which to deny a late-filed election. Bearing in mind the caveats provided in the Zou Report, I find that it was not

unreasonable for Ms. Zou and Ms. Henderson to have considered cases involving different ITA and ETA election provisions in the absence of judicial interpretation of subsection 156(4).

VI. Conclusion

[87] The application for judicial review will be dismissed. The Applicants have not discharged their burden of establishing one or more significant errors in the Decision (*Vavilov* at 100).

[88] The principal basis for the Minister's refusal to allow the request to late file the 2017 Election was CBS's acknowledged non-compliance with the ETA until March 2018, well after the Applicants filed the 2017 Election on February 22, 2017. The Applicants' reliance on discrete sections of the Zou Report and mischaracterization of the basis of the Decision do not establish a persuasive basis on which the Court should intervene and require redetermination of their request to file the 2017 Election. Their disagreement with Ms. Zou's conclusions are clearly stated but, in some respects, reflect only a different perspective of the admissible evidence. The Decision is reasonable when read within the *Vavilov* framework for intelligibility and justification, taking into account "the evidence before the decision maker, the submissions of the parties [and] publicly available policies or guidelines that informed the decision maker's work […]" (*Vavilov* at para 94).

VII. Costs

[89] During the hearing, the parties informed me that they had reached agreement regarding an award of costs on disposition of the application. I have considered the parties' agreement and

will adopt their proposal. Given my decision to dismiss the application, I will award costs to the Minister in the amount of $4,000.00, inclusive of disbursements and tax.

JUDGMENT IN T-179-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Castle Building Centres Group Ltd. and Commercial Builders Supplies Inc., the applicants, shall pay the Minister of National Revenue, the respondent, costs of this application in the amount of $4,000.00, inclusive of disbursements and tax.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-179-20
STYLE OF CAUSE:	CASTLE BUILDING GROUP LTD. AND COMMERCIAL BUILDERS SUPPLIES INC. v THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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