Federal Court  Cour fédérale

Date: 20220215

Docket: T-899-21

Citation: 2022 FC 198

Ottawa, Ontario, February 15, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

GLENOGLE ENERGY INC.

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant is seeking judicial review of a decision rendered on May 5, 2021 by a delegate of the Minister of National Revenue. In the decision, the Minister's delegate denied two amended elections filed by the Applicant pursuant to subsection 97(2) of the *Income Tax Act*, RSC 1985, c 1 (5th) Supp [*ITA*]. The Applicant asserts that the decision was unreasonable and lacks an internally coherent and rational chain of analysis.

[2] For the reasons that follow, the application shall be dismissed.

I. Background

[3] The facts underlying this application are largely agreed upon by the parties.

[4] The Applicant carries on an oil and gas exploration and development business in Western Canada. The Applicant was formed on January 1, 2015 by an amalgamation of FJ Resources Ltd. [FJR] and Glenogle Energy Inc. [Old Glenogle]. Before the amalgamation, FJR and Glenogle Energy Limited Partnership [GELP] were controlled by Old Glenogle. GELP is a limited partnership existing under the laws of Alberta. The Applicant is the general partner of GELP. GELP was formed on January 16, 2012 as "FJ Resources LP". Glenogle became the general partner of GELP on the amalgamation of FJR and Old Glenogle, at which time the name was changed to GELP. Before the amalgamation, FJR was a member of GELP.

[5] The Applicant owned certain petroleum and natural gas properties referred to as the "Sinclair Properties". By agreement dated January 1, 2015, the Applicant transferred the Sinclair Properties to GELP in exchange for 1,759,845 units of GELP. The Applicant and GELP jointly elected on a T2059 (Election on Disposition of Property by a Taxpayer to a Canadian Partnership) dated July 27, 2016 to have subsection 97(2) of the *ITA* apply to the transfer of the Sinclair Properties.

[6] The Applicant also owned certain petroleum and natural gas properties referred to as the "Doe Boundary Properties". By agreement dated January 2, 2015, the Applicant agreed to transfer the Doe Boundary Properties to GELP in exchange for 3,764,224 units of GELP. The Applicant

and GELP jointly elected on a Form T2059 dated July 27, 2016 to have subsection 97(2) of the *ITA* apply to the transfer of the Doe Boundary Properties.

[7] The Applicant and GELP jointly filed the Sinclair Properties election and the Doe Boundary Properties election with GELP's T5013 Partnership Information Return dated July 27, 2016 for the fiscal period ending December 31, 2015. The elected amount for each transaction was $1.00.

[8] By letter dated November 8, 2016, the Applicant applied to the Minister to amend the elections, specifically increasing the agreed amounts in respect of each transaction. In the case of the Sinclair Properties, the Applicant sought to increase the amount from $1.00 to $30,906,390.00. In the case of the Doe Boundary Properties, the Applicant sought to increase the amount from $1.00 to $786,403.00. The explanation provided by the Applicant for the requested amendments was as follows:

> Predominantly as a result of timing/reporting differences between the filing of the partnership slips, and the Glenogle Energy Inc. T2, it was identified that the elected amount by which the intangible properties were disposed of to the partnership was incorrect. As a result, GEI LP will need to amend these forms to correctly elect at the amount that reflects the tax value of the resource pools being transferred to the partnership.

[9] On March 22, 2018, the Canada Revenue Agency [CRA] sent two letters to the Applicant (one in respect of each election), each of which stated that the CRA required an explanation for the requested amendment.

[10] By letter dated April 16, 2018, the Applicant provided the CRA with a further copy of its November 8, 216 letter that had originally accompanied the amendment requests.

[11] On December 23, 2019, the CRA sent a letter to the Applicant advising that the Applicant's amendment requests were under CRA's audit review and asking for verification of certain information set out in an accompanying query sheet. Item six of the query sheet sought "explanations of the agreed amounts chosen for the resource properties listed on the T2059s ($30,906,390 for the transfer on January 1, 2015 and $786,403 for the transfer on January 2, 2015)".

[12] By letter dated February 25, 2020, the Applicant responded to the CRA's query letter. In relation to item six, the Applicant advised:

> Per 97(2), a corporation can elect to rollover properties to the partnership at an amount between and including fair market value and the adjusted cost base of those properties. For the Jan. 1, 2015 transfer, the intangible oil & gas properties were rolled over to Glenogle Energy Limited Partnership at $30,906,390, which is between the fair market value of $30,906,390 and nil adjusted cost base. On Jan. 2, 2015, additional intangible oil & gas properties were elected to be transferred to the LP at $786,403, which is between the fair market value of $66,107,990 and nil adjusted cost bas.

[13] By letter dated May 5, 2021, the Minister's delegate provided his decision. He stated:

> Pursuant to the power delegated under subsection 220(2.01) of the *Income Tax Act* and in accordance with the facts presented, we deny the above amended elections filed under subsection 97(2) for the following reasons:
>
> - The audit team reviewed the facts based on the factors outlined in Information Circular IC76-19RC and IC 07-01.

- The request to amend the T2059s is based on retroactive tax planning.
- No evidence found to support the amended elections were filed to correct mechanical errors or mistakes.
- Our review indicates the amendment is not just and equitable per subsection 96(5.1).
- The submission from the taxpayer did not support the amendment as just and equitable.
- The fact that Glenogle Energy Inc. (GEI) has 99.3884% direct interest in Glenogle Energy Limited Partnership and the fact that GEI indirectly owns the remainder of the Partnership interest, via ownership in 16511558 Alberta Inc., show that GEI is still the sole owner of the resource properties transferred. The structure with the Partnership and the amended elections circumvent the successor rule stipulated in section 66.7.
- The amount the taxpayer is altering to take advantage of the amended elections, $31,692,761, is significant.

[14] On June 4, 2021, the Applicant commenced this application seeking to review the Minister's delegate's denial of the amended elections.

II. Preliminary Issues

A. *Objections to the Affidavit of Jamie Blair*

[15] The Respondent objects to portions of the affidavit of Jamie Blair affirmed July 29, 2021, which was filed by the Applicant in support of the application. The Respondent asserts that portions of Mr. Blair's evidence (paragraphs 9, 13, 15 (other than the first sentence), 22 and exhibits H and J) should not be considered by the Court as the information and documentation set out therein was not before the Minister's delegate or is otherwise irrelevant.

[16] The Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, has provided clear guidance on the scope of proper evidence on an application for judicial review:

> …as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the [decision-maker]. In other words, evidence that was not before the [decision-maker] and that goes to the merits of the matter before the [decision-maker] is not admissible in an application for judicial review in this Court…
>
> There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker…In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
>
> (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review….Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider…
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness…
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding…

[17] Paragraphs 9 and 13 of Mr. Blair's affidavit provide an explanation for why the amount of $1.00 for the Sinclair Properties and Doe Boundary Properties was listed in the original elections. The Applicant asserts that this constitutes appropriate background information regarding the initial elections. I reject this assertion. This evidence goes directly to the merits of the application and whether the Applicant had adequately demonstrated to the Minister's delegate that it was just and equitable to permit the amendments to the elected amounts for the transactions. In seeking to have the Minister's delegate exercise their discretion, the Applicant was obligated to explain why the elected amount needed to be changed and part of that explanation includes an explanation for why the initial amount was selected. That explanation was never provided to the Minister's delegate and it is not open to the Applicant to now provide it by way of Mr. Blair's affidavit. Accordingly, the Court will not consider paragraphs 9 and 13 of Mr. Blair's affidavit.

[18] With respect to the contested portion of paragraph 15 of Mr. Blair's affidavit, the Applicant asserts that it simply reflects what was already stated in the Applicant's letter dated November 8, 2016. I disagree. Like paragraphs 9 and 13, paragraph 15 addresses the Applicant's explanation for seeking to amend the elected amounts for the transactions, which goes to the merits of the application. While a portion of paragraph 15 is a reformulation of what was before the Minister's delegate in the Applicant's November 8, 2016 letter, the paragraph goes further and provides additional details not included in the letter. Those additional details will not be considered by the Court.

[19] Paragraph 22 of Mr. Blair's affidavit provides a summary of the Minister's delegate's decision. The Respondent seeks to strike this paragraph on the basis that it is irrelevant, as the

decision speaks for itself. I agree that the decision speaks for itself, but it is not an efficient use of Court resources to seek to strike such inconsequential portions of affidavits. In deciding this application, the Court will rely on the text of the decision and not Mr. Blair's summary thereof.

[20] With respect to Exhibits H and J, the Respondent asserts that those portions of the exhibits that contain correspondence sent by the Applicant to Alberta Treasury Board and Finance are improper as that correspondence was not before the decision-maker. The Applicant agrees that the Court need not consider that correspondence.

B. *Whether the Auditor's Report Forms Part of the Reasons for Decision*

[21] The parties disagree as to the import of the "Report on Amended Elections Under Subsection 96(5.1)" [Auditor Report], which was prepared by a CRA auditor in assessing whether the Applicant's amended elections should be permitted and forms part of the certified tribunal record. The Auditor Report concludes by providing a recommendation that the amended elections be denied and provides the following list of reasons for that recommendation:

> - The taxpayer did not provide an explanation as to [sic] why the request to amend their elections would be just and equitable for the Minister to accept the elections;
> - The audit review supports that the request was engaged in retroactive tax planning, circumventing s.66.7 of the ITA;
> - There is no evidence to show that the amended elections are just and equitable;
> - The taxpayer's request to amend the elections do not fall into any of the factors that could be considered under taxpayer relief provisions per IC07-01;
> - The taxpayer has the history of using the taxpayer relief provisions (TRPs) based on retroactive tax planning;

- The surrounding facts support that GEI had several incentives to create a larger amount of non-capital losses; and
- The amount the taxpayer is trying to alter to take advantage of the amended elections, $31,692,791, is significant.

[22] The Auditor Report was signed by the auditor, as well as the Case Manager/Team Leader, Bryan Byrhe, who is the Minister's delegate who made the decision at issue.

[23] The Applicant asserts that the Auditor Report constitutes the reasons for decision.

[24] The Respondent asserts that the May 5, 2021 decision letter sets out the reasons for decision. The Respondent notes that not all of the recommendation bullet points in the Auditor Report are reflected in the decision letter and thus it cannot be assumed that the Minister's delegate adopted the recommendation of the auditor for the reasons given by the auditor.

[25] In *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157, the Federal Court of Appeal considered what a reviewing court should look at in assessing the "adequacy" of the reasons given by a decision-maker, following the Supreme Court of Canada's seminal decision concerning the substantive review of administrative decisions, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The Federal Court of Appeal stated:

> [15] The express reasons are only one place for reviewing courts to look. The failure of the administrator's reasons to mention something explicitly is not necessarily a failure of "justification, intelligibility or transparency": *Vavilov* at paras. 94 and 122. One must look at the reasons the administrator has written and read them "holistically and contextually" in "light of the record and with due sensitivity to the administrative regime in which they were given": *Vavilov* at paras. 97 and 103.

> [16] Thus, silence in the express reasons on a particular point is not necessarily a "fundamental gap" that warrants intervention by the reviewing court. The administrator's reasons, read alone or in light of the record in a holistic and sensitive way, might legitimately lead the reviewing court to find that the administrator must have made an implicit finding. The evidentiary record, the submissions made, the understandings of the administrator as seen from previous decisions cited or that it must have been aware of, the nature of the issue before the administrator and other matters known to the administrator may also supply the basis for a conclusion that the administrator made implicit findings: *Vavilov* at paras. 94 and 123; and see, *e.g., Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140.
>
> [17] In reviewing administrators' reasons, a reviewing court is allowed to "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn": *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 IMM. L.R. (4th) 267 at para. 11; *Vavilov* at para. 97.
>
> [18] For example, take the situation where an administrator needs to analyze several elements before deciding the matter and is aware of the elements (some implicitly, from submissions made or precedents it has cited) but discusses only a couple of them in detail. The reviewing court might be able to conclude from the circumstances that the administrator knew and considered all the elements but for reasons of concision the administrator did not expressly mention them all. Even where elements of the analysis are left out and, in the whole scheme of things, the omissions are minor or inconsequential, the decision is "not undermine[d] as a whole" and must stand: *Vavilov* at para. 122.

[26] I am satisfied that the May 5, 2021 letter contains the Minister's delegate's reasons for decision. However, the reasons specifically refer to the audit team's review of the amendment requests, the results of which are set out in the Auditor Report. In such circumstances, I am satisfied that the Auditor Report must be considered in assessing the Minister's delegate's reasons for decision. This is also in keeping with the requirement that, when assessing the adequacy, logic, coherence and rationality of the decision, the May 5, 2021 letter must be read holistically and contextually in light of the certified tribunal record, which include the Auditor Report.

III. Issue and Standard of Review

[27] The sole remaining issue is whether the decision of the Minister's delegate to deny the amendments was reasonable.

[28] When a court reviews the merits of an administrative decision, the presumptive standard of review is reasonableness. No exceptions to that presumption have been raised nor apply [see *Vavilov*, *supra* at paras 23, 25].

[29] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, Justice Rowe explained what is required for a reasonable decision and what is required of a Court reviewing on the reasonableness standard. He stated:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper*

> *Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

IV. Analysis

[30] Subsection 97(2) of the *ITA* permits parties to a transfer to a partnership to rollover the tax consequences of that transfer to a future date by jointly electing that, for income tax purposes, a transferred asset was sold for an amount other than the actual consideration exchanged. The amount the parties select, which is established per asset, rather than in the aggregate, is the "agreed amount" and the *ITA* contains rules on what this amount may be. Taxpayers make this election by filing a T5029 (Election on Disposition and Property) with the CRA [see *R & S Industries Inc v Minister of National Revenue*, 2016 FC 275 at para 4].

[31] Subsection 96(5.1) of the *ITA* grants the Minister discretion to permit an election made under subsection 97(2) to be amended where, in the opinion of the Minister, the circumstances of the case are such that it would be "just and equitable" to permit the amendment.

[32] The Applicant asserts that the decision of the Minister's delegate that the circumstances of the case are such that it would not be "just and equitable" to permit the elections to be amended is unreasonable as: (a) the Minister's delegate erred in finding that the amendment request constitutes retroactive tax planning; (b) the conclusion that the Applicant was attempting to take advantage of

section 66.7 of the *ITA* is illogical and not rational; (c) the conclusion that the Applicant was attempting to improperly avoid tax was based on speculation and incorrect; (d) the decision provides no support for the finding that the Applicant had provided no explanation to the Minister as to why the amendments were just and equitable; (e) the decision provides no explanation as to why a "significant" amendment amount causes the circumstances to not be just and equitable; (f) Information Circular 07-01 does not apply; (g) the case law cited in the Auditor Report is distinguishable; and (h) the CCAA order referenced in the Auditor Report does not properly form part of the amendment requests.

[33] The Respondent asserts that the Minister's delegate's decision is reasonable as the Applicant did not provide the Minister with any submissions as to why it would be just and equitable to allow amendments. However, notwithstanding the absence of any explanation from the Applicant, the Respondent states that the Minister undertook a lengthy review of the documents and information provided by the Applicant, which review led the Minister to conclude that permitting the amendments would not be just and equitable. The Respondent asserts that the review undertaken by the Minister was based on a proper consideration of the relevant factors and the resulting decision was reasonable.

[34] The *ITA* does not set any criteria for the Minister's determination of whether it is "just and equitable" to permit an amended election. The Minister's delegate notes in his decision that the auditor reviewed the circumstances of the amendment request based on the factors outlined in two CRA Information Circulars – namely, IC 76-19R3 and IC 07-01.

[35] Information Circular 76-19R3 is entitled “Transfer of Property to a Corporation Under Section 85”. While the Information Circular addresses an amendment to an election under a different statutory provision of the *ITA*, the statutory language of “just and equitable” is identical. The key portions of IC 76-19R3 provide:

> **Late and amended elections**
>
> 15. Under subsection 85(7), you can make an election up to three years after the filing deadline referred to in paragraph 12. Subsection 85(7.1) provides that you can file an election more than three years after the original due date, or amend an election at any time if, in the opinion of the Minister, the circumstances giving rise to the late or amended election are just and equitable. The Minister delegates the authority to accept these late and amended elections to the directors of tax services offices. You or your representative should file a late or amended election, provided under subsection 85(7.1), at the transferor's tax services office, together with a written request to the Minister to accept the election. **The request should provide the reasons why you consider that it is just and equitable to accept the election**. **If you do not include these reasons, the Department will not process the election.** You also have to pay an estimate of the applicable penalty when making the election (refer to paragraph 21).
>
> 16. We will generally accept an amended election under subsection 85(7.1) if its purpose is to revise an agreed amount, and without this revision, there would be unintended tax consequences for the taxpayers involved. We will permit revisions to correct an error, omission, or oversight made at the time of the original election. However, we will not permit revisions when, in the Department's view, the main purpose of the amended election is:
>
> (a) retroactive tax planning, such as taking advantage of losses or tax credits not considered when the election was originally filed. In situations where the changes are partly retroactive tax planning and partly to correct errors, we will advise you that we will only accept an amended election for the latter;
>
> (b) to take advantage of amendments in the law enacted after the original election was filed, e.g., an increase in the agreed amount of an election made in April 1985 to create a capital gain that may be offset by a capital gains deduction under section 110.6;
>
> (c) to improperly avoid or evade tax; or

(d) to change the agreed amount in a statute-barred year.

[emphasis added]

[36] Information Circular 07-01, entitled "Taxpayer Relief Provisions", provides insight into CRA's considerations in respect of the acceptance of amended elections under section 220(3.2) of the *ITA*. Section 56 of the information circular states:

> A request may be accepted in the following situations:
>
> (a) There have been tax consequences not intended by the taxpayer, and there is evidence that the taxpayer took reasonable steps to comply with the law. This could include, for example, the situation where the taxpayer obtained a bona fide valuation for a property, but after the CRA's review the valuation was found to be not correct.
>
> (b) The request arises from circumstances that were beyond the taxpayer's control. Such extraordinary circumstances could include natural or man-made disasters such as flood or fire; civil disturbances or disruptions in services, such as a postal strike; a serious illness or accident; or serious emotion or mental distress, such as death in the immediate family.
>
> (c) It is evident that the taxpayer acted on incorrect information given by the CRA. This could include incorrect written replies to queries and errors in CRA publications.
>
> (d) The request results from what is a mechanical error. This could include the net book value amount when obviously the taxpayer intended to use the undepreciated capital cost or using an incorrect cost.
>
> (e) The late accounting of the transactions by all parties is as if the election had been made, or had been made in a particular manner.
>
> (f) The taxpayer can demonstrate that they were not aware of the election provision, even though they took a reasonable amount of care to comply with the law, and took remedial action as quickly as possible.

[37] Section 57 of the information circular addresses the denial of an amended election and provides:

> A request will not be accepted in the following instances:
>
> (a) It is reasonable to conclude that the taxpayer made the request for retroactive tax planning purposes. This could include taking advantage of changes to the law enacted after the due date of the election.
>
> (b) Adequate records do not exist.
>
> (c) It is reasonable to conclude that the taxpayer had to make the request because he or she was negligent or careless in complying with the law.

[38] The auditor considered all of the factors set out in both information circulars that favoured granting and denying the amendment requests.

[39] The Applicant does not take issue with the Minister's delegate's reliance on IC 76-19R3, but asserts that the Minister's delegate's reliance on IC 07-01 was illogical, as section 220(3.2) of the *ITA* does not require the Minister to consider if the circumstances are just and equitable to accept an amended election under that statutory provision and the Minister's delegate provided no explanation as to why he relied on that information circular in the circumstances.

[40] I am satisfied that the auditor's consideration of the factors set out in both information circulars, and the Minister's delegate's consideration of both information circulars, was reasonable. Given that the *ITA* provides no guidance to the Minister as to the factors to apply in exercising the discretion set out in section 96(5.1), I am satisfied that the Minister's delegate's recourse to an information circular dealing with an analogous *ITA* provision (IC 76-19R3) and

dealing with general taxpayer relief (IC 07-01) was appropriate. In any event, I note that the Applicant's predominate concern regarding the decision at issue is the finding by the Minister's delegate that the Applicant had engaged in retroactive tax planning, which is a factor that is found in both information circulars.

[41] The Applicant asserts that the determination by the Minister's delegate that the Applicant had provided no explanation as to why it would be just and equitable to grant the amendment requests was unreasonable, as the Applicant had, in fact, provided an explanation. I would begin by noting that in his reasons, the Minister's delegate found that "the submissions from the taxpayer did not support the amendment as just and equitable". The Minister's delegate did not find that no explanation had been provided by the Applicant – rather, that was a finding of the auditor. However, at the end of the day, this is a distinction without a difference, as I am satisfied that the Applicant's "explanation" was so devoid of particulars that it did not amount to an explanation at all.

[42] The sole explanation provided by the Applicant for the amendment request was that "predominantly as a result of timing/reporting differences between the filing of the partnership slips, and the Glenogle Energy Inc. T2, it was identified that the elected amount by which the intangible properties were disposed of to the partnership was incorrect". The Applicant has not explained the nature of the alleged "error", how and why the initial election amounts were selected, how the "error" was discovered, and why the elected amount now needs to be changed. The Applicant seeks to have the Minister exercise his discretion to grant the amendment requests, yet failed to explain in any meaningful way why it would be just and equitable for the Minister to do

so. In such circumstances, I find that it would have been reasonable, on this basis alone, for the Minister to have rejected the amendment requests, without even considering the various other factors detailed in the information circulars. I note that this would also have been in keeping with section 15 of IC 76-19R3 and the general approach to the granting of discretionary relief – namely, that the party seeking such relief must demonstrate that the relief is warranted.

[43] I will now turn to consider the Applicant's primary argument that the Minister's delegate erred in finding that the amendment request constitutes retroactive tax planning. In considering this issue, it is important to keep in mind that this issue involves the Minister's delegate's expertise in applying the provisions of the *ITA* to the facts in question and as such, the Minister's delegate is entitled to deference. The Court will only intervene if the Minister's delegate's assessment of this issue lacks justification, transparency and intelligibility and falls outside the range of possible, acceptable outcomes defensible in respect of the facts and applicable legal principles.

[44] The Applicant concedes that the term "retroactive tax planning" is not defined in the *ITA*. The Applicant provided the Court with a few decisions in which Canadian courts have commented on the concept of retroactive tax planning, but what is apparent from a review of those decisions is that no clear definition exists.

[45] In *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56 at para 72, the Supreme Court of Canada commented on rectification and stated that:

> …parties should not be given *carte blanche* to exploit rectification for purposes of engaging in retroactive tax planning. Courts will not permit parties to undo decisions simply because they have come to regret them later. Allowing parties to rewrite documents and

> restructure their affairs based solely on a generalized and all-encompassing preference for paying lower taxes is not consistent with the equitable principles that inform rectification.

[46] The Applicant asserts that the CRA's Income Tax Audit Manual is of assistance in defining retroactive tax planning, where it provides in section 12.1.4 as follows:

> Retroactive tax planning is the result of an event that occurs after initial planning was completed based on the facts available at the time. New information may cause the taxpayer to portray the events differently. Although taxpayers are allowed to arrange their affairs to decrease taxes payable, the intent of the taxpayer in making changes to previously reported transactions is important since retroactive changes may result in misuse or abuse of the acts.

[47] Taking into consideration the above, the Applicant asserts that if an amendment request does not involve a "changing legal relationship" for the purpose of obtaining a better tax result, then the amendment request cannot constitute retroactive tax planning. The Applicant asserts that in this case, the amendment requests do not reflect legal relationships that are different than those originally reported. The Applicant asserts that the rationale given by the auditor for finding the existence of retroactive tax planning is speculative and not clearly explained, as the auditor does not identify the criteria for a request to be retroactive tax planning and does not explain why the amendment requests were retroactive tax planning in the context of the legal jurisprudence.

[48] I reject the Applicant's assertions. Nowhere in the jurisprudence or materials cited by the Applicant does the concept of retroactive tax planning focus on a "changing legal relationship" as proposed by the Applicant. Rather, the materials relied upon by the Applicant urge a consideration of "the intent of the taxpayer in making changes to previously reported transactions". Here, the Applicant failed to provide any meaningful explanation as to why it seeks to make changes to the

previously elected amounts (i.e. a change to previously reported transactions). The absence of any such explanation, coupled with the absence of a clear definition for retroactive tax planning, renders it difficult to accept the Applicant's assertion that the Minister's delegate's decision is unreasonable. To the contrary, a review of the Auditor Report reveals a detailed analysis of the transactions and the tax implications of the proposed amended elections (which would change the availability of losses for future tax years).

[49] Moreover, I find that the Applicant has not demonstrated that the Minister's delegate relied on an incorrect legal principle or failed to consider any evidence provided by the Applicant.

[50] In the circumstances, I am not satisfied that the Applicant has demonstrated that the Minister's delegate's determination that the amendment requests amount to retroactive tax planning lacks justification, transparency and intelligibility and falls outside the range of possible, acceptable outcomes defensible in respect of the facts and applicable legal principles. Rather, it would appear that the Applicant simply disagrees with the conclusion, which is not a basis upon which the Court will set aside the decision.

[51] With respect to the Applicant's assertions that the conclusion that the Applicant was attempting to improperly avoid tax was based on speculation and incorrect, that the case law cited in the Auditor Report is distinguishable, and that the CCAA order referenced in the Auditor Report does not properly form part of the amendment requests, I note that none of these reasons are contained in the Minister's delegate's decision letter.

[52] Further, I am not satisfied that the absence of an explanation as to the relevance of the amount of the amendment renders the decision unreasonable.

[53] Moreover, while the Applicant alleges that the conclusion that the Applicant was attempting to take advantage of section 66.7 of the *ITA* is illogical and not rational, the Applicant made little effort in its submissions (paragraph 61 of its memorandum of fact and law) to explain this allegation. As such, I am not satisfied that the Applicant has demonstrated any error by the Minister's delegate in his finding that the amendment requests constituted an attempt to circumvent the successor rule stipulated in section 66.7 of the *ITA*.

V. Conclusion

[54] I find that the Minister's delegate's decision was justified, transparent and intelligible, falling well within the range of possible and acceptable outcomes. As a result, this application for judicial review shall be dismissed.

[55] The Respondent seeks their costs of the application. I see no basis to depart from the general principle that as the successful party, the Respondent should recover their costs of the application. With respect to the quantum of costs, the parties agree that the costs should be fixed at $2,000.00.

JUDGMENT in T-899-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Applicant shall pay to the Respondent costs of this application in the amount of $2,000.00, inclusive of disbursements and taxes.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-899-21
STYLE OF CAUSE:	GLENOGLE ENERGY INC. v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 8, 2022
REASONS FOR JUDGMENT AND JUDGMENT:	AYLEN J.
DATED:	FEBRUARY 15, 2022

APPEARANCES:

Daniel Morrison	FOR THE APPLICANT
Alexander Millman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

KPMG Law LLP Calgary, Alberta	FOR THE APPLICANT
The Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT