Federal Court of Appeal  Cour d'appel fédérale

Date: 20210225

Docket: A-151-19

Citation: 2021 FCA 35

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

VILLA STE-ROSE INC.

Respondent

Online videoconference hearing organized by the Registry on February 4, 2021.

Judgment delivered at Ottawa, Ontario, on February 25, 2021.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20210225

Docket: A-151-19

Citation: 2021 FCA 35

CORAM: **BOIVIN J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

VILLA STE-ROSE INC.

Respondent

REASONS FOR JUDGMENT

LEBLANC J.A.

[1] This is an appeal against a judgment rendered on March 15, 2019 by Justice Johanne D'Auray of the Tax Court of Canada (listed as 2019 TCC 60). Pursuant to this judgment (Judgment), Justice D'Auray (or the trial judge) allowed the appeal brought by the respondent from an assessment made by the Minister of National Revenue (the Minister) under Part IX of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the Act).

[2] The assessment made by the Minister imposed a late-filing penalty and interest on the respondent in respect of an amount of goods and services tax (GST) that the respondent was deemed to owe the Minister. The trial judge determined that because at the time this amount of GST became payable, under the Act, the respondent was entitled to GST rebates in excess of that amount, the Minister was not justified in assessing the interest and the penalty at issue.

[3] The appellant criticizes Justice D'Auray for adopting a results-oriented interpretation of the Act in order to correct a hypothetical situation that could create an undesirable outcome. The appellant argues that, in doing so, Justice D'Auray ignored the plain language of the Act, thereby committing an error of law that calls for the intervention by this Court.

[4] For the reasons that follow, the applicant has not persuaded me that there is any reason to intervene.

I. Background

[5] The facts of this case are relatively straightforward and are not in dispute. They can be summarized as follows.

[6] The respondent operates a residential complex for semi-autonomous seniors, or seniors with a loss of autonomy in Laval, Quebec. At all times relevant to this case, the respondent was not a GST registrant and its supplies were exempt from GST.

[7] In February 2013, the complex that housed the residence operated by the respondent was engulfed in flames. The respondent decided to rebuild it. As part of the reconstruction, it paid GST on the invoices submitted by the builder. Once the work was completed, under subsection 191(3) of the Act, the respondent was then deemed to have made and received a taxable supply by way of sale of the complex.

[8] It was therefore incumbent on the respondent to report the corresponding GST, the undisputed amount of which was $736,864.18. The respondent had until December 31, 2014 to file its return with the Minister. At that time, pursuant to subsections 256.2(3) and 257(1) of the Act, it was entitled to receive GST rebates from the Minister. These rebates amounted to $860,665.48.

[9] However, the respondent did not file its GST return with the Minister until September 28, 2015. This return was accompanied by an application, filed in due time, for the rebates to which it was entitled to receive from the Minister.

[10] On October 30, 2015, the Minister issued a Notice of Assessment granting the respondent a credit in the amount of $860,665.48 for the said rebates. However, the Minister assessed the respondent interest totalling $27,984.09 and a $22,105.92 late-filing penalty, pursuant to subsection 280(1) and section 280.1 of the Act respectively. The penalty and interest were calculated on the total amount of GST owing: $736,864.18.

[11] After unsuccessfully objecting to the Minister's October 30, 2015 Notice of Assessment, the respondent appealed it to the Tax Court of Canada (TCC).

II. Judgment under appeal

[12] Justice D'Auray considered that she had to determine whether the interest and the GST late-filing penalty imposed on the respondent on October 30, 2015, should be calculated on the total amount of the GST payable, as the Minister did, or on the difference between the total amount and the amount of GST rebates to which the respondent was entitled.

[13] From the outset, Justice D'Auray noted that, pursuant to subsection 191(3) of the Act, the respondent had to self-assess for the GST payable on the "sale" of the reconstructed complex, a sale that the respondent was deemed to have carried out on its own as a "builder" within the meaning of subsection 123(1) of the Act. Noting that the respondent was not a GST registrant and that, therefore, unlike registered businesses, it could not claim input tax credits (ITCs) for the GST paid to its suppliers, Justice D'Auray considered that Parliament wanted to remedy this fiscal imbalance for non-registrants, like the respondent deemed to have made a taxable supply of a complex, by instituting the rebate mechanism provided for in subsections 256.2(3) and 257(1) of the Act.

[14] Justice D'Auray further stated that, in connection with the taxable supply of the new complex, the respondent was entitled to two types of rebates by way of this mechanism. The first

rebate was for the GST paid to suppliers during the reconstruction of the said complex. The second rebate was for land and buildings leased for residential purposes.

[15] Justice D'Auray noted that the respondent was late in filing its GST return related to the deemed acquisition of the new complex. However, she was of the opinion that, for the purposes of calculating the interest and the penalty provided for in subsection 280(1) and section 280.1 of the Act, the Minister had to offset the GST payable by the respondent against the rebates to which the respondent was entitled, because at the time the Minister received the said return, the Minister had also received the respondent's rebate applications. According Justice D'Auray, the obligation arose from the application of subsection 228(6) of the Act. This section, read in conjunction with subsections 228(2) and 228 (4), necessarily refers to the concept of "net tax", i.e., the tax deemed remitted when the GST return is filed less the amount of rebates payable by the Minister pursuant to subsection 228(6) and filed concurrently with the GST return.

[16] Justice D'Auray further stated that according to this interpretation, as at September 28, 2015, the Minister could calculate the interest and the GST late-filing penalty to be assessed only on the net amount payable by the respondent, i.e., the amount of the difference between the tax due by the respondent and the rebates that were payable to it by the Minister on that date. Since this amount was negative, the Minister did not have the power to assess the respondent for the interest and the penalty at issue.

[17] Justice D'Auray noted in this regard that subsection 296 (2.1) of the Act imposed the same obligation on the Minister in cases where she found that a rebate was due when she had not

received a rebate application and that the period filing such an application had expired. She saw this as a compelling indication that, in matters having to do with rebates, the Minister could act "retroactively" (Judgment at paragraph 23).

[18] She then focused on the decision rendered by one of her colleagues in *Humber College Institute of Technology & Advanced Learning v. The Queen*, 2013 TCC 146, [2013] TCJ No. 117 (QL/Lexis) [*Humber College*], a case which, according to her, was [TRANSLATION] "almost identical" (Judgment at paragraph 8). In that case, the TCC ruled that the interest and GST late-filing penalty due in respect of a return involving, as in this case, the self-assessment obligation under subsection 191(3) of the Act, should only be calculated on the difference between the amount of GST payable and the amount of rebates payable by the Minister.

[19] Justice D'Auray noted that she had arrived at the same conclusion that her colleague had, but had reached it via a different route, by way of subsection 228(6) of the Act. Nevertheless she pointed out that *Humber College* illustrated how a taxpayer who filed a GST return and a rebate application as soon as he realized that this was required under the Act would be at a fiscal disadvantage, if the Minister's position were to prevail in this case, versus a taxpayer who did nothing and waited for the Minister to assess him.

[20] Justice D'Auray found that her interpretation of the Act was consistent with the idea that, according to these provisions, the tax and the rebate were inextricably linked and more consistent [TRANSLATION] "with the objective of the Act and the rationale of the rebate provisions" (Judgment at paragraph 39).

[21] This interpretation ensures that a complex builder, who is not a GST registrant, will not be at a disadvantage compared to a registered builder who can only be assessed interest and penalties on the net amount of GST payable, i.e., the difference between the gross amount of tax payable and the ITCs that he is entitled to claim. This avoids an outcome that Parliament cannot have intended, i.e., where a person who does not file a GST return, nor a rebate application, or who only files a return, without attaching a rebate application, would be in a better position than a taxpayer who files a late self-assessment tax return, because that person would not have to pay the interest and penalty on the full amount of GST payable. In other words, Justice D'Auray pointed out that to accept the Minister's position would be to encourage taxpayers in the respondent's situation to ignore their obligation to self-assess.

III. Position of the appellant

[22] The appellant submits that the language of the statutory provisions at issue does not support the interpretation adopted by the trial judge. In particular, it argues that by interpreting subsection 228(6) of the Act as she did, Justice D'Auray gave it retroactive effect, not borne out by the language of that provision.

[23] The appellant also submits that the trial judge erroneously associated the rebates to which the respondent was entitled under subsection 228(6) with the "net tax" calculation within the meaning of subsections 225(1) and 228(1) of the Act. Subsection 228(6) of the Act does not allow such an association. It only creates a presumption that these rebates are applied as payment of net tax, not as a reduction of net tax. The appellant further argues that when the Act provides

that certain amounts may be deducted from the net tax calculation, it does so in express terms, which is not the case in subsection 228(6).

[24] Also, the rebates at issue here, i.e., those provided for in subsections 256.2(3) and 257(1) of the Act, follow special rules according to which rebates do not become payable by the Minister until they are claimed by the taxpayer. In other words, the appellant argues that the rebates would not be relevant to the calculation of the net tax owed by the taxpayer and, consequently, to the calculation of the interest and GST late-filing penalty payable, because subsection 280(1) and section 280.1 of the Act operate independently of subsection 228(6).

[25] Thus, assuming that subsection 228(6) requires the Minister to set off rebates, the appellant submits that this requirement was only triggered when the respondent filed its rebate application on September 28, 2015. The appellant also submits that the Minister was therefore fully entitled to calculate the interest and the GST late-filing penalty to be assessed under subsection 280(1) and section 280.1 based on the full amount of tax due because the rebates could not be set off between the time when the said return should have been filed, i.e. on December 31, 2014, and the time it was filed in September 2015.

IV. Issue and standard of review

[26] The issue here is whether Justice D'Auray erred in deciding that the interest and GST late-filing penalty payable under subsection 280(1) and section 280.1 of the Act could only be

calculated on the amount of GST payable by the respondent, after taking into account the rebates to which it was entitled.

[27] Both parties are of the view that the standard of review applicable to this issue – a question of statutory interpretation – is correctness. This is consistent with the appeal standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235: questions of law raised on appeal must be analyzed according to the correctness standard.

V. Analysis

[28] The backdrop against which this case rests is not factually or legally controversial. The respondent, who, I would point out again, operates a residential complex for semi-autonomous persons or persons with a loss of autonomy, provides "exempt supplies", i.e., services exempt from taxes. This means that it does not have to charge GST on its supplies of goods and services. It also means that it does not have to be a GST registrant, unlike businesses that provide "taxable supplies" and who, on behalf of the tax authorities, are required pursuant to subsection 221(1) of the Act to collect the tax payable by the purchasers of such supplies.

[29] The respondent's "non-registrant" status also means that, unlike registered businesses, it is not entitled to claim ITCs on the goods and services it acquires in order to make its exempt supplies. ITCs, which are calculated according to the formula set out in subsection 169(1) of the Act, allow the tax paid by the purchaser of a taxable supply who uses the good or service so taxable in the production of other taxable supplies, to be recovered from the government

(*Reference re Goods and Services Tax*, [1992] 2 SCR 445, 430 D.L.R. (4th) 315 at page 456 (*Reference re the GST*)). This is consistent with the logic of the GST. Following this logic, the tax is ultimately borne only by the ultimate consumer of the good or service. However, this is not the case with exempt supplies. I will come back to this later.

[30] Notwithstanding its non-registrant status, by rebuilding the building that housed its residential complex following the fire that destroyed it, the respondent is deemed, by the combined effect of the definition of "builder" set out in subsection 123(1) and subsection 191(3) of the Act, to have, on the day the construction was substantially completed, "made and received [. . .] a taxable supply by way of sale of the complex" and to have, on that date, "paid as a recipient and to have collected as a supplier [. . .] tax in respect of the supply calculated on the fair market value of the complex on that day."

[31] On the day when the reconstruction work was substantially completed, which, as indicated above, both parties agree was on November 1, 2014, the respondent was therefore deemed to be both the purchaser and the supplier of the building that was reconstructed, and at the same time responsible for the payment and the collection of the tax on this supply deemed to be taxable.

[32] Pursuant to subsections 228(1), 228(2), 238(2) and 245(1) of the Act, the respondent was then required to file a "net tax" return with the Minister on that taxable supply and remit the "positive amount" of that tax to the Minister. The respondent had until December 31, 2014 to do this. However, the respondent could not claim any ITCs in calculating the "net tax" payable for

the period covered by its return, as allowed by subsection 225(1) of the Act, which sets out the formula used to calculate the amount of “net tax”, because, in the course of its operations, the respondent was deemed to make only exempt supplies.

[33] However, in accordance with subsections 256.2(3) and 257(1) of the Act, the respondent was entitled to receive rebates from the Minister for this same period, in particular for the GST paid to suppliers during the reconstruction of the building. Under subsection 228(6) of the Act, it could file a rebate application with the Minister when it filed its GST return. However, pursuant paragraph 256.2(7)(*a*) and subsection 257(2) of the Act, it could not claim these rebates unless it filed an application for the rebate within two years after the day the taxable supply was made.

[34] As we have seen, it is not disputed in this case that on November 1, 2014, the respondent was deemed to owe the Minister $736,864.18 of GST. Nor is it disputed that on November 30, 2014, the respondent was entitled to claim $860,647.30 of rebates from the Minister in order to offset the amount of GST that she was owed.

[35] The appellant agrees that if the respondent had filed its GST return and its rebate applications by the December 31, 2014 filing deadline, the GST owed by the respondent would have been fully offset by the rebates payable by the Minister pursuant to subsection 228(6) of the Act. In fact, the Minister would, at that time, have been indebted to the respondent for the excess of the rebates that she was required to pay the respondent pursuant to subsections 256.2(3) and 257(1) of the Act, once the GST was offset.

[36] It is useful to reproduce subsection 228(6) of the Act here:

Set-off of refunds or rebates	**Compensation de remboursement**
(6) Where at any time a person files a particular return under this Part in which the person reports an amount (in this subsection referred to as the "remittance amount") that is required to be remitted under subsection (2) or (2.3) or paid under subsection (2.1) or (4) or Division IV or IV.1 by the person and the person claims a refund or rebate payable to the person at that time under this Part (other than Division III) in the particular return or in another return, or in an application, filed under this Part with the particular return, the person is deemed to have remitted at that time on account of the person's remittance amount, and the Minister is deemed to have paid at that time on account of the refund or rebate, an amount equal to the lesser of the remittance amount and the amount of the refund or rebate.	**(6)** Dans le cas où une personne produit, à un moment donné et conformément à la présente partie, une déclaration où elle indique un montant (appelé « versement » au présent paragraphe) qu'elle est tenue de verser en application des paragraphes (2) ou (2.3) ou de payer en application des paragraphes (2.1) ou (4) ou des sections IV ou IV.1 et qu'elle demande dans cette déclaration, ou dans une autre déclaration ou une demande produite conformément à la présente partie avec cette déclaration, un remboursement qui lui est payable à ce moment en application de la présente partie, compte non tenu de la section III, la personne est réputée avoir versé à ce moment au titre de son versement, et le ministre avoir payé à ce moment au titre du remboursement, ce versement ou, s'il est inférieur, le montant du remboursement.

[37] The question then arises as to the consequences, if any, of the respondent's failure to file its GST return on time in such a context. In other words, the Court must determine whether the interest and penalty that may be imposed under subsection 280(1) and section 280.1 of the Act for failing to file a GST return when required, must be calculated solely based on the GST payable or based on the net amount owed by the taxpayer. In this case, this amount is the difference between the GST owed and the rebates to which the taxpayer is entitled.

[38] In my view, this calls for an analysis of the meaning to be given to the concept of the "amount to be remitted or paid" upon which the interest and the penalty must be calculated pursuant to these two provisions. This is the only issue to be resolved in this case. For these purposes, it is also useful to reproduce the text of these two provisions here:

Interests	**Intérêts**
280(1) Subject to this section and section 281, if a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay interest at the prescribed rate on the amount, computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.	**280(1)** Sous réserve du présent article et de l'article 281, la personne qui ne verse pas ou ne paie pas un montant au receveur général dans le délai prévu par la présente partie est tenue de payer des intérêts sur ce montant, calculés au taux réglementaire pour la période commençant le lendemain de l'expiration du délai et se terminant le jour du versement ou du paiement.
[…]	[…]
Failure to file a return	**Non-production d'une déclaration**
280.1 Every person who fails to file a return for a reporting period as and when required under this Part is liable to pay a penalty equal to the sum of	**280.1** Quiconque omet de produire une déclaration pour une période de déclaration selon les modalités et dans le délai prévus par la présente partie est passible d'une pénalité égale à la somme des montants suivants :
(a) an amount equal to 1% of the total of all amounts each of which is an amount that is required to be remitted or paid for the reporting period and was not remitted or paid, as the case may be, on or before the day on or before which the return was required to be filed, and	**a)** le montant correspondant à 1 % du total des montants représentant chacun un montant qui est à verser ou à payer pour la période de déclaration, mais qui ne l'a pas été au plus tard à la date limite où la déclaration devait être produite;
(b) the amount obtained when one quarter of the amount determined under paragraph (a) is multiplied	**b)** le produit du quart du montant déterminé selon l'alinéa a) par le nombre de mois entiers, jusqu'à

by the number of complete months, not exceeding 12, from the day on or before which the return was required to be filed to the day on which the return is filed.	concurrence de douze, compris dans la période commençant à la date limite où la déclaration devait être produite et se terminant le jour où elle est effectivement produite.

[39] It is settled law that the modern approach to statutory interpretation now applies to taxation statutes no less than it does to other statutes (*Placer Dome Canada Ltd v. Ontario (Minister of Finance))*, 2006 SCC 20, [2006] 1 SCR 715 at paragraph 21 (*Placer Dome*); see also *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 R.C.S. 601, at paragraphs 10-11 (*Trustco*); *Canada v. Cheema*, 2018 FCA 45, [2018] 4 FCR 328 at paragraph 73 (*Cheema*). The words of a statute must therefore be read "in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Placer Dome* at paragraph 21, citing *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, 10 D.L.R. (4th) 1, at page 578).

[40] Although the words of a taxation statute can play a "dominant role" in the interpretative process when they are "precise and unequivocal", the words will play a lesser role and greater recourse to the context and purpose of the Act may be necessary when the words of a statute give rise to more than one reasonable interpretation (*Placer Dome* at paragraphs 21-22). The analysis of the context and the purpose of the Act is also useful in all circumstances as it can reveal or resolve latent ambiguities in a provision that may appear to be unambiguous at first glance (*Placer Dome* at paragraph 22).

[41] The interpretive approach will thus depend on the level of precision and clarity with which a taxing provision in question is drafted. If it is unambiguous, it will generally suffice to

apply the provision, since the purpose of the provision cannot be used to create an unstated exception to what is clearly prescribed (*Placer Dome* at paragraph 23; *Cheema*, at paragraph 74). Conversely, if the provision is ambiguous, then "greater emphasis must be placed on the context, scheme and purpose of the Act" (*Placer Dome* at paragraph 23).

[42] In this case, the appellant has not persuaded me that we are dealing with a case where it is clear and unequivocal that subsection 280(1) and section 280.1 of the Act do not allow the interest and the GST late-filing penalty to be calculated only on the amount of GST owed to the Minister, without taking into consideration any rebates payable to the taxpayer. It therefore becomes necessary to examine these two provisions in view of the context, i.e., the scheme and the purpose of the Act.

[43] The appellant's position essentially consists of two arguments:

a. The first is that, unlike ITCs, "rebates", as defined in the Act, cannot be used to calculate the "net tax" that the respondent was required to report under subsection 238(2) of the Act. Rather, they are governed by a different set of rules under which they do not become payable until the taxpayer claims them and therefore do not affect the amount of net tax due until that time.

b. The second argument is that subsection 228(6) of the Act is no exception to this rule. It only has an impact on the net tax payable when rebates are claimed. In this sense, this provision has no retroactive effect on the amount of the net tax itself. Therefore, it cannot have any effect on the calculation of interest and the GST late-filing penalty, which are applicable on the total amount of net tax due until the time when the rebate becomes payable and when it can thus be offset.

[44] These arguments run into a number of obstacles. On the one hand, subsection 280(1) of the Act applies to a person who, for a given reporting period, "fails to remit or pay an amount to the Receiver General when required [in part IX]" (emphasis added). In addition, pursuant to section 280.1, the penalty payable for late remittance or payment is also based on each amount to be remitted or paid for the reporting period in question. The word "amount" is defined as follows in the Act: "money, property or a service, expressed in terms of the amount of money or the value in terms of money of the property or service" (see subsection 123(1)). Evidently, Parliament opted for a flexible and general definition.

[45] The language of these two provisions therefore does not contain an explicit reference to "net tax", which has a specific meaning in the Act. However, subsection 280(1.1) does. It refers to the amount payable "on account of the […] net tax". This shows that Parliament had two distinct concepts in mind when it drafted these provisions. Indeed, as dictated by the presumption of uniformity of expression, when Parliament uses two different expressions in the same Act in relation to the same subject, it must be assumed that it did not intend to say the same thing (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Edition, Markham, Ontario, LexisNexis, 2014 at page 218, citing *Jabel Image Concepts Inc. v. Canada*, 257 N.R. 193, [2000] F.C.J. No. 894 at paragraph 12 (FCA)). (QL/Lexis). This must be so when, as here, Parliament uses two different expressions in connection with the same subject in the same section of an Act.

[46] The language of subsection 280(1) and section 280.1 of the Act does not provide us with more information on the gross or net nature of the unremitted or unpaid "amount" on which

interest and a penalty may be assessed. In the light of subsections 228(6), 256.2(3), 257(1) and 296(2.1) of the Act, which deal either with the right to rebates or the right to set-off against the tax payable, or the right to deduct them in order to reduce the amount of net tax due when the taxpayer fails to claim them, the language of subsection 280(1) and section 280.1 does not provide a "precise and unequivocal" answer regarding the exact nature of the "amount" at issue. This requires us to examine the interaction between these different provisions of the Act, in the light of the context, purpose and general scheme of the Act.

[47] First of all, it is important to bear in mind the objective underlying the rebate to which the respondent is entitled under subsections 256.2(3) and 257(1) of the Act. According to the explanatory note concerning section 257 of the Act, produced by the parties in the joint book of authorities, this section "provides a rebate to a non-registrant who makes or is deemed to make a taxable supply or real property by way of sale". The rebate is "based on the tax the non-registrant paid on the purchase of the property and that was not recovered by the non-registrant by way of an input tax credit or rebate through an [ITC] or a rebate." It aims to "avoid double taxation".

[48] Although explanatory notes issued in connection with taxation statutes are not binding on the Court, they are entitled to some weight and may constitute an important factor in the interpretation of statutes (*Silicon Graphics Ltd. v. Canada*, 2002 FCA 260, [2003] 1 F.C. 447 at paragraph 50, citing *Canada v. Ast Estate (C.A.)*, [1997] 3 F.C. 86, [1997] F.C.J. 267 at paragraph 27 (FCA)). (QL/Lexis); see also *ExxonMobil Canada Ltd. v. Canada*, 2010 FCA 1, 397 N.R. 204, at paragraph 51). Here, in my view, when subsections 256.2(3), 257(1) and 191(3) of the Act are read together, they make this objective clear. Again, the respondent had already

paid the GST when it paid the invoice submitted by the contractor it hired to rebuild its residential complex. Having the respondent also pay GST on the sale of the reconstructed property, which it is deemed to have sold to itself, would undoubtedly constitute double taxation.

[49] I therefore agree with the trial judge: the rebates to which the respondent was entitled were designed to prevent an unregistered "builder"—who was deemed to have made, and received a taxable supply by way of sale of a complex to be used to produce GST-exempt services intended, as in this case, for vulnerable clients—from being put at a fiscal disadvantage compared to a registered "builder" whose main commercial activity is the construction of buildings. A registered "builder" is entitled to recover the GST that it paid in similar circumstances because the recipient of the taxable supply so produced is ultimately responsible for paying the GST.

[50] By and large, Parliament wanted to remedy a situation that would otherwise be unfair to unregistered "builders" because they would have to bear a heavier tax burden without any real justification: they would have to pay a tax that cannot be carried over to the ultimate purchaser of the service provided because the ultimate purchaser receives a non-taxable service from this deemed "builder" (see *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715, 115 D.L.R. (4th) 449, at page 722). In my view, this is an important contextual element for the purposes of interpreting subsection 280(1) and section 280.1 of the Act.

[51] In addition, an examination of subsections 256.2(3) and 257(1) shows that the right to rebates provided under these subsections is acquired when the eligibility requirements specified

therein are met. When these requirements have been met, the Minister must provide the rebates. In other words, she has no other choice. She is then bound to do so.

[52] For its part, subsection 228(6) of the Act specifies that the amount of net tax owed by the taxpayer can be offset by the rebates payable to him by the Minister. This is, as it were, the counterpart of subsection 225(1) of the Act with respect to ITCs, with this difference that ITCs can be deducted from the amount of GST owing for the purposes of calculating the "net tax". For its part, the set-off provided for in subsection 228(6) is deemed to occur at anytime a taxpayer files his GST return, provided that a concomitant rebate claim is submitted to the Minister, which may be filed in the particular return, in "another return" or in "an application filed under this Part".

[53] The appellant insists that under subsection 262(1) of the Act, a rebate must be made in prescribed form containing prescribed information and must be filed with the Minister in prescribed manner. She argues that as long as this application has not been made, prepayment cannot produce any effect on the amount of net tax that the taxpayer will have to pay nor on the calculation of the interest and GST late-filing penalty to which he could be liable. The appellant therefore blames the trial judge for having associated the rebates with the calculation of the net tax, which, in her view, the trial judge was not allowed to do according to the language of subsections 262(1) and 228(6) of the Act.

[54] In my view, this is where subsection 296(2.1) of the Act comes into play. The Supreme Court of Canada considered this provision in *United Parcel Service Canada Ltd. v. Canada*,

2009 SCC 20, [2009] 1 S.C.R. 657 (*UPS*). Although this case concerned a different type of rebate from those at issue in the case at bar, namely a rebate for overpaid GST, as provided for in subsection 261(1) of the Act, it is instructive as to the meaning and scope of subsection 296(2.1) of the Act, which deals with the treatment of rebates not claimed when the Minister of National Revenue makes an assessment, regardless of the type of rebate involved.

[55] Pursuant to subsection 296(1) of the Act, the Minister may assess, reassess or make an additional assessment in order to determine, in particular, the "net tax" and, where applicable, interest and penalties payable by a person. As for subsections 296(2) and 296(2.1), they deal with the treatment of credits, including ITCs (subsection 296(2)), and rebates (subsection 296(2.1)) not claimed by a taxpayer when the assessment is made. For all intents and purposes, credits and rebates receive the same treatment.

[56] In *UPS*, the taxpayer, United Parcel Service Canada Ltd. (UPS), had paid an amount on account of GST on imported goods that it did not have to pay. The overpayment resulted from mistakes made by UPS and its customers. In addition, UPS had not filed any rebate applications, as required under subsection 261(3) of the Act, nor had it filed, as it could have, rebate applications pursuant to provisions of the Act and the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), mentioned in paragraph 261(2)(*c*) of the Act. Instead, it had opted to file its monthly GST returns, in which it deducted the overpayment amounts from its own GST liability.

[57] The Minister of National Revenue (the Minister) disallowed the amount of $2,937,123 that UPS had deducted for the period in question. The Minister only allowed UPS an adjustment

of $36,265. In addition, the Minister assessed interest of $456,606.20 and a penalty of $632,229.77.

[58] Although the Minister agreed that the $2,900,858 balance constituted an overpayment within the meaning of subsection 261(1) of the Act and that this amount would not have been payable if errors had not been made, the Minister nevertheless maintained that UPS was not entitled to a rebate for this overpayment, in particular, because UPS had not followed the prescribed procedure to obtain the said rebate.

[59] The Supreme Court rejected that argument. In doing so, it cited subsection 296(2.1) of the Act. In its view, this provision required the Minister to apply the amount of a rebate "against the net tax" otherwise payable, when he determines that, in the assessment procedure, "a rebate would have been payable had it been claimed in an application, that it was not so claimed and that the period for claiming the rebate has expired" (*UPS* at paragraph 29). The Supreme Court added the following comment as to the meaning and scope of this provision:

> [30] As I read s. 296(2.1), even if no application for a rebate was made within the applicable limitation period, the rebate shall be applied by the Minister against the net tax owed by the taxpayer in the reassessment process if the Minister determines that a rebate would have been payable had it been claimed. The section refers to "allowable rebate". Allowable rebate must mean a rebate that would have been allowable had the applicable procedure been followed. In other words, where these procedures have not been followed, it is not fatal to the rebate claim.

[60] Noting that the Minister had agreed that the $2,900,858 balance constituted an overpayment and that UPS had not collected the overpayment from its customers, the Court held that if the appropriate procedures had been followed, the rebate would have been allowed. As a

result, the Minister was obliged to apply the rebate to the net tax assessed against UPS pursuant to subsections 261(1) and 296(2.1) of the Act (*UPS* at paragraph 33).

[61] As I have already noted, the language of subsection 296(2.1) does not exclude any type of rebate from its application. The rebates provided for in subsections 261(1), 256.2(3) and 257(1) are grouped together in the same Division—Division VI, entitled "Rebates" ("Remboursements" in the French version)—of Part IX of the Act. Other than the eligibility requirements, there is no policy reason to distinguish them for the purposes of implementing subsection 296(2.1).

[62] Thus, it must be understood that the respondent would have been in a better position if it had simply failed to claim the rebates to which it was entitled. From the moment where, in assessing the respondent, the Minister would have determined that the respondent was entitled to the said rebates, it is not by simply offsetting the amount of net tax payable when the Minister made the determination that this benefit would have been obtained, but by actually reducing the amount of the said tax.

[63] In such a very real scenario, the net tax owed by the respondent would have been a negative amount, because the amount of rebates payable to the respondent were greater than the amount of the said tax. It is this negative amount of net tax that, pursuant to subsection 296(1) of the Act, the Minister would then have been required to assess. As a result, it was no longer open to the Minister to assess interest and a GST late-filing penalty.

[64] However, the appellant considers that subsection 296(2.1) does not apply in this case because the respondent filed rebate applications. She notes that Justice D'Auray admitted this. Insofar as this means that subsection 296(2.1) is of no assistance to the interpretive exercise that must be undertaken in this case, which is certainly not the conclusion that Justice D'Auray reached, this argument cannot be accepted. Justice D'Auray turned to subsection 296(2.1) to comment on how absurd it was that the respondent would have been better off if it had skirted its duty to file a rebate application and that it was equally absurd to report the GST that it was deemed to owe because, pursuant to the Act, it was deemed to have acquired the reconstructed complex on its own.

[65] As Justice D'Auray noted, it well settled that a literal interpretation which may produce illogical or absurd results must be set aside (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 154 D.L.R. (4th) 193 at paragraph 27). The interpretation advanced by the appellant that the interest and the GST late-filing penalty that may be assessed must, in all circumstances, be calculated on the amount of net tax, without taking into consideration rebates payable, is, as we have seen, likely to produce absurd results.

[66] This is the conclusion reached by Justice D'Auray, and I cannot say that she erred in coming to this conclusion. To paraphrase Justice Miller in *Humber College*, it would be absurd, to say the least, if provisions intended to assist a taxpayer were to cause greater harm to a well-intentioned taxpayer than to a less well-intentioned taxpayer (*Humber College* at paragraph 1). This cannot be the result Parliament sought in adopting subsection 280(1) and section 280.1 of the Act.

[67] More importantly, this interpretation fails to reflect the context in which subsection 280(1) and section 280.1 of the Act operate. Here, it is clear that the respondent is entitled to the rebates allowed in subsections 256.2(3) and 257(1) of the Act and that the amount of these rebate exceeds the amount of tax that it owes. It is also clear that, as Justice D'Auray pointed out, these rebates and this tax are inextricably linked because they have to do with the same taxable supply and reporting period. Furthermore, the Minister agrees that if the respondent had filed its GST return with its rebate applications, on December 31, 2014, and had therefore followed the applicable procedure, the respondent would not have had to pay or remit any amount of tax, and no interest or penalty could have been assessed.

[68] Insofar as Parliament's obvious intention in enacting subsections 256.2(3) and 257(1) of the Act, in particular, was to ensure that an unregistered taxpayer was not put at a disadvantage compared to a registered taxpayer, who, unlike a unregistered taxpayer, can deduct ITCs in calculating the amount of net tax payable, and also insofar as the Act allows an unregistered taxpayer who fails to file a rebate application when required in order to receive the same benefit, i.e., having "the rebate [. . .] applied by the Minister against the net tax owed by the taxpayer" (*UPS* at paragraph 30), subsection 280(1) and section 280.1 cannot have the meaning and scope that the applicant gives them.

[69] Indeed, I do not believe that Parliament, in enacting subsection 280(1) and section 280.1 of the Act, intended that the "amount" of interest and GST late-filing penalty to be paid or remitted, could, in circumstances such as those in this case, be calculated without taking into account the rebates payable to the taxpayer. In other words, in circumstances such as ours, this

“amount” can only be the amount of tax actually owed by the taxpayer. Parliament would have had to express itself differently than it did in order for the Court to accept the appellant’s argument that it is clear and unequivocal that this “amount” cannot represent only the net tax, without taking into account the rebates due and payable to the taxpayer.

[70] As the Supreme Court of Canada pointed out in *Trustco*, “in all cases the court must seek to read the provisions of an Act as a harmonious whole” even if “[t]he relative effects of ordinary meaning, context and purpose on the interpretive process may vary” (*Trustco* at paragraph 10). The position defended by the appellant in this case, which consists of a decontextualized reading of subsection 280(1) and section 280.1 and is likely to produce results that Parliament may not have wanted, runs directly counter to this general principle. This position does not withstand scrutiny.

[71] Therefore, I am of the view that the interest and GST late-filing penalty could only be calculated on the amount that the respondent actually owed the Minister for the reporting period in question. Because this amount was negative, I agree with Justice D’Auray that the Minister was not justified in imposing the interest and penalty that the Minister seeks to recover from the respondent.

[72] For these reasons, I would dismiss the appeal with costs to the respondent.

"René LeBlanc"

J.A.

"I agree.
Richard Boivin J.A. "

"I agree.
Mary J. L. Gleason J.A. "

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-151-19
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. VILLA STE-ROSE INC.
PLACE OF HEARING:	BY ONLINE VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 4, 2021
REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	BOIVIN J.A. GLEASON J.A.
DATED:	FEBRUARY 25, 2021

APPEARANCES:

Christian Lemay Antoine Lamarre	FOR THE APPELLANT
Camille Janvier-Langis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPELLANT
DENTONS CANADA LLP	FOR THE RESPONDENT