Docket: 2017-3087(GST)G

BETWEEN:

HATEM ABDUL AL-RUBAIY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 3, 2019, at Ottawa, Ontario

Before: The Honourable Justice Susan Wong

Appearances:

Counsel for the Appellant:	Marwa Racha Younes
Counsel for the Respondent:	Dominik Longchamps

JUDGMENT

The appeal, made under Part IX of the *Excise Tax Act*, from the notice of assessment dated April 6, 2016 is dismissed, without costs.

Signed at Ottawa, Canada, this 20th day of February 2020.

"Susan Wong"

Wong J.

Citation: 2020 TCC 34
Date: 20200220
Docket: 2017-3087(GST)G

BETWEEN:

HATEM ABDUL AL-RUBAIY,

Appellant,

and

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REASONS FOR JUDGMENT

Wong J.

Introduction

[1] The Appellant Dr. Al-Rubaiy appeals the Minister of National Revenue's April 6, 2016 assessment denying his application made under subsection 261(3) of the *Excise Tax Act* for a rebate of GST/HST paid in error.

Issue

[2] The issue is whether the Appellant's rebate application was filed within time.

[3] Specifically, the Appellant takes the position that the common law rule/principle of discoverability applies such that the two-year limitation in subsection 261(3) had not lapsed when the rebate application was filed.

Factual Background

[4] On May 11, 2011, the Appellant signed an Offer to Purchase by which he agreed to purchase 40 percent of the assets of a dental practice belonging to another dentist (the "Vendor"), for a purchase price of $760,000 [Exhibit A-1, Tab 1].

[5] The Offer stated, among other things, that:

a) the purchase price would be allocated amongst the assets as follows:

Tenant's leasehold improvements	$ 8,663
Instruments and materials, "As Is"	$ 16,875
Dental equipment	$ 89,175
Professional goodwill, patient charts, x-rays, models and records	$645,287
TOTAL PRICE	**$760,000**

[Offer to Purchase, page 1]

b) the closing date would be June 30, 2011 [Offer to Purchase, page 2];

c) the Vendor would stay with the practice for four years after the closing date [Offer to Purchase, page 3]; and

d) the Offer was conditional upon satisfactory review by the Appellant's and the Vendor's respective lawyers [Offer to Purchase, page 3]. In direct examination, the Appellant stated that he retained counsel, who reviewed the Offer with him.

[6] With respect to HST/GST, the Offer stated as follows:

HST / GOODS AND SERVICES TAX

In completing the purchase and sale of the Assets:

a. the Vendor and the Purchaser shall jointly elect under subsection 167(1) of the Excise Tax Act ("ETA") that no GST/HST shall be payable with respect to the sale and purchase of the remaining Assets, and shall make such election in the prescribed form containing prescribed information pursuant to the ETA; and

b. the Purchaser shall file the joint election in compliance with the requirements of the ETA.

c. If pursuant to any reassessment or other action or proceeding under the ETA after closing any goods and services tax, or interest or penalty, becomes payable other than or in addition to the GST/HST paid to the Vendor at closing, the Purchaser shall on the Vendor's demand pay the same to the applicable payee under the ETA and the Purchaser shall indemnify the Vendor and save the Vendor harmless from and against all such tax, interest and penalties,

> together with all costs and expenses reasonably arising in relation thereto. The provisions in this section shall survive closing of the purchase and sale of the Assets and at all times thereafter continue in full force and effect.
>
> d. To the best of the Vendor's knowledge and belief the sale of this Dental Practice is exempt from GST/HST and that an election shall be completed and filed by the Purchaser. The Vendor is not a GST registrant.

[Offer to Purchase, page 4]

[7] On January 27, 2012, the parties signed an Offer to Purchase Amendments Term Sheet which provided for the following, among other things:

a) the closing date would be January 31, 2012 [Exhibit A-1, Tab 2, paragraph 1];

b) the Appellant would pay and the Vendor would collect HST as required by the Act [Exhibit A-1, Tab 2, paragraph 7];

c) the assets would be transferred on January 1, 2012 and the Appellant would pay the Vendor interest on the purchase price from January 1st to closing [Exhibit A-1, Tab 2, paragraphs 2 and 5];

d) the Appellant and the Vendor would enter into a partnership [Exhibit A-1, Tab 2, paragraph 10];

e) the Appellant would have an option to purchase the Vendor's partnership interest by buying the remaining 60 percent of the assets [Exhibit A-1, Tab 2, paragraph 8].

[8] On February 29, 2012, the Appellant paid the Vendor the total amount of $788,961.45, broken down as follows in the receipt [Exhibit A-1, Tab 5]:

Purchase price	$685,000.00
Interest on purchase price	3,747.95
Brokerage fee	15,200.00
HST payable	85,013.50
TOTAL	**$788,961.45**

[9] The Appellant testified that the purchase price in the receipt decreased from $760,000 to $685,000 because the difference of $75,000 was treated as a loan from the Vendor to him. He stated that he repaid this loan within about three to six months after the purchase.

[10] The $85,013.50 in HST was remitted late by the Vendor to the Receiver General at the beginning of January 2013.

[11] The Appellant filed a GST/HST return dated August 26, 2015 reporting both a rebate and a refund in the amount of $85,013.50, respectively, for the reporting period of January 1 to December 31, 2014 [Exhibit R-1, Tab 7].

[12] The Appellant filed GST/HST general rebate application dated February 12, 2016 seeking a rebate of tax paid in error in the amount of $85,013.50. The Minister received this application on February 5, 2016 and denied it on the basis that it was filed beyond the two-year limitation period set out in subsection 261(3) of the Act.

[13] The Appellant testified that he used the services of the Vendor's existing accountant at the time of purchase and for three years afterwards. He stated that he eventually found this accountant's fees to be high so he sought advice from his personal accountant. He testified that his personal accountant reviewed the purchase documents and asked him why he had paid GST/HST on the purchase. He stated that the August 2015 GST/HST return was prepared and filed on his behalf and that by then he knew he had paid tax in error.

Legislative framework

[14] Subsection 261(1) states as follows with respect to tax paid in error:

> **261. (1) Rebate of payment made in error [tax paid in error]** – Where a person has paid an amount
>
> a) as or on account of, or
>
> b) that was taken into account as,
>
> tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsection (2) and (3), pay a rebate of that amount to the person.

[15] Subsection 261(3) states as follows with respect to applying for a rebate of tax paid in error:

> **261. (3) Application rebate** – A rebate in respect of an amount shall not be paid under subsection (1) to a person unless the person files an application for the rebate within two years after the day the amount was paid or remitted by the person.

[16] Distilled down to its practical effect for the purposes of the present case, the Minister shall pay a rebate to a person who has paid tax in error if that person files a rebate application within two years after the date on which the amount was paid/remitted.

Analysis

[17] I am unable to see a way in which the common-law discoverability rule can be appropriately applied to the present situation.

[18] In *Twentieth Century Fox Home Entertainment Canada Limited v. Canada (Attorney General)*, 2013 FCA 25, [2013] GSTC 16 at paragraph 10, the Federal Court of Appeal stated that:

> Parliament has provided that the only right to recover an over-payment of GST is that contained in section 261. A taxpayer who has no right to a statutory rebate because it is claimed too late has no right to recover a mistaken over-payment, but may apply for a favourable exercise of discretion under subsection 23(2) [of the *Financial Administration Act*].

[19] With respect to the discoverability rule, the Federal Court of Appeal stated as follows in *Carlson v. Canada*, 2002 FCA 145, 2002 DTC 2556 at paragraph 17:

> We are therefore of the view that the Deputy Judge erred, in the circumstances of this case, in relying on the discoverability rule. As to whether the rule can find application in cases arising under the Act, in regard to which question we have serious doubts, we need not answer today.

[20] In *Nagle v. The Queen*, 2005 TCC 462, 59 DTC 1093 at paragraph 12, this Court held that the discoverability rule does not override legislation.

[21] Both *Carlson* and *Nagle* dealt with an extension of time to file a notice of objection under the *Income Tax Act*. In my view, these conclusions apply equally to the limitation periods in the *Excise Tax Act*.

[22] In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, 2005 DTC 5523 at paragraph 11, the Supreme Court said the following with respect to Canadian tax legislation:

> Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

[23] In *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 SCR 217 at paragraph 16, the Supreme Court also said the following with respect to taxation statutes:

> It is well known that the modern approach to interpretation applies to taxation statutes no less than it does to other statutes, that is, "the words of an Act 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" (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715, 2006 SCC 20, at para. 21; E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). However, because of the degree of precision and detailed characteristics of many tax provisions, an emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11; *Placer Dome*, at para. 23. As McLachlin J. (as she then was) stated for the Court in *Shell Canada Ltd. v. Canada*, 1999 Can LII 647 (SCC), [1999] 3 S.C.R. 622, at para. 43:
>
> > The [*ITA*] is a complex statute through which Parliament seeks to balance a myriad of principles. This Court has consistently held that courts must therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention…

[24] In the present case, the Appellant paid the tax on February 29, 2012 so the two-year time limit under subsection 261(3) would expire on March 3, 2014 because March 1, 2014 was a Saturday. By the time the Minister received the Appellant's rebate application on February 5, 2016, the time limit had already passed and cannot be extended: see *Panar v. The Queen*, 2001 CanLII 549, 2001 CarswellNat 762 at paragraphs 12 and 15.

[25] No evidence was introduced to show that the joint election was made with respect to subsection 167(1) for the tax-free supply of the Vendor's business assets. Therefore, since no election appears to have been made, this transaction was subject to GST/HST and the tax in issue was likely not paid in error.

Conclusion

[26] The appeal is dismissed without costs.

Signed at Ottawa, Canada, this 20th day of February 2020.

"Susan Wong"

Wong J.

CITATION:	2020 TCC 34
COURT FILE NO.:	2017-3087(GST)G
STYLE OF CAUSE:	HATEM ABDUL AL-RUBAIY and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 3, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice Susan Wong
DATE OF JUDGMENT:	February 20, 2020

APPEARANCES:

Counsel for the Appellant:	Marwa Racha Younes
Counsel for the Respondent:	Dominik Longchamps

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