Pawlak v The Queen, 2012 TCC 355

ITCs claimed in out of time return must be considered in determining Net Tax

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The issue in this case was whether Input Tax Credits (ITC) for past period, not reported within the reporting period for those period, should be taken into account when assessing or reassessing the taxpayer in relation to the net tax for purposes of the *Excise Tax Act* (ETA).

ITCs claimed in a late filed return, so long as not previously claimed, will have to be taken into account by the Minister in assessing or reassessing a taxpayer in relation to Net Tax at a subsequent (in time) filing. In coming to this conclusion the TCC held that a texual interpretation of paragraph 262(2)(b) would lead to absurd results, and interpreted the section to only require that ITCs not have been previoulsy used.

FACTS

The Taxpayers carried on the business as a partnership. They sold their goods mostly to the US, and therefore made zero-rated supplies. Both had serious health problems, and first brought their income tax returns up to date, and then focused on their GST returns.

In the returns for the past periods, the taxpayers claimed ITCs and calculated a Net Tax refund. The GST returns were reassessed so that the ITCs were reduced to the GST Collectible, reducing the net tax to nil. This was done on the basis that the ITCs were not claimed within the limitation period set out in subsection 225(4) of the ETA.

ANALYSIS

The TCC set out the relevant words of subsection 225(4) of the ETA, which reads:

> 225 (4) An input tax credit of a person for a particular reporting period of the person shall not be claimed by the person unless it is claimed in a return under this Division filed by the person on or before the day that is
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> …
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> (b) where the person is not a specified person during the particular reporting period, the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within four years after the end of the particular reporting period;

The court noted that the taxpayers were not "specified persons" (subsection 225(4.1)). The Crown was relying on the decision in *Layte* v. *The Queen*, 2010 TCC 281, 2010 G.T.C. 66, [2010] G.S.T.C. 80, to support the position that the taxpayers ought not be

entitled to claim ITCs in this case. The TCC, however, noted that *Layte* didn't deal with subsection 296(2) of the ETA which provides:

296 (2) Where, in assessing the net tax of a person for a particular reporting period of the person, the Minister determines that

(a) an amount (in this subsection referred to as the “allowable credit”) would have been allowed as an input tax credit for the particular reporting period or as a deduction in determining the net tax for the particular reporting period if it had been claimed in a return under Division V for the particular reporting period filed on the day that is the day on or before which the return for the particular reporting period was required to be filed and the requirements, if any, of subsection 169(4) or 234(1) respecting documentation that apply in respect of the allowable credit had been met,

(b) the allowable credit was not claimed by the person in a return filed before the day notice of the assessment is sent to the person or was so claimed but was disallowed by the Minister, and

(c) the allowable credit would be allowed, as an input tax credit or deduction in determining the net tax for a reporting period of the person, if it were claimed in a return under Division V filed on the day notice of the assessment is sent to the person or would be disallowed if it were claimed in that return only because the period for claiming the allowable credit expired before that day,

the Minister shall take the allowable credit into account in assessing the net tax for the particular reporting period as if the person had claimed the allowable credit in a return filed for the period

If the conditions of this subsection are satisfied, in assessing or reassessing a person for net tax for a particular reporting period, the person must be allowed a credit for unclaimed ITCs for that period even if the assessment or reassessment is issued after the expiration of the time period within which such ITC could have been claimed (para 8).

The Court noted that the no facts were assumed by the Minister that had to do with the documentation of the ITCs claimed, and there was no evidence presented in relation to this at the hearing. Since there was no evidence to deny the ITC on the basis of lack of documentation, the condition in paragraph 262(2)(a) was met.

In dealing with paragraph 262(2)(b), the TCC noted that " on the day that the notice of the reassessment was sent to the Appellants, they had claimed the ITCs in a return and, prior to the reassessment being issued, the ITCs claimed had not been disallowed" (para 12). A literal

interpretation of this paragraph would mean that the taxpayer's had no satisfied the condition, but the TCC didn't think that this was the correct interpretation.

The Court refereed to the decision of the SCC in *The Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54, setting out the general rule of statutory interpretation, and then referred to the decision in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, in stating that absurd consequences should not flow from an interpretation. The TCC held that a literal interpretation would lead to illogical results since including ITCs in a late filed return would deny them being into taking account, but not including them in a late filed return would require them to be taken into account. The TCC also noted that in reassessing the taxpayers some of the ITC were allowed (up to the GST collectible), therefore the amounts would have satisfied paragraph 296(2)(b) (or else why allow the ITCs?). The Court stated, beginning at paragraph 18:

> [18] It does not seem to me that paragraph (b) should be interpreted to mean that a person would be denied the benefit of the provisions of subsection 296(2) of the ETA if the person reports ITCs in a late filed return but will receive the benefit of this subsection if the ITCs are not reported (and the CRA determines the ITCs as a result of an audit or as a result of a disclosure made outside a return). It would also seem to me that it would not be intended that the conditions as set out in subsection 296(2) of the ETA would not be satisfied because the ITCs were claimed in the return in relation to which the assessment (or reassessment) is issued (which assessment or reassessment disallows such ITCs) but such conditions would be satisfied if the Minister were to subsequently be ordered to reassess the person as a result of an appeal to this Court following such initial assessment (or reassessment).
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> [19] It seems to me that the purpose of the condition in paragraph 296(2)(b) of the ETA is to ensure that a person has not already been allowed the benefit of such ITCs in determining that person's net tax for any reporting period. Therefore, the condition in paragraph 296(2)(b) of the ETA will be satisfied as long as the ITCs had not been previously allowed as ITCs in computing the net tax of the person for any reporting period. In this case, the Appellants satisfy this condition.
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> [emphasis added]

The condition in paragraph 262(2)(c) is that ITC would be allowed or only disallowed because of the timing of the claim for them, which the taxpayer's met (their claim was denied only because of the timing).

The Crown argued that subsection 296(4) would prevent the payment of a refund. The TCC referred to section 12 of the *Tax Court of Canada Act*, which deals with the jurisdiction of the TCC with respect of the ETA, and then to section 309 of the ETA, concluding that the TCC cannot order the Minister to pay a refund, and therefore cannot determine in subsection 262(4)

would prevent the taxpayer from receiving a refund. That would have to be determined by the Federal Court.