

Federal Court



Cour fédérale

Date: 20210819

Docket: T-1797-19

Citation: 2021 FC 853

Ottawa, Ontario, August 19, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

TELLZA INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Tellza Inc. operates in the telecommunications field and is an aggregator of long distance minutes. The Canada Revenue Agency [CRA] sought to audit Tellza's goods and services tax/harmonized sales tax [GST/HST] returns for the reporting period November 1, 2016 to January 31, 2018.

[2] In connection with its audit, the CRA issued a letter to Tellza on October 4, 2019 under subsection 288(1) of the *Excise Tax Act*, RSC 1985, c E-15 [ETA] to obtain all of Tellza's electronic accounting data for this period. By its judicial review application, Tellza seeks to have the October 4, 2019 letter quashed or set aside.

[3] The main issue for this Court's determination is whether the Minister of National Revenue's reliance on the *ETA* s. 288(1), instead of the *ETA* s. 289(1), to obtain Tellza's accounting data was unreasonable. The relevant legislative provisions are reproduced in Annex "A" below.

[4] I find that none of the situations in which the presumptive reasonableness review can be rebutted is present in the matter before me: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 10, 17. Further, what may be reasonable in a given review depends on the applicable legal and factual constraints that bear on the decision: *Vavilov*, at paras 90, 105. The party challenging the decision has the onus of demonstrating that the decision is unreasonable, bearing in mind that the exercise is not a line-by-line treasure hunt for error: *Vavilov*, at paras 100, 102.

[5] I am not persuaded that the Minister's decision was unreasonable in the circumstances. For the more detailed reasons that follow, I thus dismiss Tellza's judicial review application.

[6] I deal first with a preliminary issue regarding a co-pending application proceeding under Court File T-322-20 that the Minister brought for compliance with two subsequent letters for

information the CRA issued on November 25, 2019, one to Tellza and the other to a Tellza director, Fred Panet. A question arose about whether the two applications should be heard together and if not, in which order these matters should be heard. I deal next with the issue of whether the October 4, 2019 letter was a “request” under the *ETA* s. 288(1) or a “requirement” under the *ETA* s 289(1), and thus, whether it was *ultra vires* and void *ab initio* because it was issued under the incorrect provision.

II. Analysis

(1) *Preliminary Issue*

[7] By way of Order dated July 22, 2020, Case Management Judge [CMJ] Furlanetto (as she then was) ordered that Court Files T-1797-19 and T-322-20 be heard on the same day on October 14, 2020, one after the other, with the order of the hearings left to the discretion of the hearings judge. Following oral submissions from the parties on October 14, 2020, I exercised my discretion to hear Tellza’s judicial review application on Court File T-1797-19 [JR Application] first, followed by the Minister’s compliance application on Court File T-322-20 [Compliance Application].

[8] At the outset, Tellza’s counsel requested that the Compliance Application be heard first because of the more complete record in that matter. In my view, doing so would have risked this Court becoming a forum for fact-finding on the merits of the JR Application, contrary to its role as a reviewing court: *Delios v Canada (Attorney General)*, 2015 FCA 117 [*Delios*] at para 41.

Further, “as a general rule, evidence that was not before the administrative decision-maker and that goes to the merits of the matter ... is not admissible on judicial review”: *Delios*, at para 42.

[9] In addition, the JR Application involves only the validity of the October 4, 2019 letter, and not the November 25, 2019 letters at issue in the Compliance Application. Although it was a possibility that the outcome of the Compliance Application could render the JR Application moot, it was by no means a given especially before either matter was heard.

[10] In my view, the Compliance Application involves sufficiently different considerations and issues, as well as one additional party, that hearing the JR Application first was the more just and expeditious, and least expensive manner of proceeding with both matters on the same date, further to CMJ Furlanetto’s July 22, 2020 Order.

(2) “*Request*” versus “*Requirement*”

[11] Contrary to Tellza’s position that the October 4, 2019 letter was a “requirement” and not a “request” and hence, should have issued under the *ETA* s 289(1), instead of the *ETA* s 288(1), I am not persuaded that it was unreasonable for the CRA to issue the letter under the latter provision instead.

[12] The parties do not disagree that the statutory interpretation of a provision must be consistent with the text, context and purpose of the provision: *Vavilov*, above at paras 117-120; see also *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21. The role of the reviewing court, however, on a reasonableness review involving statutory interpretation is not to “undertake

a *de novo* analysis of the question or ‘ask itself what the correct decision would have been’”:

Vavilov, above at para 116, citing *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 50.

[13] Taking into account the context and purpose of the *ETA*, as a self-reporting and self-assessing taxation regime, as well as the plain, grammatical, dictionary meaning of “inspect, audit, or examine”, in my view the CRA’s decision to rely on subsection 288(1) as the basis for issuing the October 4, 2019 letter was justified. I add that Tellza did not adduce any evidence contradicting that the letter was issued by an “authorized person,” as contemplated in the relevant provision.

[14] Subsection 288(1) essentially permits the authorized person to “inspect, audit or examine the documents, property or processes” of persons with record keeping and reporting obligations under the *ETA*, including in connection with any claimed rebate or refund such as input tax credits or ITCs. Further, subsection 288(1) and the remainder of section 288 deal with the conditions under which the authorized person “may” enter business or commercial premises to carry out these functions.

[15] Tellza contends that the “inspection power” under subsection 288(1) is more limited in scope than the “requirement power” under subsection 289(1) of the *ETA*, in that the authorized person is not empowered to request or require information to be provided. Although I do not disagree with the general proposition about the more limited scope of subsection 288(1), I cannot agree with the latter contention for several reasons.

[16] First, the ability to inspect premises is permissive; the provision does not mandate in-person inspections, audits or examinations. In other words, the inspection power is not limited to a physical location or locations but rather, in my view, relates to the person or persons whose documents, property or processes can be inspected, audited or examined. The purpose of this activity also is more limited, as contrasted with subsection 289(1), to determining obligations under Part IX (GST) of the *ETA* or the amount of any rebate or refund to which a person is entitled. Subsection 289(1), on the other hand, operates “[d]espite any other provision of this Part” and applies more broadly to “any person” within the confines of the stated purpose. That purpose also is broader, however, and described as “...any purpose related to the administration or enforcement of a listed international agreement or this Part [i.e. Part IX (GST)], including the collection of any amount payable or remittable under this Part by any person...”

[17] Second, the applicable definitions of “document” and “property” in the *ETA* s 123(1) are not restricted to physical things. For example, a “document” is defined as including “money, a security and a record,” while a “record” is defined as including “...any other thing containing **information**, whether in writing **or in any other form.**” [Emphasis added.] In addition, “property” is defined as meaning “any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money.”

[18] I thus find that on a plain reading of the applicable definitions, within the context and purpose of the *ETA*, subsection 288(1) indeed grants an authorized person the power to request or require a taxpayer to provide information in any form. The inspection power necessarily

entails, in my view, the power to request or require documents to be provided so that the authorized person can conduct the inspection, audit or examination effectively. I further find that the authorized person is not limited, in a modern, electronic era, to an inspection, audit or examination of the taxpayer's documents and records at their premises.

[19] For the above reasons, I find the Federal Court of Appeal's decision in *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 [*Cameco*] distinguishable. *Cameco* involved an issue about whether the taxpayer or employees could be compelled to answer oral questions during an inspection at the taxpayer's premises, pursuant to the roughly equivalent, although not identical, provision under the *Income Tax Act*, RSC 1985, c 1 [*ITA*], that is subsection 231.1(1). The Federal Court of Appeal held that the words "inspect, audit or examine" mean "self-directed enquiry" but do not include "a power to compel a person to answer questions": *Cameco*, above at paras 18-19.

[20] Here, the October 4, 2019 letter requests ("Please provide") all electronic accounting data, so that the self-directed enquiry can occur. In that sense, the data is necessary or required so that the Minister can conduct the contemplated inspection, audit or examination.

[21] Further, the Supreme Court of Canada recognizes that, "the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to **audit** taxpayers' returns and **inspect** all records which may be relevant to the preparation of these returns": *R. v McKinlay Transport Ltd.*, [1990] 1 SCR 627 at 648. [Emphasis added.] Indeed, the same phrase "inspect, audit or examine" in the *ITA* s 231.1(a) has been held to empower the Minister to examine

information that is or should be in the taxpayer's books and records: *Redeemer Foundation v Canada (National Revenue)*, 2008 SCC 46 [*Redeemer*] at para 13. Dissenting in part for other reasons, Justice Rothstein (as he then was) went so far as state that under the *ITA* s 231.1, the "CRA may **require** any documents of the taxpayer and any other person that may relate to **information** that is or should be in the books and records of the taxpayer": *Redeemer*, above at para 31. [Emphasis added.]

[22] Tellza also contends that the request for records in an electronically readable format, along with the system administrator's user ID and password, where applicable, falls outside the scope of the inspection power in the *ETA* s 288(1). I disagree for at least two reasons, the first of which involves the definitions of "document" and "record" discussed above. Second, subsection 286(3.1) of the *ETA* mandates the retention of records in an electronically readable format for the retention period stipulated in subsection 286(3) (i.e. "six years after the end of the year to which they relate"). The applicable reporting period in this case falls well within the six-year retention period.

[23] In addition, Tellza takes issue with the indication in the October 4, 2019 letter that the CRA may ask for more information later and suggests that this is another reason why the letter was more consistent with a "requirement" pursuant to the *ETA* s 289(1). Again, I disagree. That the CRA may request or require more information once it has conducted the subsection 288(1) inspection, audit or examination is logical and not surprising. The fact that "additional information" is mentioned specifically in the *ETA* s 289(1)(a) does not derogate, in my view, from the Minister's reliance on the auditing tool provided in subsection 288(1), nor is the

Minister restricted to making only one demand or request for information under such provision:

R v Grimwood, [1987] 2 SCR 755.

[24] I also agree with the Minister that the fact the October 4, 2019 letter was sent by registered mail does not convert it to a requirement under subsection 289(1) of the *ETA*. Although the latter provision stipulates that the Minister must serve a requirement (either personally or by registered or certified mail), subsection 288(1) does not limit or prescribe the manner in which the authorized person can request the documents to be inspected, audited or examined.

[25] At the hearing before me, Tellza also took issue with the fact that the October 4, 2019 letter was addressed to the company at its Hallandale Beach, Florida address in the United States of America (i.e. the mailing address provided on Tellza's application for GST/HST rebate for the applicable reporting period) and thus, does not comply with the *ETA* s 292 regarding foreign-based information or document. There was no evidence in the matter before me, however, of the place where Tellza's electronic accounting data was maintained, stored, or otherwise, available.

[26] Further, the Minister's record disclosed that Tellza is a Canadian company registered under Ontario law with an office in Toronto, Ontario. As argued by the Minister in response, and I agree, subsection 286(1) of the *ETA* stipulates that taxpayers required to file returns or who apply for a rebate or refund (under Part IX), must keep records in Canada, unless the Minister specifies in writing that the records may be kept somewhere else. Again, there was no evidence in this matter that the Minister has permitted Tellza to maintain its records outside Canada.

[27] In any event, information stored in electronic form on servers outside Canada is capable, in law, of being located in Canada: *eBay Canada Ltd. v M.N.R.*, 2008 FCA 348 (CanLII) [*eBay*] at paras 48, 51-52, [2010] 1 FCR 145. As queried by Justice Evans (as he then was), “[w]ho, after all, goes to the site of servers in order to read the information stored on them?”: *eBay*, above at para 48.

III. Conclusion

[28] For the above reasons, I conclude that the issuance of the October 4, 2019 letter under the *ETA* s 288(1) was justified; Tellza has failed to persuade me that the Minister’s reliance on such provision was unreasonable in the circumstances, and that the letter was *ultra vires* and void *ab initio*. Rather, I find that Tellza engaged in an unacceptable line-by-line treasure hunt for errors.

[29] I therefore dismiss the JR Application.

IV. Costs

[30] Both parties seek costs. I find the Minister, as the successful party, is entitled to her costs, payable by Tellza. The parties have 30 days from the date of this judgment in which to reach an agreement on costs or to make brief submissions, no longer than 3 pages, regarding costs for the Court’s determination.

JUDGMENT in T-1797-19

THIS COURT'S JUDGMENT is that:

1. Tellza Inc.'s judicial review application is dismissed.
2. The Minister of National Revenue is entitled to its costs, payable by Tellza Inc.; the parties have 30 days from the date of this judgment in which to reach an agreement on costs or to make brief submissions, no longer than 3 pages, regarding costs for the Court's determination.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Excise Tax Act, 1985, c E-15

<p>Definitions</p> <p>123 (1) In section 121, this Part and Schedules V to X,</p> <p>document includes money, a security and a record (document)</p> <p>record includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form; (registre)</p>	<p>Définitions</p> <p>123 (1) Les définitions qui suivent s’appliquent à l’article 121, à la présente partie et aux annexes V à X.</p> <p>document Y sont assimilés l’argent, les titres et les registres. (document)</p> <p>registre Sont compris parmi les registres les comptes, conventions, livres, graphiques et tableaux, diagrammes, formulaires, images, factures, lettres, cartes, notes, plans, déclarations, états, télégrammes, pièces justificatives et toute autre chose renfermant des renseignements, qu’ils soient par écrit ou sous toute autre forme. (record)</p>
<p>Keeping books and records</p> <p>286 (1) Every person that carries on a business or is engaged in a commercial activity in Canada, every person that is required under this Part to file a return and every person that makes an application for a rebate or refund shall keep all records that are necessary to enable the determination of the person’s liabilities and obligations under this Part or the amount of any rebate or refund to which the person is entitled.</p> <p>Period for retention</p> <p>(3) Every person required under this section to keep records shall retain them until the expiration of six years after the end of the year to which they relate or for such other period as may be prescribed.</p> <p>Electronic records</p> <p>(3.1) Every person required by this section to keep records who does so electronically</p>	<p>Obligation de tenir des registres</p> <p>286 (1) Toute personne qui exploite une entreprise au Canada ou y exerce une activité commerciale, toute personne qui est tenue, en application de la présente partie, de produire une déclaration ainsi que toute personne qui présente une demande de remboursement doit tenir les registres permettant d’établir ses obligations et responsabilités aux termes de la présente partie ou de déterminer le remboursement auquel elle a droit.</p> <p>Période de conservation</p> <p>(3) La personne obligée de tenir des registres doit les conserver pendant la période de six ans suivant la fin de l’année qu’ils visent ou pendant toute autre période fixée par règlement.</p> <p>Registres électroniques</p> <p>(3.1) Quiconque tient des registres, comme l’en oblige le présent article, par voie</p>

<p>shall retain them in an electronically readable format for the retention period set out in subsection (3).</p>	<p>électronique doit les conserver sous une forme électronique intelligible pendant la durée de conservation visée au paragraphe (3).</p>
<p>Inspections</p> <p>288 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Part, inspect, audit or examine the documents, property or processes of a person that may be relevant in determining the obligations of that or any other person under this Part or the amount of any rebate or refund to which that or any other person is entitled and, for those purposes, the authorized person may</p> <p>(a) subject to subsection (2), enter any premises or place where any business or commercial activity is carried on, any property is kept, anything is done in connection with any business or commercial activity or any documents are or should be kept; and</p> <p>(b) require the owner or manager of the property, business or commercial activity and any other person on the premises or in the place to give to the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Part and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.</p>	<p>Enquêtes</p> <p>288 (1) Une personne autorisée peut, en tout temps raisonnable, pour l'application ou l'exécution de la présente partie, inspecter, vérifier ou examiner les documents, les biens ou les procédés d'une personne, dont l'examen peut aider à déterminer les obligations de celle-ci ou d'une autre personne selon la présente partie ou son droit à un remboursement. À ces fins, la personne autorisée peut :</p> <p>a) sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est exercée une activité commerciale, est gardé un bien, est faite une chose en rapport avec une entreprise ou une activité commerciale ou sont tenus, ou devraient l'être, des documents;</p> <p>b) requérir les propriétaire ou gérant du bien, de l'entreprise ou de l'activité commerciale ainsi que toute autre personne présente sur le lieu de lui donner toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application ou à l'exécution de la présente partie et, à cette fin, requérir le propriétaire ou le gérant de l'accompagner sur le lieu.</p>
<p>Requirement to provide documents or information</p> <p>289 (1) Despite any other provision of this Part, the Minister may, subject to subsection (2), for any purpose</p> <p>related to the administration or enforcement of a listed international agreement or this Part, including the collection of any amount payable or remittable under this Part by any</p>	<p>Présentation de documents ou de renseignements</p> <p>289 (1) Malgré les autres dispositions de la présente</p> <p>partie, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution d'un accord international désigné ou de la présente partie, notamment la</p>

<p>person, by notice served personally or by registered or certified mail, require that any person provide the Minister, within any reasonable time that is stipulated in the notice, with</p> <p>(a) any information or additional information, including a return under this Part; or</p> <p>(b) any document.</p>	<p>perception d'un montant à payer ou à verser par une personne en vertu de la présente partie, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :</p> <p>a) qu'elle lui livre tout renseignement ou tout renseignement supplémentaire, y compris une déclaration selon la présente partie;</p> <p>b) qu'elle lui livre des documents.</p>
<p>Compliance order</p> <p>289.1 (1) On summary application by the Minister, a judge may, despite subsection 326(2), order a person to provide any access, assistance, information or document sought by the Minister under section 288 or 289 if the judge is satisfied that</p> <p>(a) the person was required under section 288 or 289 to provide the access, assistance, information or document and did not do so; and</p> <p>(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 293(1)).</p>	<p>Ordonnance</p> <p>289.1 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 326(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 288 ou 289 s'il est convaincu de ce qui suit :</p> <p>a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 288 ou 289;</p> <p>b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 293(1), ne peut être invoqué à leur égard.</p>
<p>Meaning of foreign-based information or document</p> <p>292 (1) For the purposes of this section, foreign-based information or document means any information or document that is available or located outside Canada and that may be relevant to the administration or enforcement of this Part, including the collection of any amount payable or remittable under this Part by any person.</p>	<p>Sens de renseignement ou document étranger</p> <p>292 (1) Pour l'application du présent article, un renseignement ou document étranger s'entend d'un renseignement accessible, ou d'un document situé, en dehors du Canada, qui peut être pris en compte pour l'application ou l'exécution de la présente partie, notamment pour la perception d'un montant à payer ou à verser par une personne en vertu de la présente partie.</p>

Income Tax Act, RSC 1985, c 1

Inspections	Enquêtes
<p>231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,</p> <p>(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and</p> <p>(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,</p> <p>and for those purposes the authorized person may</p> <p>(c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and</p> <p>(d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable</p>	<p>231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois :</p> <p>a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;</p> <p>b) examiner les biens à porter à l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;</p> <p>à ces fins, la personne autorisée peut :</p> <p>c) sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres;</p> <p>d) requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide</p>

assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin, requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1797-19

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REVENUE

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DATED: AUGUST 19, 2021

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