Docket: 2016-4517(GST)G

BETWEEN:

STEPHEN POIRIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on May 29, 2018, at Toronto, Ontario.

By: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant: Jason C. Rosen

Counsel for the Respondent: John Chapman

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**JUDGMENT**

In accordance with the attached Reasons for Judgment, the appeal from the assessment made under the *Excise Tax Act* for the GST/HST New Residential Rental Property Rebate is dismissed. Each party shall bear their respective costs.

Signed at Ottawa, Canada, this 14th day of January 2019.

"Guy R. Smith"

Smith J.

Citation: 2019 TCC 8
Date: 20190114
Docket: 2016-4517(GST)G

BETWEEN:

STEPHEN POIRIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**REASONS FOR JUDGMENT**

Smith J.

I. Introduction

[1] Stephen Poirier appeals from an assessment made by the Minister of National Revenue (the "Minister") on February 27, 2015, denying the GST/HST New Residential Rental Property Rebate (the "Rental Rebate"), pursuant to Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the "*Act*"). The Minister did so, on the basis that the application had not been submitted within the two-year filing deadline. As will be described in further detail below, the Appellant had purchased a new residence and claimed the GST/HST New Housing Rebate (the "New Housing Rebate") as a credit on closing. Once he was informed by the Canada Revenue Agency ("CRA") that the New Housing Rebate would be denied, he filed the Rental Rebate application.

[2] The Appellant argues that the Minister: i) failed to act "with all due dispatch," contrary to subsection 297(1) of the *Act*; ii) failed to consider that the Appellant had "complied substantially" with the filing requirements for the Rental Rebate, relying on subsection 32 the *Interpretation Act*, R.S.C., 1985, c. I-21 (the "*Interpretation Act*"), and finally, that iii) despite the expiry of the two-year filing deadline, the Minister, having concluded that the Appellant was not entitled to the New Housing Rebate, should have determined that the Appellant was entitled to the Rental Rebate, applying subsection 296(2.1) of the *Act*.

[3] The material facts are not in dispute and the chronology is as follows:

a) The Appellant (and his spouse) entered into an assignment of an agreement of purchaser and sale with Lakeshore Bathurst Developments Ltd. (the "Builder") on October 11, 2011 for the acquisition of a condominium property located at 15 Bryeres Mews, suite 411, Toronto, Ontario (the "Property");

b) The Appellant entered into a lease agreement with two tenants on March 23, 2012 for a one year term commencing on April 15, 2012;

c) The Appellant acquired legal title and took possession of the Property on April 18, 2012 and neither he nor his qualifying relations were the first to occupy the premises as their primary place of residence;

d) The Appellant signed a New Housing Rebate application form and received a credit on closing $27,239;

e) Relying on the form and other statutory declarations delivered on or prior to closing, the Builder submitted the New Housing Rebate application form to the CRA on February 24, 2014, approximately 22 months after the date of closing;

f) The CRA sought additional information from the Appellant by letter dated January 6, 2015, indicating that if no response was received by February 6, 2015, the New Housing Rebate would be disallowed;

g) In a telephone conversation that followed, the Appellant informed the CRA representative that the Property had always been rented. The Appellant was told that the New Housing Rebate would be denied but that the Appellant might be entitled to the Rental Rebate. He was provided with the appropriate form number;

h) The Appellant filed the Rental Rebate form with a cover letter dated January 28, 2015 and included a copy of the lease agreement and statement of adjustments. This letter was stamped-dated as received by the CRA on February 6, 2015;

i) The Minister issued a Notice of Assessment denying the New Housing Rebate on February 13, 2015. The Appellant did not file a notice of objection to this assessment;

j) The Minister then issued a Notice of Assessment denying the Rental Rebate on February 27, 2015. The Appellant filed a notice of objection and the assessment was confirmed on September 20, 2016, leading to the filing of the appeal that is now before the Court.

[4] The Appellant testified on his own behalf. The basic thrust of his testimony was that he had been referred to the Builder's lawyer, that he might have not have been properly represented, that he had not really understood the difference between the New Housing Rebate and the Rental Rebate and that, since the amounts were the same in both instances, there was no real reason to differentiate between the two.

[5] During cross-examinations, the Appellant acknowledged that he had reviewed the New Housing Rebate form and initialled the space to confirm that he would be occupying the Property as his primary place of residence. He also acknowledged that he had signed a statutory declaration indicating that he would be occupying the premises and acknowledged that the Builder would be relying on this representation for the purpose of the New Housing Rebate credit on closing.

[6] The Appellant had no credible explanation as to why he had made these declarations, having already entered into a lease agreement, other than to say that he might have acted in haste and that he and his spouse had initially intended to occupy the Property as their primary place of residence.

## II. The Relevant Statutory Provisions

[7] The New Housing Rebate is described in section 254 of the Act. Subsection 254(3) requires that the application for the rebate be filed within two years from the date of transfer of the residential premises and subsection 254(4) provides a mechanism whereby the rebate can be assigned to the builder and credited against the purchase price on closing. As a result, it is typically the builder who, pursuant to subsection 254(5), submits the application for the rebate to the Minister "for the reporting period in which the rebate was paid or credited". Subsection 254(6) creates a joint and several liability for the amount of the rebate where the builder credits the rebate on closing when it "knows or ought to know that the individual is not entitled to the rebate (…)".

[8] It is not necessary to reproduce the statutory provision in question and it is sufficient for the purposes hereof to state that paragraph 254(2)(*b*) requires that the Appellant intended to occupy the Property as his primary place of residence at the time the agreement of purchase and sale was signed. Secondly, paragraph 254(2)(*g*), requires that either the Appellant or his qualifying relations are the first to occupy the Property.

[9] Since it is admitted that the Appellant did not file an objection to the assessment denying the New Housing Rebate, it is not necessary to analyse the matter further other than to say that while the Appellant and his spouse may have initially intended to occupy the Property as their primary place of residence, I find that there is no evidence of a settled intention and that, in any event, such intention was vitiated when they entered into the lease agreement. In the end, I find the lease agreement is the best evidence before the Court as to the Appellant's true intentions for the purposes of this analysis: *Coburn Realty Ltd. v Canada*, 2006 TCC 245, para. 10. And since it is not disputed that the first occupants were tenants, I find that the Appellant has not met the requirements of paragraphs 254(2)(*g*) of the *Act*. It follows that the Appellant was not entitled to the New Housing Rebate and that the assessment of February 13, 2015 was correct in law and in fact.

[10] The Rental Rebate, also known as the "landlord's rebate for new residential rental property", is described in section 256.2 of the *Act*. Unlike the New Housing Rebate, there is no mechanism that allows for the assignment of the rebate to the builder. As such the full amount of the GST/HST must be paid on closing and the purchaser as landlord must then file an application for the rebate. Subsection 256.2(7) provides that "[a] rebate shall not be paid under this section unless" the application is filed within two years calculated, in accordance with subparagraph 256.2(7)(*a*)(iii), from "the end of the month in which tax first becomes payable by the person". The use of the words "shall not" suggest that neither the Minister nor this Court has any discretion to extend the time limit: *Zubic v. R.*, 2004 TCC 533, para. 7 ("*Zubic*").

[11] Since the Appellant acquired legal title to the Property on April 18, 2012, I find that the final date for the filing of the Rental Rebate application was April 30, 2014, being the end of the month in which the tax first became payable. It is not disputed that the Appellant filed the Rental Rebate form on January 28, 2015.

[12] A number of decisions of this Court have dealt with instances where a taxpayer, having initially filed the New Housing Rebate form, later applied for the

Rental Rebate after the expiry of the two-year deadline. Those decisions stand for the proposition that this Court has no jurisdiction to extend the time limit set out in subsection 256.2(7) and thus, no power to order the Minister to allow the Appellant's Rental Rebate: *Napoli v R*, 2013 TCC 307 ("*Napoli*"), *Nijaf Enterprises Inc. v R*, 2013 TCC 241 ("*Nijaf"*) and *Chen v R*, 2016 TCC 7 ("*Chen*").

[13] The other relevant provisions include sections 296 and 297 of the *Act* which provide the Minister with authority for the making of assessments and form the basis for the preparation of a notice of assessment pursuant to section 300. These provisions will be discussed in greater detail below and are reproduced in part below and in Annex "A" attached hereto.

III. Argument # 1 - Acting "with all due dispatch"

[14] The Appellant argues that he was prejudiced by the Minister's failure to consider his application for the New Housing Rebate in a timely fashion and that had the Minister done so, he would have been in a position to file a revised application, being the Rental Rebate form, within the prescribed two-year deadline. He argues that the words "with all due dispatch" suggest that the Minister should have acted more promptly. Indeed, subsection 297(1) of the *Act* provides as follows:

> 297(1) On receipt of an application made by a person for a rebate under section 215.1 or Division VI, the Minister shall, with all due dispatch, consider the application and assess the amount of the rebate, if any, payable to the person.
>
> (My Emphasis.)

[15] A review of the uncontroverted facts, suggests that the CRA received the New Housing Rebate application from the Builder in mid-January 2014. The CRA representative who testified at the hearing, explained that the file was duly assigned to an agent but that the Appellant was not contacted until January 2015.

[16] The Builder was not called upon to testify such that there is no explanation for the 22 months or so delay in filing the application with the CRA. In any event, it is apparent that knowledge of the New Housing Rebate cannot be imputed to the Minister during that period, such that the real question is whether the CRA acted "with all due dispatch" during the remaining two months.

[17] There is no shortage of case law on the meaning of the expression “with all due dispatch”, particularly with respect to the Minister’s obligation to respond to a notice of objection pursuant to subsection 305(1) of the *Act* as well as analogous provisions under the income tax legislation. Whether the words “with all due dispatch” suggest that the Minister should have acted more promptly – as argued by the Appellant, was discussed in *Hillier v. Canada* (Attorney General), 2001 CarswellNat 1262, where Sexton J.A. considered subsection 165(3) of the *Income Tax Act* that requires the Minister to act “with all due dispatch” upon receipt of a notice of objection:

> [13] The meaning of the phrase "with all due dispatch" has been considered by both the Tax Court of Canada and this Court. In *J. Stollar Construction Ltd. v. The Minister of National Revenue*, 89 D.T.C 134, Bonner, J.T.C.C. held, at 136, that the purpose of the requirement that the Minster act "with all due dispatch" is "primarily to protect the individual taxpayer by bringing certainty to his financial affairs at the earliest reasonably possible time." With respect to what constituted a reasonable period of time, the learned judge had this to say:
>
> The words "with all due dispatch" and the words "avec toute la diligence possible" express a clear intention on the part of the legislature to require the Minister to act within a reasonable period, the length of which will vary in accordance with the circumstances of each case. The statutory language does not permit the formulation of a rigid time limit.
>
> (My Emphasis.)

[18] In other words, the expression “with all due dispatch” is the equivalent of “with all due diligence” or “within a reasonable time” but there is no fixed time period for the performance of the duty to assess or reassess: *Ficek v. Canada (Attorney General)*, 2013 FC 502 (para.19) and *Duchaine v. The Queen*, 2015 TCC 245 (para. 26).

[19] In this instance, it is only relevant to determine whether the Minister acted “with all due dispatch” during the two months that followed receipt of the application from the Builder and I have no difficulty in concluding that the Minister has satisfied that requirement. Even if the issue had been whether the Minister had acted “with all due dispatch” in the 12 months or so that followed receipt, I would have found that this was an acceptable period of time. It follows that this argument must be rejected.

IV. Argument # 2 - Section 32 of the *Interpretation Act*

[20] The Appellant relies on the *Interpretation Act* and argues that the New Housing Rebate application filed with CRA within the two year time limit should be accepted in lieu of the Rental Rebate form. Section 32 provides as follows:

> 32. Where a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead, do not invalidate the form used.

[21] This provision was discussed in *Easy Way Cattle Oilers Ltd. v R*, 2016 FCA 301, ("Easy Way Cattle") where the Federal Court of Appeal dealt with prescribed forms involving prescribed information in the context of scientific research and experimental development expenditures. The Court found that the Appellant's reliance on section 32 was "misguided" (para. 11) and added that:

> 13. Second, the clear intent of section 32 of the *Interpretation Act* is, in my respectful view, to avoid penalizing a taxpayer who has complied substantively with a statutory provision which requires the filing of a prescribed form containing prescribed information. In other words, section 32 applies where the taxpayer has filed the prescribed information, but has not used the prescribed Form to do so. Nonetheless, the taxpayer has substantially complied with the requirements of the form by providing the Minister the information which the Minister needs in regard to the taxpayer's claim. (…)
>
> (My Emphasis.)

[22] Therefore, the question is whether by filing the New Housing Rebate form (and not the Rental Rebate form), the Appellant can be said to have "complied substantially" with the requirements of section 256.2. Can it be said that this was a mere "deviation" from the form "not affecting the substance" of the Rental Rebate application? Clearly the New Housing Rebate form provided some of the prescribed information including a description of the Property and the closing date. However, the real question is whether it provided the Minister with the information required to assess the Appellant's entitlement to the Rental Rebate.

[23] Since there was no indication in the New Housing Rebate application that the Property had been rented and no mention of the duration of the rental period, it seems apparent that this was much more than a mere "deviation" and that the Appellant cannot be said to have "complied substantially" with the requirements of subsection 256.2 of the Act.

[24] The other difficulty with this argument, is that the *Act* contains the following specific provision dealing with all rebates described in Division VI:

> 262(1) An application for a rebate under this Division (other than section 253) shall be made in prescribed form containing prescribed information and shall be filed with the Minister in prescribed manner.

[25] It is apparent that Parliament has used very clear and precise language. The wording is quite technical and must be considered "mandatory as opposed to directory:" *Chandra v R*, 2009 TCC 230, para. 4.

[26] Even if the Court were to accept that it was not necessary to use the "prescribed form" (Form GST524), it would still be necessary to conclude that the "prescribed information" had been filed with the Minister.

[27] In this instance, it is clear that the "prescribed information" required to support the Rental Rebate application was not included with the New Housing Rebate application such that, in the end, this argument must also be rejected.

V. Argument # 3 - Section 296(2.1) of the *Act*

[28] The Appellant argues that he should be relieved from the application of the two-year time limit set out in subsection 256.2(7), relying on subsection 296(2.1) set out below:

> 296(1) The Minister may assess
>
> > (a) the net tax of a person under Division V for a reporting period of the person,
> >
> > (b) any tax payable by a person under Division II, IV or IV.1,
> >
> > (c) any penalty or interest payable by a person under this Part,
> >
> > (d) any amount payable by a person under any of paragraphs 228(2.1)(b) and (2.3)(d), section 230.1 and paragraphs 232.01(5)(c) and 232.02(4)(c), and
> >
> > (e) any amount which a person is liable to pay or remit under subsection 177(1.1) or Subdivision a or b.1 of Division VII,
>
> and may reassess or make an additional assessment of tax, net tax, penalty, interest or an amount referred to in paragraph (d) or (e).

(2) Allowance of unclaimed credit (…)

(2.1) Allowance of unclaimed rebate: Where, in assessing the net tax of a person for a reporting period of the person or an amount (in this subsection referred to as the "overdue amount") that became payable by a person under this Part, the Minister determines that

> (a) an amount (in this subsection referred to as the "allowable rebate") would have been payable to the person as a rebate if it had been claimed in an application under this Part filed on the particular day that is
>
> > (i) if the assessment is in respect of net tax for the reporting period, the day on or before which the return under Division V for the period was required to be filed, or
> >
> > (ii) if the assessment is in respect of an overdue amount, the day on which the overdue amount became payable by the person,
>
> and, where the rebate is in respect of an amount that is being assessed, if the person had paid or remitted that amount,
>
> (b) the allowable rebate was not claimed by the person in an application filed before the day notice of the assessment is sent to the person, and
>
> (c) the allowable rebate would be payable to the person if it were claimed in an application under this Part filed on the day notice of the assessment is sent to the person or would be disallowed if it were claimed in that application only because the period for claiming the allowable rebate expired before that day,

the Minister shall apply all or part of the allowable rebate against that net tax or overdue amount as if the person had, on the particular day, paid or remitted the amount so applied on account of that net tax or overdue amount.

(My Emphasis.)

[29] The Appellant argues that this provision refers to an "allowable rebate" and is applicable because he delivered the Rental Rebate application and supporting documentation before the Notice of Assessment denying the New Housing Rebate had been issued and the Minister should have considered it.

[30] The Appellant argues that the amount owed in connection with the denial of the New Housing Rebate is an "overdue amount" and that the Minister should have determined that the Rental Rebate as an "allowable rebate", was payable to him and that he was entitled to same, relying on paragraph 296(2.1)(*c*), despite the fact that "the period for claiming the allowable rebate expired before that date." The

Appellant argues that this provision allows the Minister to apply "all or part of the allowable rebate against the net tax or overdue amount" as if the Appellant "had (…) paid or remitted the amount so applied on account of the net tax or overdue amount". It is in this sense that the Appellant argues that the New Housing Rebate is a placeholder for the Rental Rebate and that the two amounts should be offset or netted one against the other.

[31] The Respondent argues that this provision is not applicable since the Minister did not "assess net tax" or an "overdue amount" but rather was assessing "the amount of the rebate" under Division VI of the *Act*, pursuant to subsection 297(1) noted above.

[32] Paragraph 296(1)(*a*) refers to "net tax" which, for registrants under the *Act*, would generally refer to collected or collectible GST minus input tax credits. Paragraph 296(1)(*b*) refers to Divisions II, IV or IV.I but does not include "Rebates" including both the New Housing Rebate and Rental Rebate described in Division VI.

[33] Subsection 296(2.1) was considered by the Supreme Court of Canada in *United Parcel Service of Canada Limited v. Canada*, [2009] 1 SCR 657, 2009 SCC 20 ("*UPS*"). In that decision, *UPS* had overpaid $2.9 million in GST on imported goods delivered to Canadian customers. It sought a reimbursement from the Minister (rather than claiming same from its clients) for tax paid or remitted in error pursuant to subsection 261(1) of the *Act* and argued that subsection 296(2.1) provided relief against the limitation period for claiming the reimbursement. The Court held that in appropriate circumstances, that provision could relieve against certain limitation periods set out in Part IX of the *Act* and indicated that:

> 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.

[34] Although *UPS* had filed an application for a rebate pursuant to subsection 261(1), a rebate described in Division VI, it appears the Court considered that it was dealing with an assessment of net tax. In any event, the *UPS* decision was later considered and distinguished by this Court in *A OK Payday Loans Inc. v. The*

*Queen*, 2010 TCC 469 ("*OK Payday Loans*"). In that decision, the Appellant was operating a financial services business and had mistakenly collected and remitted GST to the Minister. Relying on subsection 296(2.1), it sought a reimbursement from the Minister on the basis that it operated an exempt service. Justice Paris indicated that:

> [13] Counsel for the Respondent submitted that subsection 296(2.1) is not applicable in this case because the assessment under appeal is an assessment of the Appellant's rebate application and not an assessment of net tax for a reporting period of the Appellant or for any amount owing under Part IX. An assessment of a rebate application is made under subsection 297(1) of the *Act* whereas an assessment of net tax is made under paragraph 296(1)(*a*). Therefore, counsel argued, the only issue before the Court is whether the Appellant's rebate application met the conditions set out in section 261.
>
> [14] I agree with counsel for the Respondent that subsection 296(2.1) can have no application in this case. That provision requires the Minister to take into account an allowable rebate "in assessing the net tax of a person for a reporting period of the person or an amount … that became payable by a person under Part IX of the *Act* …".
>
> [15] An assessment of net tax is normally made under paragraph 296(1)(*a*) of the *Act*.
>
> > 296(1) The Minister may assess
> >
> > > (*a*) the net tax of a person under Division V for a reporting period of the person,
>
> The assessment under appeal does not deal with net tax of the Appellant for a reporting period or with an amount payable by the Appellant under Part IX. Rather, it was made under subsection 297(1) of the *Act* which requires the Minister to consider an application for a rebate and to assess the amount of the rebate, if any. Subsection 297(1) reads:
>
> > 297(1) On receipt of an application made by a person for a rebate under section 215.1 or Division VI, the Minister shall, with all due dispatch, consider the application and assess the amount of the rebate, if any, payable to the person.
>
> [16] The heading on the notice of assessment in issue reads:
>
> Notice of (Re) Assessment
>
> Goods and Services Tax (Harmonized Sales Tax (GST/HST)

Rebate Application

and the body of the notice reads:

> This notice explains the results of our (re) assessment of the GST/HST rebate application(s) received February 25, 2008.
>
> The notice does not include any reference to net tax of the Appellant for a reporting period or to an amount owing under Part IX of the *Act*.

[17] Finally, although there was no evidence of when the Appellant was last assessed or reassessed net tax for any of the periods in which it mistakenly paid the GST, Ms. Rosene confirmed that the Appellant had not objected to any of those assessments.

[18] The decision of the Supreme Court in *United Parcel Service Canada Ltd.* does not assist the Appellant. It is distinguishable on the basis that the assessments in dispute there were assessments of net tax. In filing its GST returns for the reporting periods covered by the assessments, the Appellant had claimed an input tax credit for the GST paid in error. The Appellants in the *Peach Hill Management Ltd.* and *SAS Restaurants Ltd.* had done likewise, and their appeals were also from assessments of net tax.

[19] In my view, on an appeal from a reassessment under subsection 297(1) of an application for a rebate, this Court may only consider whether the Minister's decision concerning the rebate was correct, and whether the conditions for obtaining the rebate set in section 261 of the *Act* have been met. Given that, by the Appellant's own admission, the application for the rebate was beyond the time limit set out in subsection 261(3), it is clear that the Minister's refusal to grant the rebate was correct, and the appeal must be dismissed.

(My Emphasis.)

[35] As noted in paragraph 18 above, Justice Paris distinguished the UPS decision on the basis that it involved an "assessment of net tax" and held that, in an appeal under subsection 297(1) of the *Act*, the Court can only consider whether the conditions for obtaining the rebate have been met.

[36] There is a second decision also known as *A OK Payday Loans v. The Queen*, 2013 TCC 217 ("*OK Payday Loans #2*), where Justice Campbell Miller reviewed and summarized the decision of Justice Paris, noted above. The facts were somewhat different in that the appellant, whose rebate application pursuant to subsection 261(1) had previously been dismissed, claimed input tax credits

("ITCs") equal to the amount of the refund sought, thus triggering an assessment. The Minister denied the ITCs.

[37] The appellant appealed and again claimed relief pursuant to subsection 296(2.1), relying on the *UPS* decision. Justice Miller referred to that provision as "the gatekeeper to enter these relieving provisions" and observed that one of the conditions to obtain relief was found in paragraph 296(2.1)(*b*) which requires that the claimant not "have made a claim for rebate in an application filed before the day the notice of assessment is sent" (para. 11). This was fatal to the appellant and the appeal was dismissed on that basis and other reasons that are not relevant here. In this instance, the Appellant's Rental Rebate application was clearly filed prior to the Notice of Assessment denying the New Housing Rebate.

[38] The Appellant relies on the decision of this Court in *Ahmad v. the Queen*, 2017 TCC 195 ("*Ahmad*") where the facts were quite similar to the case at hand in that the appellant had filed a New Housing Rebate application followed some time later, by a Rental Rebate application. Justice Russell opined that the Minister likely had sufficient information to determine that the appellant in fact qualified for the Rental Rebate, though the application itself was filed much later.

[39] The appellant in *Ahmad* claimed relief pursuant subsection 296(2.1) and Justice Russell observed that:

> [42] (…) I do consider that that question is, *per* subsection 296(2.1), a matter for the Minister to "determine" as part of the assessment of February 20, 2014, which assessment is under appeal herein. The Minister would have at hand information from the auditor's February 2014 and earlier discussions with the Appellant and now also as set out in the 2016 NRRPR application, to consider in so determining. Certainly the Minister had encouraged the Appellant in February 2014 when the NPR application was denied to submit a NRRPR application; signalling (sic) that the Minister considered that the Appellant might well qualify for that rebate.
>
> (My Emphasis.)

[40] Justice Russell also referred to *OK Payday Loans* and distinguished it on the basis that, unlike the facts before him, there was no "amount payable":

> [49] The Respondent also cited *A OK Payday Loans Inc* (*supra*). In that case however the appellant was seeking rebate of mistakenly remitted GST for services that were exempt from GST. This Court, *per* Paris J., found that subsection 296(2.1) could not apply as the pertinent assessment in that case was not, as subsection 296(2.1) requires, either in respect of net tax owed for a reporting

> period or for an amount payable under the Act. Since no tax was owing to begin with, the assessment did not reflect any amount payable under the Act. Rather, it simply dealt with denial of the claim for rebate on the basis it was out of time. In the case at bar however there is an amount of HST/GST payable, assessed February 20, 2014 as overdue.

[41] Having made that observation, Justice Russell referred the matter back to the Minister for reconsideration and reassessment to determine "per subsection 296(2.1) of the *Act*" whether the appellant was entitled to the New Rental Rebate as "an allowable rebate". The distinguishing feature appears to be Justice Russell's finding that the Appellant had filed an objection and that, at the time the notice of assessment was issued denying the New Housing Rebate, the filing of a Rental Rebate application "would not have been beyond that legislated two year deadline for so doing" (My Emphasis). I am unaware of the actual disposition resulting from the Minister's reconsideration.

[42] The Respondent submitted the un-reported decision of Justice Kathleen Lyon in *Sen v. The Queen*, 2016-1796(GST)I ("*Sen*") dated May 4, 2017. The facts were similar in that the Minister had denied the New Housing Rebate on the basis that the property had been rented. The appellant filed a Rental Rebate application which was also denied since it had been filed beyond the two year deadline from the date of closing. The appellant appealed from the latter decision and took the position that he was entitled to the Rental Rebate despite the expiry of the two year time limit arguing that subsection 296(2.1) was an offsetting provision that allowed him to retroactively claim the Rental Rebate.

[43] Having completed a detailed review of subsections 296(1) and 296(2.1), Justice Lyons noted that the rebates referred to in that provision did not include the rebates described in Division VI. She then reviewed the jurisprudence including *UPS* and *Ok Payday Loans*, and concluded that (at pages 22-23) the "offsetting provisions in subsection 296(2.1)" did not apply and that, since the appellant's "application for a Rental Rebate was reassessed and denied by the Minister under the authority of subsection 297(1)", the only issue was whether she had correctly denied the Rental Rebate described in subsection 256.2.

[44] It should be noted that the appeals in *OK Payday Loans*, *OK Payday Loans #2*, *Ahmad* and *Sen* were all dealt with under the Informal Procedure and thus have no precedential value: Section 18.28 of the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2.

[45] It is apparent from the above, that the jurisprudence on this issue remains unsettled. On the one hand, it is suggested that the off-setting provisions in subsection 296(2.1) are not available when a rebate application has been dealt with under subsection 297(1): *Ok Payday Loans*, *Ok Payday Loans #2* and *Sen*. On the other hand, it is suggested that those provisions may be available in certain circumstances: *Ahmad*.

[46] In any event, I have concluded that whether subsection 296(2.1) may be relied upon to extend the two year deadline is a matter for another day. In this instance, it is not disputed that the Appellant filed his Rental Rebate application prior to the issuance of the Notice of Assessment denying the New Housing Rebate. As noted by Justice Miller in *Ok Payday Loans #2* (see paragraph 37 above), this runs afoul of paragraph 296(2.1)(b) and is fatal to the request for relief.

VI. Conclusion

[47] The Respondent has advanced the additional argument that the appeal of the Notice of Assessment denying the New Housing Rebate is not properly before the Court since the Appellant failed to file a notice of objection. This argument was reviewed in some detail by Justice Lyons in the *Sens* decision noted above, and she concluded that (page 23):

> Even if subsection 296(2.1) applied, I agree with the respondent that, inescapably, any amount payable or owing by the appellant in relation to the denial of the Housing Rebate is not properly before the Court and cannot succeed on procedural grounds.

[48] I agree with her conclusion but decline to address the issue in any further detail, having already concluded that the Appellant's various grounds of appeal must be rejected.

[49] For all the foregoing reasons, the appeal is dismissed. The issues raised are novel and as a result, I will order that each party shall bear their respective costs.

Signed at Ottawa, Canada, this 14th day of January 2019.

"Guy R. Smith"

Smith J.

# SCHEDULE "A"

296(1) The Minister may assess

(a) the net tax of a person under Division V for a reporting period of the person,

(b) any tax payable by a person under Division II, IV or IV.1,

(c) any penalty or interest payable by a person under this Part,

(d) any amount payable by a person under any of paragraphs 228(2.1)(b) and (2.3)(d), section 230.1 and paragraphs 232.01(5)(c) and 232.02(4)(c), and

(e) any amount which a person is liable to pay or remit under subsection 177(1.1) or Subdivision a or b.1 of Division VII,

and may reassess or make an additional assessment of tax, net tax, penalty, interest or an amount referred to in paragraph (d) or (e).

(2) Allowance of unclaimed credit (…)

(2.1) Allowance of unclaimed rebate: Where, in assessing the net tax of a person for a reporting period of the person or an amount (in this subsection referred to as the "overdue amount") that became payable by a person under this Part, the Minister determines that

(a) an amount (in this subsection referred to as the "allowable rebate") would have been payable to the person as a rebate if it had been claimed in an application under this Part filed on the particular day that is

(i) if the assessment is in respect of net tax for the reporting period, the day on or before which the return under Division V for the period was required to be filed, or

(ii) if the assessment is in respect of an overdue amount, the day on which the overdue amount became payable by the person,

and, where the rebate is in respect of an amount that is being assessed, if the person had paid or remitted that amount,

(b) the allowable rebate was not claimed by the person in an application filed before the day notice of the assessment is sent to the person, and

(c) the allowable rebate would be payable to the person if it were claimed in an application under this Part filed on the day notice of the assessment is sent to the person or would be disallowed if it were claimed in that

application only because the period for claiming the allowable rebate expired before that day,

the Minister shall apply all or part of the allowable rebate against that net tax or overdue amount as if the person had, on the particular day, paid or remitted the amount so applied on account of that net tax or overdue amount.

(3) Application or payment of credit: If, in assessing the net tax of a person for a particular reporting period of the person, the Minister determines that there is an overpayment of net tax for the particular period, except where the assessment is made in the circumstances described in paragraph 298(4)(a) or (b) after the time otherwise limited for the assessment by paragraph 298(1)(a), the Minister shall

(a) apply

(i) all or part of the overpayment

against

(ii) any amount (in this paragraph referred to as the "outstanding amount") that, on or before the particular day that is the day on or before which the person was required to file a return under this Part for the particular period, the person defaulted in paying or remitting under this Part and that remains unpaid or unremitted on the day notice of the assessment is sent to the person,

as if the person had, on the particular day, paid or remitted the amount so applied on account of the outstanding amount;

(b) apply

(i) all or part of the overpayment that was not applied under paragraph (a) together with interest at the prescribed rate on all or that part of the overpayment, computed for the period beginning on the day that is 30 days after the latest of

(A) the particular day,

(B) the day on which the return for the particular reporting period was filed, and

(C) in the case of an overpayment that is attributable to a payment or remittance made on a day subsequent to the days referred to in clauses (A) and (B), that subsequent day,

and ending on the day on which the person defaulted in paying or remitting the outstanding amount referred to in subparagraph (ii)

against

(ii) any amount (in this paragraph referred to as the "outstanding amount") that, on a day (in this paragraph referred to as the "later day") after the particular day, the person defaulted in paying or remitting under this Part and that remains unpaid or unremitted on the day notice of the assessment is sent to the person,

as if the person had, on the later day, paid the amount and interest so applied on account of the outstanding amount; and

(c) refund to the person that part of the overpayment that was not applied under paragraphs (a) and (b) together with interest at the prescribed rate on that part of the overpayment, computed for the period beginning on the day that is 30 days after the latest of

(i) the particular day,

(ii) the day on which the return for the particular reporting period was filed, and

(iii) in the case of an overpayment that is attributable to a payment or remittance made on a day subsequent to the days referred to in subparagraphs (i) and (ii), that subsequent day,

and ending on the day the refund is paid to the person.

Application or payment of rebate

(3.1) If, in assessing the net tax of a person for a particular reporting period of the person or an amount (in this subsection referred to as the "overdue amount") that became payable by a person under this Part, all or part of an allowable rebate referred to in subsection (2.1) is not applied under that subsection against that net tax or overdue amount, except where the assessment is made in the circumstances described in paragraph 298(4)(a) or (b) after the time otherwise limited for the assessment by paragraph 298(1)(a), the Minister shall

(a) apply

(i) all or part of the allowable rebate that was not applied under subsection (2.1)

against

(ii) any other amount (in this paragraph referred to as the "outstanding amount") that, on or before the particular day that is

(A) if the assessment is in respect of net tax for the particular reporting period, the day on or before which the return under Division V for the particular period was required to be filed, or

(B) if the assessment is in respect of an overdue amount, the day on which the overdue amount became payable by the person,

the person defaulted in paying or remitting under this Part and that remains unpaid or unremitted on the day notice of the assessment is sent to the person,

as if the person had, on the particular day, paid or remitted the amount so applied on account of the outstanding amount;

(b) apply

(i) all or part of the allowable rebate that was not applied under subsection (2.1) or paragraph (a) together with interest at the prescribed rate on all or that part of the allowable rebate, computed for the period beginning on the day that is 30 days after the later of

(A) the particular day, and

(B) where the assessment is in respect of net tax for the particular reporting period, the day on which the return for the particular reporting period was filed,

and ending on the day on which the person defaulted in paying or remitting the outstanding amount referred to in subparagraph (ii)

against

(ii) any amount (in this paragraph referred to as the "outstanding amount") that, on a day (in this paragraph referred to as the "later day") after the particular day, the person defaulted in paying or remitting under this Part and that remains unpaid or unremitted on the day notice of the assessment is sent to the person,

as if the person had, on the later day, paid the amount and interest so applied on account of the outstanding amount; and

(c) refund to the person that part of the allowable rebate that was not applied under any of subsection (2.1) and paragraphs (a) and (b) together with interest at the prescribed rate on that part of the allowable rebate, computed for the period beginning on the day that is 30 days after the later of

(i) the particular day, and

(ii) where the assessment is in respect of net tax for the particular reporting period, the day on which the return for the particular period was filed,

and ending on the day the refund is paid to the person.

Limitation on refunding overpayments

(4) An overpayment of net tax for a particular reporting period of a person and interest thereon under paragraphs (3)(b) and (c)

(a) shall not be applied under paragraph (3)(b) against an amount (in this paragraph referred to as the "outstanding amount") that is payable or remittable by the person unless the input tax credit or deduction to which the overpayment is attributable would have been allowed as an input tax credit or deduction, as the case may be, in determining the net tax for another reporting period of the person if the person had claimed the input tax credit or deduction in a return under Division V filed on the day the person defaulted in paying or remitting the outstanding amount and the person were not a specified person for the purposes of subsection 225(4); and

(b) shall not be refunded under paragraph (3)(c) unless the input tax credit or deduction would have been allowed as an input tax credit or deduction, as the case may be, in determining the net tax for another reporting period of the person if the person had claimed the input tax credit or deduction in a return under Division V filed on the day notice of the assessment is sent to the person.

Limitation on refunding allowable rebates

(4.1) An allowable rebate referred to in subsection (2.1) or a part thereof that was not applied under that subsection and interest thereon under paragraphs (3.1)(b) and (c)

(a) shall not be applied under paragraph (3.1)(b) against an amount (in this paragraph referred to as the "outstanding amount") that is payable or remittable by a person unless the allowable rebate would have been payable to the person as a rebate if the person had claimed it in an application under this Part filed on the day the person defaulted in paying or remitting the outstanding amount and, in the case of a rebate under section 261, if subsection 261(3) allowed the person to claim the rebate within four years after the person paid or remitted the amount in respect of which the rebate would be so payable; and

(b) shall not be refunded under paragraph (3.1)(c) unless the allowable rebate would have been payable to the person as a rebate if the person had claimed it in an application under this Part filed on the day notice of the assessment is sent to the person, and, where the rebate is in respect of an amount that is being assessed, if the person had paid or remitted that amount.

Deemed claim or application

(5) Where, in assessing the net tax of a person or tax or any other amount payable by a person, the Minister takes an amount into account under subsection (2) or applies or refunds an amount under subsection (2.1), (3) or (3.1),

(a) the person is deemed to have claimed the amount in a return or application filed under this Part; and

(b) to the extent that an amount is applied against any tax or other amount payable or remittable by the person under this Part, the Minister is deemed to have refunded or paid the amount to the person and the person is deemed to have paid or remitted the tax or other amount against which it was applied.

Refund on reassessment

(6) Where a person has paid an amount on account of tax, net tax, penalty, interest or other amount assessed under this section and the amount paid exceeds the amount determined on reassessment to have been payable or remittable by the person, the Minister shall refund to the person the amount of the excess, together with interest thereon at the prescribed rate for the period beginning on the day the amount was paid by the person and ending on the day the refund is paid.

Interest on cancelled amounts

(6.1) Despite subsection (6), if a person has paid an amount of interest or penalty and the Minister cancels that amount under section 281.1, the Minister shall refund the amount to the person, together with interest on the amount at the prescribed rate for the period beginning on the day that is 30 days after the day on which the Minister received a request in a manner satisfactory to the Minister to apply that section and ending on the day on which the refund is paid.

Restriction on refunds

(7) An amount under this section shall not be refunded to a person at any time, unless all returns of which the Minister has knowledge and that are required to be filed at or before that time by the person under this Act, the Air Travellers Security Charge Act, the Excise Act, 2001 and the Income Tax Act have been filed with the Minister.

Meaning of overpayment of net tax

(8) In this section, overpayment of net tax of a person for a reporting period of the person means the amount, if any, by which the total of

> (a) all amounts remitted by the person on account of net tax for the period, and
>
> (b) where the net tax for the period is negative, the net tax refund for the period,

exceeds the total of

> (c) where the net tax for the period is positive, the net tax for the period, and
>
> (d) all amounts paid to the person as a net tax refund for the period.

Assessment of rebate

297 (1) On receipt of an application made by a person for a rebate under section 215.1 or Division VI, the Minister shall, with all due dispatch, consider the application and assess the amount of the rebate, if any, payable to the person.

Reassessment

(2) The Minister may reassess or make an additional assessment of the amount of a rebate, notwithstanding any previous assessment of the amount of the rebate.

Assessment of overpayment of rebate

(2.1) The Minister may assess, reassess or make an additional assessment of an amount payable by a person under section 264, notwithstanding any previous assessment of the amount.

Payment of rebate

(3) Where, on assessment under this section, the Minister determines that a rebate is payable to a person, the Minister shall pay the rebate to the person.

Interest on rebate

(4) If a rebate under section 215.1 or Division VI (other than section 253) is paid to a person under subsection (3), the Minister shall pay interest at the prescribed rate to the person on the rebate for the period beginning on the day that is 30 days after the day the application in which the rebate is claimed is filed with the Minister and ending on the day the rebate is paid.

(…)

Notice of assessment

300 (1) After making an assessment, the Minister shall send to the person assessed a notice of the assessment.

Scope of notice

(2) A notice of assessment may include assessments in respect of any number or combination of reporting periods, transactions, rebates or amounts payable or remittable under this Part.

(…)

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| CITATION: | 2019 TCC 8 |
| COURT FILE NO.: | 2016-4517(GST)G |
| STYLE OF CAUSE: | STEPHEN POIRIER v.<br>HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | May 29, 2018 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Guy R. Smith |
| DATE OF JUDGMENT: | January 14, 2019 |

APPEARANCES:

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