Federal Court  Cour fédérale

Date: 20200512

Docket: T-2085-18

Citation: 2020 FC 614

Ottawa, Ontario, May 12, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

EXPRESS GOLD REFINING LTD.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Express Gold Refining Ltd. (the Applicant) is in the business of buying scrap gold and other precious metals, and getting it refined for resale in a pure form. It pays the Goods and Services Tax or Harmonized Sales Tax (GST/HST) on its purchases, but does not collect this tax on its sales because the sale of refined precious metals are not subject to it. The Applicant is entitled to claim Input Tax Credits (ITCs) for the tax it has paid for these purchases, and these

credits exceed the GST/HST it has collected on other transactions. Therefore, it is in a constant position to be refunded a portion of the taxes it has paid, as a normal part of its business operations.

[2] The Applicant filed its return for the August 2018 reporting period, claiming a net tax refund of $9,128,196.67. Subsequently, the Canada Revenue Agency (CRA) advised the Applicant that an audit of the return had started and that the net tax refund for that month was being withheld. The scope of the audit was later expanded to cover the period from June 1, 2016, to October 31, 2018, and the CRA advised the Applicant that it would not be receiving its August net tax refund or any refunds for subsequent months while the audit was underway.

[3] The Applicant claims that the Respondent has not complied with the obligation to pay the net tax refund "with all due dispatch" pursuant to subsection 229(1) of the *Excise Tax Act*, RSC 1985, c E-15 [the *Act*]. It seeks an order in the nature of *mandamus* to require the Respondent to pay the refunds before the audit is completed.

[4] For the reasons that follow, this application is dismissed.

II. Context

[5] The Applicant is a family-owned business that was founded in 1994. It buys scrap gold and other precious metals which are then refined by third parties so that it can be sold in a purified form. It has a large volume of transactions but says that its profit margins are very small.

[6] The Applicant files GST/HST returns on a monthly basis, as is permitted for enterprises that are in a tax refund position. The Applicant pays GST/HST on its purchases of scrap metal

from suppliers, but its sales of the refined precious metals are not subject to GST/HST, as they are "zero rated" transactions. The Applicant's monthly GST/HST returns typically include large amounts of ITCs, consisting of the GST/HST it has paid or is payable to its suppliers and a much smaller amount of GST/HST collected. This results in a monthly net tax refund, pursuant to paragraph 228(3)(b) of the *Act*.

[7] In 2004 and again in 2010, the CRA launched audits of the applicant's GST/HST net tax refund claims. The CRA withheld the Applicant's net tax refunds for substantial periods of time while these audits were underway. The second audit required a ruling from the Excise and GST/HST Rulings Directorate, rendered in 2013, in relation to how the tax regime applied to aspects of the business, and this delayed the completion of this audit. Both audits resulted in reassessments being issued by the CRA, several years after each audit was commenced. The first reassessment resulted in a tax refund of over $750,000 being paid to the Applicant, while the second showed it had taxes owing of almost $900,000.

[8] In addition, the CRA has had ongoing and regular interactions with the Applicant regarding its dealings with third parties in the scrap gold industry. The Applicant states that it has always cooperated with the CRA whether about the two audits or these other information requests.

[9] On September 6, 2018, the Applicant filed its GST/HST return for the August 2018 reporting period, claiming a net tax refund of $9,128,196.67 on sales of $30,954,282.40. On October 4, 2018, the CRA advised it that the August 2018 return was under audit. The file was transferred to a different CRA office, and on November 6, 2018, the Applicant was advised that the scope of the audit was being expanded to cover the period from June 1, 2016, to October 31,

2018. In addition, the CRA indicated that it would not be paying the net tax refund for the August 2018 period or any subsequent periods, pending completion of the audit.

[10] The Applicant's return for the August 2018 reporting period had initially been flagged by an automatic system for further screening. The CRA had identified the scrap gold business as a high risk industry. The August 2018 return was reviewed by a screener and an extra risk analysis was conducted. It was selected for audit due to a substantial increase in the Applicant's net tax refund claims, which went from $5.47 million for the fiscal year ending May 31, 2015, to $74.7 million for the fiscal year ending May 31, 2018.

[11] In early November 2018, the Applicant's legal representatives wrote to the CRA to demand that it pay the August 2018 net tax refund, in accordance with the statutory duty set out in section 229 of the *Act*.

[12] The auditor replied on November 26, 2018, confirming that the audit scope had been expanded and that the Applicant's net tax refunds would be withheld for the duration of the audit. The letter explains that all GST/HST returns are systematically reviewed to identify errors or evidence of non-compliance, and that some refunds may be withheld while the account is under review, "to enable the CRA to ensure that registrants receive only the correct amount of refund to which they are entitled in order to protect the GST/HST revenue base." The rationale for the decision to withhold the refund is explained in the following paragraph:

> Section 229 of the *Excise Tax Act* (Act) states that the Minister shall pay the refund to a person with "all due dispatch" after the return is filed. The phrase "all due dispatch" is not defined in the Act. The length of time for which the Minister can withhold a refund relating to a return is determined by the complexity of the file and the time required to complete a review of the return filed. This period may vary and is commensurate with the risk identified

> in the file. Based on our review of your client's file in respect of the current period under audit, we have determined that it would be inappropriate to release the August 2018 tax refund [the Applicant] has claimed, or indeed subsequent refunds, until our audit is complete. With the continued cooperation of your client it is our intention to conduct and conclude this audit in a timely manner.

[13] In regard to the Applicant's concern regarding the impact of the delayed refund on its business, the auditor noted that one of the Applicant's agreements with its suppliers stated that it reserved the right to delay payment of the sales tax owing until the amount of tax has been either cleared or denied by the CRA. Based on this, the auditor indicated that the claim that the delay would force the business into bankruptcy appeared to be exaggerated, unless there were other circumstances of which they were not aware. The auditor affirmed that the CRA "is not attempting to compromise [the Applicant's] business but rather is acting in good faith in a manner consistent with its statutory mandate." The letter concludes: "As you can appreciate the refinement of precious metals involves complex transactions with multiple suppliers. As a matter of due diligence the CRA is required to verify whether there are any errors or omissions in terms of the reporting of these transactions."

[14] On December 6, 2018, the Applicant launched this application for an order in the nature of *mandamus* requiring the Respondent to pay the net tax refunds forthwith, and an order in the nature of *certiorari* quashing the decision to withhold the net tax refunds.

[15] The audit was still ongoing, as the auditors attended the Applicant's offices during the week of January 14, 2019, to conduct interviews and review documents.

[16] The matter was heard on July 3, 2019, and taken under reserve. On August 30, 2019, the Applicant wrote to the Court indicating it intended to bring a motion to re-open the hearing to

adduce new evidence about actions taken by the Respondent after the hearing. Subsequently, two motions were filed: the Applicant brought its motion to re-open the hearing to adduce new evidence, and the Respondent brought a motion to strike the affidavit filed by the Applicant in support of its motion. These motions are dealt with below.

III. Issues and Standard of Review

[17] There are two issues:

A. Should *mandamus* issue to force the Respondent to pay the net tax refunds claimed by the Applicant?

B. Should the Applicant's motion to re-open the hearing to adduce new evidence be granted?

[18] The traditional standard of review analysis does not apply to either issue, except in relation to the challenge to the CRA's interpretation of subsection 229(1) of the *Act*. The Applicant submitted that this was subject to correctness review, but in light of the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 108-124, this is subject to review on a standard of reasonableness.

IV. Analysis

A. *Should mandamus issue to force the Respondent to pay the net tax refunds claimed by the Applicant?*

(1) Legal Framework

[19] This case turns on the interpretation of subsection 229(1) of the *Act*:

Payment of net tax refund	**Paiement du remboursement de taxe nette**
229 (1) Where a net tax refund payable to a person is claimed in a return filed under this Division by the person, the Minister shall pay the refund to the person with all due dispatch after the return is filed.	**229 (1)** Le ministre verse avec diligence le remboursement de taxe nette payable à la personne qui le demande dans sa déclaration produite en application de la présente section.

[20] The Applicant claims that the CRA's failure to pay its net tax refund "with all due dispatch" should result in an order in the nature of *mandamus*. The test for *mandamus* was set out by the Federal Court of Appeal in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742, [1993] FCJ No 1098 (QL) [*Apotex*], aff'd [1994] 3 SCR 1100, [1994] SCJ No 113 (QL), and summarized recently in *Canada (Health) v The Winning Combination Inc*, 2017 FCA 101 (leave to appeal to SCC denied: 2018 CanLII 30056) at paragraph 60:

> (1) there must be a legal duty to act;
>
> (2) the duty must be owed to the applicant;
>
> (3) there must be a clear right to performance of that duty;
>
> (4) where the duty sought to be enforced is discretionary, certain additional principles apply;
>
> (5) no adequate remedy is available to the applicant;

(6) the order sought will have some practical value or effect;

(7) the Court finds no equitable bar to the relief sought; and

(8) on a balance of convenience an order of *mandamus* should be issued.

(2) Position of the Applicant

[21] The Applicant argues that the Respondent has blindly applied a flawed policy based on its incorrect interpretation of subsection 229(1) of the *Act*. It submits that it has met all of the elements of the *Apotex* test for *mandamus*. The provision creates a public legal duty on the CRA to pay a refund, and that duty is owed to the Applicant because it has filed its GST/HST returns claiming a net tax refund for the applicable periods, and thus it has met the first two elements of the *Apotex* test.

[22] The crux of the Applicant's argument is that it has a clear right to be paid the refund, because subsection 229(1) requires the refund to be paid notwithstanding any review or audit that the CRA may undertake. The Applicant points to the accepted approach to statutory interpretation set out by the Supreme Court of Canada, which requires a textual, contextual, and purposive analysis to determine the meaning of subsection 229(1) in a manner that is harmonious with the *Act* as a whole (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10 [*Canada Trustco*] and *Copthorne Holdings Ltd v Canada*, 2011 SCC 63 at para 70). The Applicant submits that this interpretation supports the conclusion that it has satisfied the third element of the *Apotex* test. The Applicant contends that the text of subsection 229(1) is clear and unambiguous. The relevant part states that the "Minister shall pay the refund to the person with all due dispatch after the return is filed." This creates a positive obligation on the CRA to pay a

net tax refund once it is claimed. The French version of the provision confirms this interpretation: “Le ministre verse avec diligence le remboursement de taxe nette payable à la personne qui le demande dans sa déclaration […]”

[23] The context for this provision also supports this interpretation, according to the Applicant. The provision is set out in the division of the *Act* entitled “Collection and Remittance of Division II Tax” which establishes the self-reporting system by which registrants file periodic returns that calculate their “net tax.” This self-reporting system is separate and apart from the CRA auditing and compliance powers, which are set out in a separate division of the *Act*. This architecture suggests that the obligation to pay the net tax refund was intended to arise upon the submission of the return and not the exercise of the CRA’s audit and assessment powers.

[24] The obligation to pay a refund is subject to specific limitations set out in subsections 229(2) and (2.1), which state that the CRA is not obliged to do so where the claimant has not filed its returns under various taxation statutes, or where the CRA is not satisfied that the claimant’s contact information is accurate. If Parliament wanted to incorporate other restrictions on the obligation to pay the refund, it could have done so explicitly.

[25] The Applicant contrasts the mandatory wording of subsection 229(1) with other provisions that make specific reference to the CRA making an assessment before paying an amount owing. For example, section 297 of the *Act*, which sets out the process for obtaining a GST/HST rebate, provides at subsection 297(1) that “[o]n receipt of [a rebate] application… the Minister shall, with all due dispatch, consider the application and assess the amount of the rebate, if any, payable to the person.” Subsection 297(3) provides that where on “assessment… the Minister determines that a rebate is payable to a person, the Minister shall pay the rebate to the

person." This is similar to subsection 152(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] which states that the "Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year… and determine (a) the amount of the refund…for the year; or (b) the amount of tax… for the year." To a similar effect, subsection 152(1) and paragraph 164(1)(b) of the *ITA* make clear that an obligation to pay a refund to a taxpayer only arises following an assessment.

[26] The Applicant contrasts these provisions, which include a specific duty on the Minister to assess the claims with all due dispatch in order to determine the amount owing or due, with subsection 229(1), which simply states that the Minister shall pay a refund once it is claimed. The difference in the wording of these provisions must be given effect in order to reflect Parliament's clear intention in adopting them; otherwise the Court is, in effect, redrafting section 229, which is contrary to well-established principles of interpretation of tax legislation (*Friesen v Canada*, [1995] 3 SCR 103 at para 27; *Markevich v Canada*, 2003 SCC 9 at para 16).

[27] In addition, section 296 of the *Act* grants the Minister the power to assess the GST/HST obligations of registrants and obligates it to pay a refund where an assessment is issued which shows that an amount is due to a registrant. This means that the CRA already has an obligation to pay a refund to a registrant following an assessment. Therefore, an interpretation of subsection 229(1) that allows the CRA to delay paying a refund until after an audit would render section 296 redundant, which is also contrary to the accepted principles of statutory interpretation (*Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 45).

[28] The Applicant submits that the purpose of the provision in the context of the overall GST/HST scheme also requires that the CRA's duty to pay the net tax refunds not be delayed

pending the completion of an audit. The GST/HST is a tax on consumption to be paid by the end consumer, not by the person supplying the goods or services. To achieve this, the legislation incorporates the concept of ITCs whereby registered businesses are granted credits for the GST/HST paid on their inputs. The requirement for the CRA to pay ITCs on a timely basis was built into the design of the system, and it was recognized that certain businesses would be in a continuous net tax refund situation (Minister of Finance, "GST/HST Overview Paper", August 1989, page 4). This explains why such businesses can opt to submit monthly returns (Minister of Finance, "GST/HST Technical Paper", August 1989, Part C ss 1 and 2.8(a)).

[29] The jurisprudence in Canada and elsewhere also supports an interpretation that requires payment of the refund before completion of any audit or assessment. The Applicant notes that subsection 229(1) has only been considered in two decisions, which were interrelated. In *Nautica Motors Inc v Canada (Minister of National Revenue)*, 2002 FCT 442 [*Nautica Motors*], the Court granted an order of *mandamus* compelling the CRA to process the HST returns filed by the company, but did not grant an order for the CRA to issue the credit returns that were owing. In the related case of *Cambridge Leasing Ltd v Canada (Minister of National Revenue)*, 2003 FCT 112 [*Cambridge Leasing*], the Court refused to grant an order of *mandamus* because by the time the matter was heard, the CRA had issued a Notice of Assessment and the company had filed a Notice of Objection. It was thus not appropriate to issue equitable relief.

[30] The Applicant contends that these decisions are of limited value as precedents for this case, because the companies in those two cases did not invoke subsection 229(1) of the *Act* in their notices of application and therefore the interpretation of that provision was not squarely before the Court.

[31] Similarly, the Applicant submits that the jurisprudence interpreting the term "with all due dispatch" in the *ITA* is of limited application here, because those cases involved an obligation to assess income tax returns with all due dispatch, and thus are different from the duty set out in subsection 229(1) (*Ginsberg v Canada*, [1994] 2 CTC 2063; *Madore v Canada (Attorney General)*, 2018 FC 244 [*Madore*]).

[32] Instead, the Applicant points to jurisprudence from other jurisdictions. In *Multiflex Pty Ltd v Commissioner of Taxation*, [2011] FCA 1112, the Federal Court of Australia issued an order of *mandamus* in relation to a provision similar to subsection 229(1), in a situation where the tax authorities had withheld a refund pending an investigation of suspected fraud. The court found that the obligation to pay the refund did not depend on and was not affected by the making of an assessment, and that a requirement to pay before any such assessment gave predictability and immediacy to the short-term cash flow requirements of the registered business. This was upheld on appeal ([2011] FCAFC 142), and leave to appeal was denied ([2011] HCATrans 344).

[33] To a similar effect, the European Court of Justice also considered a case where a taxation authority withheld a portion of a net tax refund, and found that the relevant legislation did not authorize the authority to defer the refund pending the examination of the taxpayer's return (*Mednis v Valsts*, [2012] ECJ C-525/11 at para 33).

[34] Finally, the Applicant argues that the other elements of the *Apotex* test for *mandamus* are satisfied: the CRA has a duty to pay it the refunds; it has satisfied the prerequisites to trigger the statutory duty and the CRA has not offered a reasonable justification for its failure to pay; there is no other adequate alternative remedy available; the order will have practical value because the delay in receiving the refund is having a dramatic impact on the Applicant's business; and, an

order for the CRA to pay the net tax refund is warranted by equity and the balance of convenience. The CRA has not alleged or established any wrongdoing by the Applicant.

[35] The Applicant does not dispute that the CRA is entitled to launch an audit if it wishes to do so, after paying the net tax refund. However, it argues that "confiscation of all ITC refunds for a year or more without legal authority is blatantly unfair and unreasonable."

(3) Position of the Respondent

[36] The Respondent advances three arguments: (i) the Applicant's interpretation of subsection 229(1) is incorrect; (ii) the *mandamus* request is premature; and (iii) even if the request is not premature, the Applicant has not met the test for *mandamus*. It argues that in the context of this case, the Applicant has not demonstrated that it deserves the extraordinary relief of *mandamus*.

[37] First, the Respondent submits that a reasonable interpretation of subsection 229(1) requires the CRA to determine with all due dispatch whether a refund is payable. It does not require that the refund be paid without that determination. Pursuant to section 275 of the *Act*, the Minister has a duty to assess GST in accordance with the statute, and the law does not provide any discretion in making this assessment (*Canada Revenue Agency v Tele-Mobile Company Partnership*, 2011 FCA 89 at paras 4-5 [*Tele-Mobile*]; *Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 77-78 [*JP Morgan*]). Once that assessment is done, if a net tax refund is payable to the registrant, it must be paid with all due dispatch.

[38] This is consistent with the jurisprudence, in particular the *Nautica Motors* and *Cambridge Leasing* decisions.

[39] This is also consistent with the overall context and object of the *Act*. The Supreme Court has found that the *Act* "has no purpose other than to raise revenue for the federal government…" (*Reference re Excise Tax Act*, [1992] 2 SCR 445 at 468). Consistent with this purpose, the government adopted the statute to raise revenue and to seek to prevent revenue loss. While the obligation to issue refunds is acknowledged, the government also indicated when it created the regime that "correct payments of credit returns and rebate claims are to be made as quickly as possible" (Michael H. Wilson, *Goods and Services Tax: An Overview* (Ottawa, Department of Finance, 1989), section 15.5.2). This is not consistent with the Applicant's position, which urges that the Court interpret subsection 229(1) as imposing a "pay first, audit later" regime.

[40] The Respondent submits that it is acting with all due dispatch in seeking to complete the audit. In *Jolicoeur v Canada (Minister of National Revenue)*, [1961] ExCR 85 [*Jolicoeur*] the Court interpreted the phrase "with all due dispatch" and concluded that it could not be interpreted as establishing a fixed period of time for an assessment, in view of the variety of taxpayers, claims and issues that may arise in the administration of the statute. In another case, the Federal Court of Appeal described it as "an elastic standard that gives the Minister sufficient discretion to determine that a particular return should not be assessed until after a detailed review" (*The Queen v Imperial Oil Ltd*, 2003 FCA 289 at para 9 [*Imperial Oil*]).

[41] In *Nautica Motors*, the case involved returns filed in 1998 for a period from March to May. The audit was commenced in July 1998 and the application for *mandamus* was heard in

December 2001, three years later. The Court granted *mandamus*, ordering the Minister to issue assessments and make a determination whether or not any refund was due.

[42] This timeline can be contrasted with the situation in this case: the Applicant filed its August 2018 return in early September 2018, and the audit was launched in October 2018; the Applicant wrote to demand immediate payment of the refund in early November 2018, and then launched this Application in December 2018.

[43] The CRA anticipated that the audit would be completed by September 2019, 11 months after it began. This is a reasonable delay within which to complete this audit. The scrap gold industry has been identified as high risk (see *TricomCanada Ltd v The Queen*, 2016 TCC 8). The Applicant reported sales of over $348 million for the 2017 fiscal year and over $364 million for the 2018 fiscal year. These sales are comprised of a large number of transactions, and the auditor must collect information from both the Applicant and third parties. This is a complex audit, which is being completed "with all due dispatch."

[44] Second, the Respondent argues that the *mandamus* request is premature. One of the requirements set out in *Apotex* is that the applicant must give reasonable time to the decision-maker to comply with its demand for performance of the legal duty. The Respondent admits that it owes a legal duty to the Applicant pursuant to subsection 229(1) of the *Act* to make a determination whether or not a net tax refund is due, and it agrees that this must be done with all due dispatch. However, in light of the sequence of events reviewed above, the Respondent submits that a reasonable time for the performance of this duty had not expired before the commencement of the *mandamus* application.

[45] The Respondent contends that this is similar to the situation in *Madore*, where the Court refused to issue *mandamus* on the basis that it was premature. The Court refused *mandamus*, because the Minister was acting without undue delay.

[46] The Respondent submits that the Applicant's request is premature, because it is undertaking a complex audit with all due dispatch, and the Applicant had demanded payment of the net tax refund before a reasonable time had elapsed, and then launched this application.

[47] Finally, in the alternative, the Respondent argues that *mandamus* should not issue because such an order would not be of practical value to the Applicant, and the balance of convenience weighs against granting such relief.

[48] The Respondent submits that even if an order of *mandamus* is granted, the Minister must still assess the Applicant's tax liability; the Court cannot stop the Minister from carrying out this mandatory statutory duty, and the Minister has no discretion in the application of the law (*JP Morgan* at para 78; *Tele-Mobile* at para 4). Therefore, if the audit findings thus far do not support the Applicant's claims of a net tax refund, the Minister has no discretion to pay the claimed amount. Without knowing the result of the audit, the Minister cannot carry out the request. Once the audit is complete and an assessment is issued, the Applicant can exercise its appeal rights in the Tax Court of Canada.

[49] Finally, the Respondent submits that the balance of convenience weighs in favour of not issuing *mandamus*, because such an order will likely create a demand for immediate payment of any refunds owing to the Applicant and other registrants, without giving the Minister adequate time to assess them. This would leave the tax system vulnerable to abuse, and could create an

incentive to file a fraudulent tax return, knowing that the refund would be paid automatically and the subsequent audit and enforcement process would take time to complete. This could lead to a loss of revenue for the government of Canada, which would defeat one of the objectives of the legislation.

(4) Discussion

[50] There is no dispute that the first two elements of the *Apotex* test are met in this case: subsection 229(1) sets out a clear legal duty, and the Respondent has not claimed that the Applicant is not eligible to receive a refund if one is due.

[51] The crux of the issue is whether a reasonable interpretation of subsection 229(1) requires that a refund be paid before an assessment or audit is completed. The Applicant argues that this is what is meant by the reference to payment "with all due dispatch" in that provision. In the alternative, the Applicant contends that in this case the time for performing an audit with all due dispatch has expired. I am not persuaded.

[52] The accepted approach to statutory interpretation requires an assessment of the text, context, and purpose of the provision. In this case, the text of subsection 229(1) of the *Act* is clear and unambiguous: "[w]here a net tax refund… is claimed in a return… the Minister shall pay the refund… with all due dispatch after the return is filed" (the French version is equally clear: "Le Ministre verse avec diligence le remboursement […]"). The Respondent agrees with the Applicant that it has an obligation to pay a net tax refund with all due dispatch. The only point in dispute is whether a reasonable interpretation of this means that the refund must be paid before any assessment or audit of the claim is completed.

[53] A review of the text in its context involves a consideration of the other subsections of the same provision, as well as related provisions. To begin, it should be noted that both subsections 229(2) and (2.1) provide for a verification by the Minister that returns have been filed and other business information is accurate. These provisions contemplate some examination of the return by the Minister. More importantly, in my view, subsection 229(3) provides that interest is to be paid on a net tax refund after a thirty day period following filing. This provision indicates that Parliament had contemplated that some refunds would not be paid immediately, and indeed that some would be paid more than a month after filing. This is undoubtedly a measure to ensure tax fairness to the registrants, but it is also a clear indication that it was contemplated that in some instances a sufficient period of time would elapse between the filing of the return and the paying of a net tax refund to require that interest should be paid on the amount owing to the taxpayer.

[54] The Applicant submits that the difference in wording between subsection 229(1) and other similar provisions is relevant, because other sections that require a payment or refund to be provided "with all due dispatch" make clear that this is following an assessment of the return. The absence of those words in subsection 229(1) must mean that the obligation to pay the refund arises separate and apart from any verification process. While the Applicant does not dispute the authority of the CRA to undertake an audit, it argues that it should not have to wait for its refund until the audit is completed.

[55] In my view, the context for the provisions makes it clear that finding that the obligation to pay the refund with all due dispatch was not intended to displace the Minister's obligation to verify the claim is not unreasonable. The Respondent has adopted a reasonable interpretation of

the provision, which requires that the Minister must act with due dispatch in determining whether a refund is due, and if so, to pay it without delay.

[56] The net tax of a registrant for a particular period is calculated pursuant to section 225 of the *Act*, and is reflected in the return filed by that person for the relevant period. The Minister has a duty to assess the GST owing (or return due), pursuant to section 275 (*Tele-Mobile* at paras 4-5; *JP Morgan* at paras 77-78). Subsection 296(1) provides: "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.I…" (subsection 229(1) is in Division V). Once this process is complete, the Minister will issue an assessment to the registrant, who can then object pursuant to section 301 of the *Act* and appeal to the Tax Court of Canada pursuant to section 302.

[57] I am not persuaded by the Applicant's argument that subsection 296(1) is made redundant by an interpretation of subsection 229(1) which permits the Minister to delay paying a net tax refund pending the results of an audit. Rather, the two provisions must be interpreted together. The words are to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (*Canada Trustco* at para 10 citing *5302 British Columbia Ltd v Canada*, [1999] 3 SCR 804 at para 50). The goal is to "find a meaning that is harmonious with the Act as a whole" (*Canada Trustco* at para 10).

[58] Subsection 229(1) imposes an obligation to pay a net tax refund, if one is found to be owing, with all due dispatch. Subsection 296(1) confirms that the Minister can assess a claim for a net tax refund. This does not displace the requirement that any refund found to be owing must be paid without delay.

[59] Other provisions require the Minister either to assess a claim or pay a refund or rebate following an assessment, and to do this with all due dispatch or without delay. This does not mean that the different wording of subsection 229(1) must lead inexorably to an interpretation that forbids such a review before making an assessment or conducting an audit. The different provisions play different roles in the legislative schemes, and it should be noted that some provisions, such as paragraph 164(1)(b) of the *ITA*, match the wording of subsection 229(1). This is discussed below in the analysis of the *Madore* decision. There is not one uniform approach to the wording of the different provisions, and the scheme must be examined as a whole.

[60] This interpretation of subsection 229(1) is reinforced by the wording of subsection 299(1) of the *Act*:

Minister not bound	**Ministre non lié**
299 (1) The Minister is not bound by any return, application or information provided by or on behalf of any person and may make an assessment, notwithstanding any return, application or information so provided or that no return, application or information has been provided.	**299 (1)** Le ministre n'est pas lié par quelque déclaration, demande ou renseignement livré par une personne ou en son nom; il peut établir une cotisation indépendamment du fait que quelque déclaration, demande ou renseignement ait été livré ou non.

[61] Viewed in its legislative context, a reasonable interpretation of subsection 299(1) is that the Minister may choose to audit a claim for a net tax refund, in order to determine whether the amount is properly claimed. The Minister must do so, and must pay any refund owing, with all due dispatch. Equally, the Minister may decide to conduct only a cursory review of the return and pay the refund without further examination. This is for the Minister to decide. It is not a "pay first, audit later" system, as proposed by the Applicant.

[62] The operation of the system as set out in the statute is demonstrated by the history of this case. The Applicant's August 2018 return was initially screened by an automated system, which identified it for further screening. This had been done for many previous returns, which had then been paid without further review. The August 2018 review, however, was reviewed by a CRA screener who conducted a further risk analysis, which showed that the Applicant's annual net tax refund claims had increased from $5.47 million for the fiscal year ending May 31, 2015, to $74.7 million for fiscal year ending May 31, 2018. In light of this increase, the return was selected for audit. All of this must be examined against the backdrop of the CRA identifying the scrap gold business as a high risk industry.

[63] Based on this, it is clear that the CRA had a valid reason to initiate the audit. There is no allegation that it was done for some ulterior purpose not related to the CRA's mandate to ensure proper administration of the tax system.

[64] As noted earlier, pursuant to its policy, the CRA then expanded the audit to cover the period from June 1, 2016, to October 31, 2018. Again, on the evidence it appears that this was done pursuant to a general CRA policy regarding audit coverage. In addition, the Respondent notes that it had already paid out $74.7 million for net tax refunds for the fiscal year ending May 31, 2018, and thus the Applicant had received its refunds for 26 of the 29 reporting periods covered by the expanded audit.

[65] The interpretation of subsection 229(1) is also consistent with the relevant case-law. The jurisprudence has consistently found that the term "with all due dispatch" and similar expressions do not set a specific deadline by which the Minister must complete an obligation set out in the *Act* or the *ITA*. Rather, this has been interpreted as an "elastic standard" which must be

examined in the context of the particular facts of each case (*Imperial Oil* at para 9; *Jolicoeur* at para 47).

[66] In *Ficek v Canada (Attorney General)*, 2013 FC 502 [*Ficek*], the issue was whether the Minister had met the obligation to examine the applicant's income tax return "with all due dispatch" under the *ITA*. Justice Michael Phelan examined the *Jolicoeur* decision in some detail, and concluded at paragraph 19 that "[t]he essential conclusions are that the term is the equivalent of 'with all due diligence' or 'within a reasonable time' and that there is no fixed time period for the performance of the duty to assess." Phelan J. went on to conclude, however, that the delay in conducting the examination in that case was not due to the requirements of ascertaining how much tax was owed, but rather was for an extraneous purpose of seeking to discourage taxpayers from claiming a certain type of charitable deduction.

[67] In a subsequent decision involving a similar question (*McNally v Canada (Minister of National Revenue)*, 2015 FC 767 at para 33 [*McNally*], Justice Sean Harrington cited the decision in *Ficek* for the following proposition:

> "With all due dispatch" does not imply a drop dead date. In order to properly administer the *Income Tax Act*, the Minister has some discretion. Whether a return has been examined "with all due dispatch" is a question of fact. However, as Mr. Justice Phelan stated at paragraph 21, basing himself on *J Stoller* above:
> "However, the discretion is not unfettered, it must be reasonable and for a proper purpose of ascertaining and fixing the liability of the taxpayer."

[68] In *McNally*, Harrington J. concluded that the audit of the tax shelters that had been the basis for the claimed charitable deduction was being done for an extraneous purpose, and that the results of the audit were a foregone conclusion long before their completion. Therefore he

granted the application for judicial review, and ordered the Minister to complete the examination and to issue a Notice of Assessment within 30 days.

[69] These decisions confirm that the determination of whether the Minister has acted with all due dispatch is a finding of fact. They also confirm that if the Minister decided to launch an audit for a purpose extraneous to the duty to ascertain how much tax is due (or owed), then the delay may be found to be beyond what is reasonable in the circumstances. That is not the case here: as discussed previously, the Minister had a legitimate reason to initiate the audit of the Applicant's return.

[70] The interpretation of subsection 229(1) adopted by the CRA is also consistent with the approach taken by Justice John O'Keefe in *Nautica Motors*. The Applicant argued that this was not a useful precedent. I disagree. Despite the fact that subsection 229(1) was not specifically invoked in the applicant's notice of motion that launched that case, it was relied on by the respondent (see *Nautica Motors* at para 32), and is discussed in some detail in the decision. Therefore I find that this decision is a helpful precedent.

[71] The applicant in *Nautica Motors* sought an order of *mandamus* to compel the CRA to process its HST returns and to issue the credits it claimed. The returns had been filed for a period between March and May 1998; an audit was commenced in July 1998, and the case was heard in December 2001. The company claimed that subsection 297(1) of the *Act* created a public legal duty on the Minister to consider and assess an application for a rebate with all due dispatch, and that the delay in doing so had been unreasonable. The respondent submitted that subsection 229(1) did not impose a requirement to pay out a credit return immediately or as soon as possible, but rather required the Minister to consider each case on its facts. It argued that the

delay was reasonable because it had been waiting for information requested from the applicant that was needed to complete the audit.

[72] In that case, the CRA had issued an "interim assessment" of the HST return in November 2001 (shortly before the hearing), and the respondent argued that the application should be dismissed because there was no live controversy before the Court. O'Keefe J. rejected this, noting that subsection 229(1) requires the Minister to pay any refund that is claimed "with all due dispatch after the return is filed" (at para 42). Because the respondent had only issued an interim assessment and therefore the final amount due or owing had not been determined, there was a live issue between the parties and so the application was considered on its merits.

[73] Justice O'Keefe concluded that the first element of the *Apotex* test was met. At paragraph 45, the Court described the Minister's duty under section 229: "There is no doubt that there is a public legal duty to act imposed on the respondent by subsection 229(1) of the [*Act*] as the Minister must make an assessment to determine whether or not any refund is due to the person."

[74] The Court also found that there was a clear right to the performance of the duty, given that the audit had commenced in 1998 and was still ongoing in 2001. O'Keefe J. found that the respondent had a sufficient time to process the returns (at para 47), and that the performance of this duty was not discretionary (para 48):

> The duty sought to be enforced is not discretionary in the sense that the respondent must process the return in order to determine whether the refund claimed is in fact payable to the applicants. In order to process the return, the respondent must complete an assessment. Here all the respondent gave was an "interim assessment" which was subject to change.

[75] On the basis of these findings. O'Keefe J. granted *mandamus* to compel the respondent to process the returns, but refused to issue an order that the respondent pay the credit returns owing to the applicants because "[i]t would be premature to grant this order as only interim assessments of the HST accounts and not an assessment of the account has been completed" (at para 54).

[76] In my view, the interpretation of subsection 229(1) in *Nautica Motors* is persuasive. The Minister is under a statutory duty to determine the tax that is owing or a refund is due in relation to the August 2018 return of the Applicant, pursuant to section 275 of the *Act* (*Tele-Mobile* at para 5; *JP Morgan* at paras 77-78). The Minister must do this without delay. The Minister is not obliged to pay the refund simply because it was claimed in the return, nor is the Minister forbidden from conducting an assessment or audit of the return, as long as this is done in good faith for the purpose of ascertaining the taxes due or refund owing (*Ficek* and *McNally*), and as long as it is done with all due dispatch.

[77] I will not comment at any length on the authorities from Australia and the European Union cited by the Applicant. In view of the differences between the schemes, and in the absence of a detailed analysis of how the particular provisions operate in the context of those schemes, I am not persuaded that these authorities should be applied to the interpretation of subsection 229(1) (*Manrell v Canada*, 2003 FCA 128 at para 58).

[78] The Respondent argues that the application is premature, because in this case the audit is being completed "with all due dispatch" and it has not yet taken an unreasonable amount of time to complete. It argues that *mandamus* is an extraordinary remedy, and that the Applicant has not met the test to obtain it (*Coombs v Canada (National Revenue)*, 2015 FC 869 at para 20).

[79] In *Apotex*, which remains the leading authority on the criteria to be applied in considering an application for *mandamus*, the Court of Appeal described the key element for this case in the following terms (at para 55):

> 3. There is a clear right to performance of that duty, in particular:
>
> (a) the applicant has satisfied all conditions precedent giving rise to the duty; *O'Grady v. Whyte*, *supra*; *Hutchins v. Canada (National Parole Board)*, [1993] 3 F.C. 505 (C.A.); and see *Nguyen v. Canada (Minister of Employment and Immigration)*, *supra*;
>
> (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; see *O'Grady v. Whyte*, *supra*, citing *Karavos v. Toronto & Gillies*, *supra*; *Bhatnager v. Minister of Employment and Immigration*, [1985] 2 F.C. 315 (T.D.); and *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, *supra*.
>
> [Underlining in original.]

[80] This was the basis for denying *mandamus* in *Madore*, which involved an application to force the CRA to deal with the taxpayer's objection to his Notice of Assessment. The CRA had decided to delay its decision on the objection pending an audit of the applicant's employer. I agree with the Respondent that it is important that this decision was made pursuant to paragraph 164(1)(b) of the *ITA*, in view of the similarities between the wording of that provision and subsection 229(1) of the *Act*. The relevant portion of paragraph 164(1)(b) provides that the Minister shall pay a refund claimed by a taxpayer with all due dispatch.

[81] In *Madore*, the Court found that the CRA had acted with all due dispatch in the circumstances of the case, and found at paragraph 27 that "[t]he delay associated with completing an audit is not an exceptional circumstance that would require this Court to interfere

with the Minister's ongoing administrative process." Therefore the Court dismissed the application as premature.

[82] On the facts of this case, I am not persuaded that a sufficient time had elapsed for the conduct of the audit before the Applicant launched this application. It should be recalled that the argument centres on the audit of the August 2018 return, which was filed on September 6, 2018. The Applicant was advised on October 4, 2018 that an audit had commenced. On November 7, 2018, the Applicant's representative wrote to demand that the net tax refund be paid, and it launched this proceeding on December 6, 2018. Unlike the situation in *Nautica Motors*, I do not find that this was a sufficient time to complete the audit. This is a situation more akin to that in *Madore*.

[83] The parties are in agreement that whether the process is being completed with all due dispatch must be assessed in the particular context of this case – primarily the fact that the Applicant files its returns monthly because it is in a continuous net tax refund position. I agree that this is a relevant consideration in assessing the timeliness of the CRA response. In addition, however, the complexity and scope of the audit are also relevant considerations. In this case, it is evident that the Applicant's business involves a high volume of transactions with multiple third parties, which in itself can be expected to add a degree of complexity to the undertaking.

[84] In the circumstances of this case, and in light of the considerations outlined above, I am not persuaded that the CRA has failed to undertake the audit with all due dispatch.

[85] In view of my conclusion on this issue, it is not necessary to address the other arguments of the parties.

[86] For this reason, the application for *mandamus* is dismissed.

B. *Should the Applicant's motion to re-open the hearing to adduce new evidence be granted?*

[87] This matter was heard on July 3, 2019, and taken under reserve. On August 30, 2019, the Applicant wrote to the Court indicating that it wished to bring a motion to reopen the hearing, and proposing a timeline for the filing of materials in relation to this motion. By letter dated September 3, 2019, the Respondent opposed this request. The Court convened a teleconference to discuss the matter, and a schedule was fixed for the Applicant to serve and file its notice of motion, and for the Respondent to respond.

[88] The Applicant served the Respondent with its motion and supporting affidavit on September 20, 2019, and these were filed on October 1, 2019. The Respondent then filed submissions seeking to strike the supporting affidavit and responding to the request to re-open the hearing. Various correspondence followed, which does not need to be summarized in detail.

[89] The Applicant's request to reopen the hearing stems from the fact that four days after the hearing, the CRA advised it that the scope of the audit was being expanded to cover reporting periods from November 1, 2018 to May 31, 2019. On August 1, 2019, it was advised that the audit was being further expanded to cover the June 2019 reporting period, and on August 26, 2019 it was informed that this would extend to the July 2019 period as well. The Applicant states that it has been advised that the audit will continue to be expanded to cover subsequent periods, although there is no confirmation of this in writing.

[90] The Applicant claims that the CRA is acting in bad faith, since the audit was first expanded just days following the hearing, and it notes that at the hearing questions were asked of counsel for the Respondent about the legal authority to withhold net tax refunds for periods not covered by the audit. To put this in context, at the time of the hearing the audit covered the period from June 1, 2016, to October 31, 2018. At that time, the CRA had advised the Applicant that it was withholding the net tax refund for the August 2018 period, as well as any subsequent net tax refunds filed by the Applicant. At the time, it was evident that net tax refunds were being withheld for reporting periods that fell outside of the scope of the audit, and questions were asked of counsel for the Respondent about the legal authority to withhold refunds for periods that were not then under audit.

[91] The Applicant contends that the most recent expansion of the audit was done as a means of providing legal authority for the withholding of the refunds, and as a means of off-setting any liability that the Respondent might have incurred if it was found to have acted without legal authority. It submits that it has met the test for reopening the hearing, so that the Court will have the full record before it.

[92] The test for re-opening a judicial review hearing is set out in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 104 at paras 17-21 [*Tsleil-Waututh*]:

1. Would the evidence, if presented at the hearing, have changed the result?
2. Could the evidence have been obtained before trial by the exercise of reasonable diligence?
3. Would reopening the evidentiary record be in the public interest?

[93] There is no dispute that the second element is satisfied, because the evidence could not have been obtained earlier, given the timing of the events in question.

[94] I am not satisfied, however, that the Applicant has met either the first or third elements of the test.

[95] Based on my conclusion that the application was brought before the Applicant had given the Respondent a reasonable period to perform its audit, I do not find that this new evidence, even if admitted in its entirety, would have changed the result.

[96] It should be recalled that the original audit was only of the August 2018 reporting period, but it was then expanded pursuant to CRA policy. It is in the nature of an audit that it may be expanded during its course, given the findings that are made through the process. There is no evidence that this was done in bad faith or for an extraneous purpose.

[97] Furthermore, although the Respondent was asked questions about the legal authority to withhold refunds for periods not under audit, the Applicant did not seek specific relief in relation to this and so the matter is not dealt with in my decision on the merits.

[98] As noted in *Tseil-Waututh* at paragraph 13: “the discretion to reopen a trial is to be used ‘sparingly and with the greatest of care’ so that abuse of the Court’s processes’ does not result.” The Court of Appeal notes that this applies with equal or greater force in the context of judicial reviews in this Court, which are to be “heard and determined without delay” pursuant to section 18.4(1) of the *Federal Courts Act*, RSC, 1985 c F-7 (at para 20). The Court summarizes the approach at paragraph 21:

> [21] The imperative to hear and determine judicial review applications without delay and in a summary way means that the discretion to reopen a concluded application for judicial review should be exercised with great caution, mindful of the need not to unduly delay the adjudication of important issues, often issues of significant public interest. The parties acknowledge that the consolidated applications raise issues of significant public interest. Thus, we would add a third criterion to the test to reopen: would reopening the evidentiary record be in the public interest?

[99] In view of my conclusion on the first issue, and my finding that the new evidence would not have changed the result, it is not in the public interest to further delay the determination of this matter by reopening the hearing.

[100] For these reasons, the Applicant's motion to reopen the hearing is dismissed.

[101] It is not necessary to deal with the Respondent's motion to strike all or portions of the supporting affidavit filed by the Applicant. Had it been necessary to do so, however, I would note that I found many of the Respondent's objections to the affidavit to be well-founded.

V. Conclusion

[102] For the reasons set out above, the application for *mandamus* is dismissed, and the application to reopen the hearing is also dismissed.

[103] I have found that it is reasonable for the CRA to conduct an audit of the net tax returns filed by the Applicant prior to paying any net tax refund, but it must do so with all due dispatch pursuant to subsection 229(1) of the *Act*. This is largely a factual determination. In this case, there is no evidence that the audit was initiated or expanded for any extraneous purpose, and the

Respondent's evidence is that it is proceeding and will be completed within a reasonable period given the complexity of the audit.

[104] In the circumstances of this case, I have concluded that the Applicant brought its application before a reasonable time for the performance of the duty had elapsed, and so I am dismissing the application. In doing so, it is worth underlining that if the Applicant has or obtains evidence that the CRA is acting for an ulterior purpose, or that the audit is being continuously expanded in bad faith, or otherwise not proceeding in a reasonable time-frame, it can bring another motion. My findings in this case relate to the evidence and circumstances that were before me.

[105] The parties requested an opportunity to make submissions on costs, if they are unable to come to an agreement. In exercise of my discretion pursuant to Rule 400 of the *Federal Court Rules*, SOR/98-106, there is no reason to depart from the usual rule, and so I award costs to the Respondent, in accordance with column III of Tariff B. If the parties are unable to agree on the amount of costs, they may make submissions of not more than five (5) pages (excluding a draft bill of costs) within 20 days of the date of this judgment.

JUDGMENT in T-2085-18

THIS COURT'S JUDGMENT is that:

1. The application to reopen the hearing is dismissed.

2. The application for an order in the nature of *mandamus* is dismissed.

3. The Applicant shall pay the Respondent's costs, in accordance with Column III of Tariff B. If the parties are unable to agree on the amount of costs, they may make submissions of not more than 5 pages (excluding a draft bill of costs) within 20 days of the date of this judgment.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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