Federal Court of Appeal | Cour d'appel fédérale

Date: 20211206

Dockets: A-99-20
A-100-20

Citation: 2021 FCA 236

CORAM: **WEBB J.A.**
MACTAVISH J.A.
LEBLANC J.A.

Docket: A-99-20

BETWEEN:

DENSO MANUFACTURING CANADA, INC.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Docket: A-100-20

AND BETWEEN:

DENSO SALES CANADA, INC.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on September 29, 2021.

Judgment delivered at Ottawa, Ontario, on December 6, 2021.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: MACTAVISH J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the ETA), closely related corporations can file an election to avoid the necessity of the vendor collecting the GST/HST payable in relation to intercorporate supplies and the recipient claiming a corresponding input tax credit for the tax payable in relation to the acquisition of such goods or services in the course of a commercial activity of the recipient.

[2] Denso Manufacturing Canada, Inc. (Denso Manufacturing) and Denso Sales Canada, Inc. (Denso Sales) are closely related corporations. In April 2007, they completed the then-required election form (GST25) to allow them to treat intercorporate sales as supplies for no consideration for the purposes of the ETA. At that time, there was no requirement to file this form with the Minister of National Revenue (Minister).

[3] As a result of amendments to the ETA that were made in 2014, effective January 1, 2015 a new prescribed election form (RC4616) (which will be referred to herein as the new election form) was required, and this form had to be filed with the Minister.

[4] Administratively, the Minister allowed existing closely related corporations to file the new election form any time prior to December 31, 2015 to allow them to continue to benefit from the provisions of subsection 156(2) of the ETA (all intercorporate taxable supplies being deemed to be made for no consideration) for 2015.

[5] The new election form for Denso Manufacturing and Denso Sales was not filed with the Minister by December 31, 2015, which resulted in notices of reassessment being issued for the unremitted tax for the intercorporate supplies made in 2015.

[6] The reassessments are not in issue in these appeals. Rather these appeals arise as a result of the request by the appellants for the Minister to accept a late-filed new election form and the Minister's decision to not accept the late-filed new election form.

[7] The Federal Court dismissed the appellants' application for judicial review of the Minister's decision. These appeals are from that decision. For the reasons that follow, I would dismiss these appeals.

[8] The appeals were not consolidated. However, the issues are identical in each appeal and therefore these reasons will apply to both appeals. The original of these reasons will be placed in the file for Denso Manufacturing (A-99-20) and a copy will be placed in the file for Denso Sales (A-100-20).

I. Background

[9] Denso Manufacturing manufactures certain parts for automobiles. It sells its products to its affiliated companies, including Denso Sales. The appellants, in April 2007, completed the then-required election form to treat the intercorporate supplies as supplies for no consideration, as provided in section 156 of the ETA. This form was not filed with the Minister.

[10] Denso Manufacturing discovered a problem with its internal accounting system sometime in late 2015. As a result of the problem, Denso Manufacturing made a voluntary disclosure to the Canada Border Services Agency (CBSA), as it was required to pay additional net GST owing in relation to certain imported goods. This also resulted in an increased claim for input tax credits. This led to the company's GST/HST returns being selected for review in January 2016 by the Canada Revenue Agency (CRA).

[11] As part of the correspondence between Denso Manufacturing and the Refund Integrity Officer for the CRA in early 2016, the appellants submitted that the sales between Denso Manufacturing and Denso Sales were subject to an internal election and that they had completed form GST25. The CRA officer, during a telephone call with a representative of Denso Manufacturing on February 11, 2016, asked the appellants to file the new election form so that they would be in compliance with section 156 of the ETA.

[12] Following this telephone call, Denso Manufacturing sought advice from a senior tax advisor with Ryan Tax Consultants concerning whether there was a change in the requirement for an election for no consideration under the ETA. The tax consultant indicated that she was unable to find any CRA publication that identified the consequences of failing to file the new election form by December 31, 2015. The tax consultant referred to an excerpt from a commentary on the ETA, which confirmed that the former election form GST25 would only be valid during 2015, and had to be replaced with the new election form by the end of 2015 to continue to be valid. The commentary also noted that if the new election form was "overlooked

or unavailable", the intercorporate sales may qualify for what is referred to as "wash transactions", which would result in a reduced interest rate of 4% of the unremitted GST/HST.

[13] The conclusion of Ryan Tax Consultants was that the only exposure for the appellants was the net tax payable by Denso Manufacturing for the month of January 2016, if the new election form was not filed by the end of February 2016. Based on this advice, the new election form was submitted on February 22, 2016 with an effective date of January 1, 2016. A few days prior to submitting this form, the Refund Integrity Officer informed Denso Manufacturing that no changes would be made to its return in which it had claimed the significant input tax credits.

[14] In June 2017, the CRA commenced an audit of Denso Manufacturing under the ETA for the reporting periods from April 1, 2014 to March 31, 2016.

[15] Denso Manufacturing sent a letter to the CRA, dated November 7, 2017. The first paragraph of this letter states as follows:

> Further to our previous discussions in respect of the section 156 election, we would like to request that the Canada Revenue Agency ("CRA") kindly accept a late-filed election under subsection 156(4) of the *Excise Tax Act* (the "ETA"), with an effective date of January 1, 2015 at this time.

[16] On December 4, 2017, Denso Manufacturing sent the following e-mail to the CRA auditor:

> This is in response to your voice mail today.

> 1) The reason for RC4616 not filed on time was that DENSO Manufacturing Canada (DMCN) and DENSO Sales Canada (DSCN) were not aware of the new RC4616 regulation.
>
> 2) The effective date is not 2015 because our consultant Ryan did not advise us that the effective date should be 2015. In February 2016, our consultant Ryan was not able to find anything published by Canada Revenue Agency that speaks to the consequences of missing the deadline for the new RC4616. According to them, the only exposure would be the transactions occurring during the month of January 2016 if we are not able to file the election by the end of February with our GST/HST return covering the month of January. Therefore, DMCN and DSCN executed RC4616 with an effective date of January 1, 2016 and submitted to CRA on February 22, 2016.
>
> We would like to seek your kind consideration for the administrative relief and to accept the amended RC4616 election form effective January 1, 2015.

[17] On April 23, 2018, the CRA sent a proposal letter to Denso Manufacturing indicating that the audit of Denso Manufacturing would result in additional net GST of approximately $30 million for the period from January 1, 2015 to December 31, 2015 and indicating that interest in excess of 4% would be waived. Following this proposal letter, further submissions were made to the CRA and meetings were held between Denso Manufacturing and the CRA.

[18] On September 11, 2018, the Minister denied the appellants' request to late file the new election form for 2015.

II. Relevant Provisions of the ETA

[19] The relevant subsections of section 156 of the ETA that specify the effect of the election and the requirement to file the new election form are subsections (2) and (4):

156 (2) For the purposes of this Part, if at any time after 2014 a person that is a specified member of a qualifying group files an election made jointly by the person and another specified member of the group, every taxable supply made between the person and the other specified member at a time when the election is in effect is deemed to have been made for no consideration.

156 (2) Pour l'application de la présente partie, si une personne qui est un membre déterminé d'un groupe admissible produit après 2014 un choix qu'elle a fait conjointement avec un autre membre déterminé du groupe, toute fourniture taxable effectuée entre eux à un moment où le choix est en vigueur est réputée être effectuée sans contrepartie.

…

[…]

156 (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

156 (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 :

(A) the day on or before which the particular specified member must file a return under Division V for the reporting period of the particular specified member that includes the effective day, and

(A) la date où le membre déterminé donné est tenu, au plus tard, de produire une déclaration aux termes de la section V pour sa période de déclaration qui comprend la date d'entrée en vigueur,

(B) the day on or before which the other specified member must

(B) la date où l'autre membre déterminé est tenu, au plus tard,

file a return under Division V for the reporting period of the other specified member that includes the effective day, or	de produire une déclaration aux termes de la section V pour sa période de déclaration qui comprend la date d'entrée en vigueur,
(ii) any day after the particular day that the Minister may allow.	(ii) à toute date postérieure que fixe le ministre.

[20] Subsection 156(2) of the ETA provides that the election to treat supplies between specified members of a qualifying group (closely related corporations or partnerships – subsection 156(1) of the ETA) as supplies for nil consideration must, after 2014, be filed to be effective. Subparagraph 156(4)(*b*)(ii) of the ETA allows the Minister to accept an election that is not filed within the time specified by subparagraph 156(4)(*b*)(i) of the ETA.

III. Minister's Decision

[21] In the decision dated September 11, 2018, the Minister referred to a meeting held on August 9, 2018 during which Denso Manufacturing confirmed its position that:

- The CRA notified Denso Manufacturing of the need to file the new election form in February 2016 during the review of its returns filed for November and December 2015;

- The review of these returns resulted in a large input tax credit without any changes;

- Upon being notified by the CRA of the need for the new election form, Denso Manufacturing sought advice from its tax consultants who advised Denso Manufacturing to file the new election form by the end of February, 2016;

- The CRA GST-HST Audit and Examination Manual, dated January 2016, indicated, with respect to elections, “that the normal audit assessment process should be followed only where there is revenue loss”;

- An extenuating circumstance was the preparation of its voluntary disclosure for the CBSA; and

- The assessment would be disproportionate and unfair, particularly in the circumstances.

[22] After summarizing the submissions of Denso Manufacturing, the Minister noted that there were no extenuating circumstances in this case that would have prevented the company from filing the new election form as required by section 156 of the ETA. The Minister also indicated that the explanations did not demonstrate that Denso Manufacturing was not negligent or careless in complying with the ETA and its election provisions. The Minister also noted that the decision to deny the request for late filing was consistent with the approach of other tax offices.

[23] The Minister, in particular, noted that the decision was based on the following:

- When the CRA officer notified Denso Manufacturing of the need to file a new election form and Denso Manufacturing contacted its tax consultant concerning this requirement, the deadline for doing so had already passed;

- The CRA officer, who was reviewing the GST/HST returns in January 2016 to determine the correctness of the input tax credits claimed, was only conducting a limited review;

- The audit manual to which Denso Manufacturing referred is generally only applicable to small and medium audits;

- The requirement to file the new election form was included in various CRA publications in May 2014, January 2015, April 2015 and December 2015;

- There was nothing that would have precluded Denso Manufacturing from filing the new election form prior to the fall of 2015;

- The preparation of the voluntary disclosure for the CBSA was not an extraordinary circumstance; and

- Legislation is to be applied consistently to all registrants and it would not be fair to those registrants who did file the new election form to allow the appellants to late file the new election form in the absence of a valid extraordinary circumstance.

[24] As a result, the request by Denso Manufacturing to late file the new election form for 2015 was denied.

IV. Application for Judicial Review

[25] Denso Manufacturing sought judicial review of this decision. Denso Manufacturing submitted that the process before the Minister was not procedurally fair, as the Minister had failed to disclose an e-mail in which a Senior Program Advisor with the CRA had recommended that the CRA not proceed with the proposed assessment for Denso Manufacturing. Denso Manufacturing also submitted that the decision of the Minister was not reasonable.

[26] The Federal Court determined that the standard of review for questions of procedural fairness is correctness and that the standard of review for the decision of the Minister to not accept the application for late filing of the new election form was reasonableness.

[27] The Federal Court found that the process was procedurally fair. There was no obligation to disclose the opinion of the Senior Program Advisor. This person was not the final decision maker, and he changed his view once he was apprised of all of the facts. Denso Manufacturing had sufficient information to know the Minister's concerns and ample opportunity to address these concerns.

[28] The Federal Court also found that the Minister's decision was reasonable. Although Denso Manufacturing submitted that the starting date of January 1, 2016 was inserted in error in

the new election form filed on February 20, 2016, the Federal Court found that there was nothing to substantiate this position. Rather, Denso Manufacturing was not aware of the legislative change that resulted in the requirement to file a new election form. Failing to file the new election form on time, because Denso Manufacturing was not aware of this requirement to file the new election form, did not render the decision to deny granting an extension of time unreasonable. The Federal Court also noted that the Minister, in the decision under review, referred to a number of CRA publications that addressed the obligation to file the new election form.

[29] As a result, the application for judicial review was dismissed.

V. Issues and Standards of Review

[30] This is an appeal from a decision of the Federal Court on a judicial review application. The Supreme Court of Canada in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at paragraph 10, referred to its earlier decision in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36. In *Agraira*, the approach to be taken by an appellate court on an appeal from a decision of a lower court on a judicial review application was that the appellate court was to step into the shoes of the lower court. After citing the passage from *Agraira* that outlined this approach, the Supreme Court in *Horrocks* noted:

> This approach accords no deference to the reviewing judge's application of the standard of review. Rather, the appellate court performs a *de novo* review of the administrative decision (D. J. M. Brown, with the assistance of D. Fairlie, *Civil Appeals* (loose-leaf), at §14:45).

[31] The issues listed by the appellants in paragraph 37 of their memoranda of fact and law (which are identical in each memorandum, as Denso Sales adopted the submissions made by Denso Manufacturing) in respect of the decision of the Federal Court are:

> (a) The lower court made palpable and overriding errors in respect of certain findings of fact, in particular those found at paragraphs 38 and 40 of the Federal Court Decision;
>
> (b) The lower court erred in finding the Appellant was negligent or careless;
>
> (c) The lower court erred in law by misdirecting itself by applying a principle typically engaged in the criminal law context, namely *"Ignorantia Juris Non Excusat"*, which has no application in a case involving the filing of a form under the ETA; and
>
> (d) The lower court erred in determining the process followed by the Respondent was procedurally fair.

[32] In paragraph 38 of their memoranda, the appellants submitted:

> Further, the Decision is unreasonable as it does not fall within a reasonable range of outcomes.

[33] The approach to be taken in these appeals, as noted by the Supreme Court in *Horrocks*, is that this Court is to conduct a *de novo* review of the administrative decision with no deference to the Federal Court in its application of the standard of review. As a result, the issues raised in paragraphs 37 (a) and (c) of the appellants' memoranda in relation to the Federal Court decision are not relevant in these appeals.

[34] The issue identified as the Federal Court erring in finding that the appellants were negligent or careless, will be treated as an allegation that the Minister erred in making the finding that the appellants had not established that they were not negligent or careless.

[35] It is not clear whether the reference to a *de novo* review of the administrative decision would also mean a *de novo* review of the issue of procedural fairness. This Court, in *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, noted:

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 20) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.
>
> [55] Attempting to shoehorn the question of procedural fairness into a standard of review analysis is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law. While there is overlap, the former focuses on the nature of the rights involved and the consequences for affected parties, while the latter focuses on the relationship between the court and the administrative decision maker. Further, certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged. As *Suresh* demonstrates, the distinction between substantive and procedural review and the ability of a court to tailor remedies appropriate to each is a useful tool in the judicial toolbox, and, in my view, there are no compelling reasons why it should be jettisoned.
>
> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice

> – was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.

[36] Since the question for procedural fairness is whether the procedure was fair, it is a moot point whether this Court conducts a *de novo* review of the issue of procedural fairness or reviews the decision of the Federal Court on the procedural fairness issue. In either approach, no deference would be shown to the decision of Federal Court on the issue of procedural fairness.

[37] With respect to the decision of the Minister to deny the application for late filing the new election form, the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65) (*Vavilov*). The focus of these appeals will be on the decision of the Minister, not the decision of the Federal Court, in accordance with the approach as set out by the Supreme Court in *Horrocks* that this Court is to conduct a *de novo* review of the administrative decision.

[38] As a result, the issues in these appeals are:

(a) Was there a breach of procedural fairness by the Minister in:

(i) Not disclosing a document in which a Senior Program Advisor indicated that he would not issue the proposed reassessment of Denso Manufacturing;

(ii) Not disclosing the documents prepared by 15 different individuals (including the Senior Program Advisor referred to above) who were involved with the application made by the appellants;

(b) Was the decision of the Minister unreasonable because:

(i) The Minister considered whether there were extenuating or extraordinary circumstances;

(ii) The Minister found that there were no extenuating or extraordinary circumstances; and

(iii) The Minister found that the appellants had not established that they were not negligent or careless.

VI. Analysis

[39] The administrative decision, which is the subject of these appeals, is the Minister's decision to deny the appellants' request to late file the new election form, with an effective date of January 1, 2015, under subsection 156(4) of the ETA. The result of this decision is that Denso Manufacturing should have collected GST on all of the sales made to Denso Sales in 2015. Although Denso Sales would be entitled to a corresponding input tax credit for the goods and services that were acquired by it in the course of a commercial activity, interest would still be payable by Denso Manufacturing based on the unremitted net GST. Interest on this amount, as noted by the Minister in the decision, was reduced to 4%.

A. *Procedural Fairness – Failure to Disclose the Opinion of a Senior Program Advisor*

[40] As noted by the majority of the Supreme Court in *Vavilov*, at paragraph 77, "[t]he duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific …". The majority of the Supreme Court then set out five factors that were previously identified by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*):

> (1) the nature of the decision being made and the process followed in making it;
>
> (2) the nature of the statutory scheme;
>
> (3) the importance of the decision to the individual or individuals affected;
>
> (4) the legitimate expectations of the person challenging the decision; and
>
> (5) the choices of procedure made by the administrative decision maker itself …

[41] In *Baker*, after referring to these factors, the Supreme Court noted:

> 28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[42] In this appeal, the question of procedural fairness arises in relation to the duty of the Minister (if any) to disclose, prior to rendering a decision on whether to accept a late-filed new

election form, various documents created by individuals within the CRA. Since the appellants were asking the Minister to exercise the discretion granted to the Minister under the ETA in their favour by accepting the new election form after the date that it was required to be filed, any duty of procedural fairness related to the disclosure of documents by the Minister would be on the low end of the spectrum.

[43] The appellants submit that there was a breach of procedural fairness because the Minister failed to disclose a document in which a Senior Program Advisor with the CRA recommended that Denso Manufacturing not be assessed for unremitted GST for 2015 based on the intercorporate sales. The Senior Program Advisor was not the person responsible for making the decision to deny the request for a late-filed new election form.

[44] In *Canadian Pacific*, at paragraph 56, this Court held that "the ultimate question [for procedural fairness] remains whether the applicant knew the case to meet and had a full and fair chance to respond". The appellants have not established how the case that the appellants had to meet would be any different if the Minister had disclosed the opinion of the Senior Program Advisor.

[45] When Denso Manufacturing submitted its request by letter dated November 7, 2017 that the CRA accept the late-filed new election form under subsection 156(4) of the ETA, it referred to GST/HST Policy Statement P-255 "Late-filed Section 156 Elections and Revocations". In this Policy Statement, the CRA noted that requests would be considered on a case-by-case basis and, in paragraph 2, that the "written request must provide a clear explanation as to why the specified

members have filed the election or revocation late …". Paragraph 7 of this Policy Statement states:

> The parties to the late-filed election or revocation must not have been negligent or careless in complying with the provisions of section 156 of the Act.

[46] Therefore, when the appellants submitted their request for the Minister to accept their late-filed new election form, the appellants knew that they had to provide an explanation as to why they were late in filing this form. They also knew that the request would generally be accepted if their explanation demonstrated that they were not negligent or careless in complying with the provisions of the ETA.

[47] The explanation of the appellants as to why they were late was based on the facts that were within their knowledge. There is nothing to suggest that this explanation would be any different if they had known that the Senior Program Advisor had expressed the opinion that their application should be accepted. It should also be noted that the opinion expressed by the Senior Program Advisor (who was not the person responsible for making the final decision) was given after the appellants had submitted the request for the Minister to accept their late-filed new election form. Although it would not affect the result in relation to the issue of whether failing to disclose the opinion was a breach of procedural fairness, it should also be noted that the Senior Program Advisor changed his opinion after further facts were revealed to him.

[48] It is far from clear how or why the appellants would have subsequently changed their submissions if they had found out that a person within the CRA agreed with their position. There

was no breach of procedural fairness arising from the failure of the Minister to disclose the opinion of the Senior Program Advisor prior to the Minister rendering the decision to deny the appellants' application to late file the new election form.

B. *Procedural Fairness – Failure to Disclose Documents Produced by 15 Different Individuals*

[49] The appellants as part of their procedural fairness argument also submit that the Minister failed to provide all the information as required by Rule 317 of the *Federal Courts Rules*, S.O.R./98-106. They submit that the documents from the files of 15 different individuals (including the Senior Program Advisor referred to above) who were involved in the matter were not disclosed, but should have been disclosed.

[50] However, the disclosure requirement under Rule 317 arises after an application for judicial review has been commenced. If the appellants wanted to pursue the issue of whether any additional documents should have been disclosed under Rule 317, the appropriate procedure for them to have followed would have been to bring a motion before the Federal Court requesting the disclosure of additional documents.

[51] The procedural fairness issue related to the decision of the Minister in this case is whether, while the Minister was considering the appellants' request for the Minister to accept the late-filed new election form and before the decision was rendered, the Minister had a duty to disclose every document created by the 15 different individuals who may have had some involvement with the file.

[52] In my view, the Minister had no such duty or obligation. In *May v. Ferndale Institution*, 2005 SCC 82, the majority of the Supreme Court of Canada noted:

> 92 In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction. …

[53] In the case under appeal, the appellants asked the Minister to accept a late-filed new election form. The information in support of this application was provided by the appellants. There is no indication that the Minister relied on any information, other than the information provided by the appellants. There was no duty on the Minister to disclose to the appellants every document created by any person who may have been involved with this application on behalf of the Minister.

[54] There is no basis to find that the appellants (who were the parties requesting that the Minister accept the late-filed new election form and, therefore, were the parties who had to establish the necessary facts to support this request) did not know the case they had to meet or did not have a full and fair chance to make their submissions. The appellants were provided with ample opportunity to present their case through written submissions and meetings with the CRA. As a result, there was no breach of procedural fairness.

C. *Reasonableness of the Decision – Reference to Absence of Extenuating Circumstances*

[55] With respect to the reasonableness of the Minister's decision, the appellants submit that this decision was based on the absence of extenuating circumstances and there is no reference to extenuating circumstances in the Policy Statement P-255. While the appellants are correct that the only factor mentioned in the Policy Statement P-255 is whether the parties were negligent or careless and there is no reference to extenuating or extraordinary circumstances in this Policy Statement, this argument does not assist the appellants.

[56] The finding of the Minister in the third paragraph of the reasons was that there were no extenuating circumstances. Later in the letter, the Minister referred to the absence of extraordinary circumstances. Because there were no extenuating or extraordinary circumstances, the result in this case is the same as it would be if the Minister had not considered this factor. In either case (finding that there were no extenuating or extraordinary circumstances or not considering whether there were any extenuating or extraordinary circumstances) the result would be the same – unless the appellants could establish that they were not negligent or careless, their application would not be approved. Therefore, even though the Minister considered whether there were extenuating or extraordinary circumstances, this consideration did not affect the result.

[57] However, since the Minister considered whether there were extenuating or extraordinary circumstances, this would simply mean that the Minister may have been prepared to allow the application for extension of time if there would have been such extenuating or extraordinary

circumstances. This would mean that there may have been an additional basis upon which the late-filed new election form could have been accepted, *i.e.* if the appellants could have established there were extenuating or extraordinary circumstances, they may have been successful. The consideration by the Minister of an additional factor, which might have resulted in the appellants being successful if they could have established that there were extenuating or extraordinary circumstances, does not render the decision to deny the application for late filing unreasonable.

D. *Reasonableness of the Decision – Extenuating Circumstances Identified by the Appellants*

[58] The appellants also submit that the Minister's decision that there were no extenuating circumstances was not reasonable. The appellants submit that there were extenuating circumstances – the voluntary disclosure that Denso Manufacturing was preparing in late 2015 and the completion of the review by the CRA in early 2016 of the returns filed by Denso Manufacturing.

[59] There is nothing to indicate that the Minister's decision (that the involvement of Denso Manufacturing in preparing the voluntary disclosure in late 2015 was not an extenuating circumstance) was not reasonable. As noted by the Minister, there was nothing that prevented Denso Manufacturing from filing the joint election with Denso Sales any time prior to the fall of 2015. The form itself is a single page. The information that is required to complete the form consists of:

- the names and business numbers of the two companies;

- checking a box to indicate that they are qualifying members;
- the reporting period that includes the effective date of the election; and
- the name and contact information for the person completing the form.

There is no indication that any of the information on this form would be difficult or time-consuming for the appellants to complete.

[60] As well, the Minister noted that there were several CRA publications that notified the public of the change to the requirements for the intercorporate election. One such publication is "94 - Excise and GST/HST News", dated January 2015. The appellants describe this document as including "3,000 words of text covering 9 topics" and submit that "the Respondent's own publications on this issue were less than clear".

[61] However, "94 - Excise and GST/HST News", includes the following section with the title in bold type:

> **Form RC4616 – Election for nil consideration under section 156 of the *Excise Tax Act***
>
> The election under section 156 permits corporations resident in Canada and Canadian partnerships that are registrants engaged exclusively in commercial activities and that are members of the same qualifying group, to jointly elect to treat taxable supplies (with certain exceptions) between them as having been made for no consideration.
>
> Effective January 1, 2015, an election (or revocation of an election) must be made jointly by a particular specified member of a qualifying group and another specified member of the same group by completing and filing Form RC4616, *Election or Revocation of an Election for Closely Related Corporations and/or*

> *Canadian Partnerships to Treat Certain Taxable Supplies as Having Been Made for Nil Consideration for GST/HST Purposes* which is replacing Form GST25. Form GST25 was not required to be filed with the CRA.
>
> Form RC4616 will be available on the CRA website in January 2015. Parties to a new election must complete Form RC4616 and file it by the earliest day on which the electing members are required to file a GST/HST return for the reporting period that includes the effective date of the election specified on the form.
>
> Parties to an existing election in effect before January 1, 2015, which is still in effect on that date, will also be required to complete Form RC4616 and file it with the CRA after 2014 and before January 1, 2016. In this case, the election remains the original election and, as a result, the effective date specified on the form should be the original effective date of the election.

[62] This section is clearly identified and sets out in plain language the requirement for existing closely related parties to file the new election form before January 1, 2016:

> Parties to an existing election in effect before January 1, 2015, which is still in effect on that date, will also be required to complete Form RC4616 and file it with the CRA after 2014 and before January 1, 2016. …

[63] There is no basis to find that the Minister's determination that the appellants could have filed the new election form earlier in 2015 is unreasonable.

[64] The appellants' argument that the completion, in early 2016, of the review by the CRA of the returns filed by Denso Manufacturing (which would include the notification by CRA to Denso Manufacturing of the need to file a new election form) is an extenuating circumstance, is without merit. This review by the CRA and the notification by the CRA to Denso Manufacturing of the requirement to file a new election form occurred after the deadline to file this new election form had passed.

[65] The appellants submit that when the CRA processed, in early 2016, the refund request for Denso Manufacturing for 2015, this must have been completed on the basis that there was a valid election between Denso Manufacturing and Denso Sales. Otherwise, either there would not have been a refund or it would have been substantially reduced. However, the nature of the limited review conducted by the CRA at that time, as well as the close proximity to the expiration of the time period for filing the new election form, means that it is not possible to draw the inferences that the appellants are attempting to make. If the appellants had properly submitted an application for a late-filed new election form (with an effective date of January 1, 2015) in February 2016, instead of simply submitting a new election form with an effective date of January 1, 2016 with no indication that they were seeking to late file the new election form, the result may well have been different.

[66] As part of their argument, the appellants refer to the “memorialization” of the election in the previous form GST25. However, the issue is not the “memorialization” of the election in the previous form GST25, but rather whether the Minister’s decision to not accept the late-filed new election form is unreasonable. The statutory requirement is to file the new election form, not to simply have an election “memorialized” in a previous election form that was not filed with the Minister.

E. *Reasonableness of the Decision – Finding That the Appellants Had Not Established That They Were Not Negligent or Careless*

[67] Each appellant, in paragraph 82 of its memorandum, submits that the following facts establish that such appellant exercised reasonable care in respect of its compliance obligations:

> a. The Appellant employed qualified accounting, legal and tax staff to assist it in complying with its obligations;
>
> b. The Appellant maintained adequate books and records, and generated various financial reports from such records;
>
> c. The Appellant had in place and reasonably relied on the advice of its professional advisors in respect of its compliance obligations under the ETA;
>
> d. The Appellant had a previous election in place (recorded in Form GST25) as of April 1, 2007, some eight years before the review by Ms. Joseph [the Refund Integrity Officer with the CRA who reviewed Denso Manufacturing's claim for input tax credits in early 2016] and the requirements to file the memorialization in Form RC4616;
>
> e. The Appellant, as soon as the error was brought to its attention, obtained advice and assistance regarding the section 156 election;
>
> f. After obtaining and relying in good faith on such advice, the Appellant understood that a new Form RC4616 was only required to memorialize transactions taking place as of January 1, 2016 and that the old Form GST25 continued to apply for transactions in 2015;
>
> g. The Appellant late-filed the Form RC4616 within 11 days of being notified by Ms. Joseph, and within 53 days of the January 1, 2016 filing deadline and was never advised at that time or prior to September 2017 that it had any liability arising from the late filing.

[68] In essence, the appellants are saying that they were not negligent or careless because they had previously completed the appropriate election form and they sought advice early in 2016 (after the deadline for filing the new election form had expired) concerning their obligations to file a new election form. While the appellants refer to the new election form that was filed in February 2016, they omit to note that the effective date as stated in this form was January 1, 2016. In the e-mail sent by Denso Manufacturing on December 4, 2017, Denso Manufacturing defended its decision to specify an effective date of January 1, 2016 on the basis that it was "not aware of the new RC4616 regulation" and that the advice from the tax advisor at that time did not indicate that the effective date should be 2015.

[69] The obligation to file the new election form after 2014 is clearly stated in subsection 156(2) of the ETA and was identified in various CRA publications, including "94 – Excise and GST/HST News", dated January 2015. The advice that the appellants received from Ryan Tax Consultants in early 2016 noted that the GST commentary stated that the former form GST25 had to be replaced by the new election form by the end of 2015 to continue to be valid.

[70] There is no basis to find that the Minister's determination that the appellants did not establish that they were not negligent or careless is unreasonable.

VII. Conclusion

[71] As a result, there was no breach of procedural fairness by the Minister in relation to the decision to deny the appellants' request to late file the new election form under section 156 of

the ETA. As well, the appellants have failed to establish that the Minister's decision was unreasonable. I would therefore dismiss these appeals with one set of costs payable in relation to Denso Manufacturing's appeal.

"Wyman W. Webb"
J.A.

"I agree
Anne L. Mactavish J.A."

"I agree
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MARCH 10, 2020, CITATION NO. 2020 FC 360

DOCKET:	A-99-20
STYLE OF CAUSE:	DENSO MANUFACTURING CANADA, INC. v. MINISTER OF NATIONAL REVENUE
AND DOCKET:	A-100-20
STYLE OF CAUSE:	DENSO SALES CANADA, INC. v. MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 29, 2021
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	MACTAVISH J.A. LEBLANC J.A.
DATED:	DECEMBER 6, 2021

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