

Docket: 2004-804(GST)I

BETWEEN:

LEE HUTTON KAYE MALOFF & PAUL HENRIKSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on June 25, 2004 at Nelson, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

Agent for the Appellant: Paul Henriksen

Counsel for the Respondent: Bruce Senkpiel

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JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is dated December 4, 2003 and bears number 11EU-033081741095, is dismissed, without costs, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 20th day of August 2004.

"L.M. Little"

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Little J.

Citation: 2004TCC537  
Date: 20040820  
Docket: 2004-804(GST)I

BETWEEN:

LEE HUTTON KAYE MALOFF & PAUL HENRIKSEN

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Little, J.**

##### A. Statement of Facts

[1] The Appellant is a partnership.

[2] The Appellant registered under Part IX of the *Excise Tax Act* (the "Act") effective May 9, 1996 and was assigned Number 867211033RT.

[3] The Appellant owned a building located in the City of Trail, British Columbia (the "Property") in which it operated a coffee shop and a pool hall.

[4] The Appellant requested that the GST registration be cancelled effective on December 31, 1998.

[5] On or about September 29, 2000 the Appellant sold the Property and contents for \$100,000.00 to a Society known as "The Heart of Trail Society" (the "Society").

[6] The Appellant did not collect and remit the GST for the sale of the Property because it was advised by its lawyer that it was not responsible for GST. In this

connection the Society advised the Appellant that they were a registrant for GST purposes and agreed to self-assess and remit any GST to the Canada Customs and Revenue Agency (the "CCRA").

[7] The Appellant subsequently determined that the GST registration of the Society had been cancelled on April 1, 1999.

[8] The Society was not a registrant for GST purposes at the time that it purchased the Property from the Appellant.

[9] By a Notice of Reassessment issued on December 4, 2003 the Minister of National Revenue (the "Minister") reassessed the Appellant to impose GST of \$7,000.00 plus penalty of \$1,139.77 and interest of \$603.73 for the reporting period January 1, 1998 to December 31, 2000 the Period.

#### B. Issue

[10] The issue is whether the Appellant is liable for GST interest and penalty in respect of the sale of the Property to the Society.

#### C. Analysis and Decision

[11] As noted above at the time of the sale of the Property to the Society, no GST was collected. Furthermore, as indicated, neither the Appellant nor the Society was a registrant at the time of the sale.

[12] Subsection 221(2) of the *Act* provides that the Purchaser of property must be a registrant for GST purposes to avoid liability for failing to collect and remit GST on the sale.

[13] Mr. Paul Henriksen, one of the partners represented the Appellant. Mr. Henriksen argued that the Appellant should not be liable for the GST that was imposed in this situation since the Society fraudulently misrepresented its GST registrant status to the Appellant at the time of the sale of the Property.

[14] Mr. Henriksen also noted that the Appellant's solicitor Mr. R.S. Bogusz advised the Appellant and R. Ann Lessard, Notary Public, the agent for the Society on October 17, 2000 as follows:

The GST form is executed on the basis that this is a taxable transaction and the purchase is liable to self-assess (See Exhibit A-2).

[15] By letter addressed to Mr. Bogusz and dated October 31, 2000 R. Ann Lessard advised as follows:

Further to my telephone call to your office this morning, I confirm that my client will self-assess the GST and for your information their GST number is 871738555 (See Exhibit A-3).

[16] After a careful analysis of the relevant facts, I have concluded that the Appellant made a taxable supply of real property during the Period and the Appellant was required to collect GST under subsection 221(1) of the *Act*. The Appellant is not able to escape liability for GST by relying on the misrepresentation made by the Society's agent that the Society was a registrant for GST purposes and would be liable for GST.

[17] In support of my conclusion, I have referred to a number of court decisions including the decision of Madam Justice Lamarre Proulx in *Makhtia Grewal v. Her Majesty The Queen*, (1996) 4 GTC 3166. In that decision, Justice Lamarre Proulx said at page 7:

The Appellant has made a taxable supply to the purchasers, who were not registered. Therefore, the Appellant had to collect the tax and remit the net tax to the Receiver General of Canada. This scheme is similar to the scheme found in the Income Tax Act, where the employer shall deduct and remit the income tax on the salaries of the employees. If the employer fails to do so, he may be assessed for the tax although the employee is responsible for this tax as well. The Minister was therefore correct in assessing the Appellant pursuant to section 296 of the Act for the net tax owed on the making of a taxable supply.

[18] In this situation the Appellant was unfortunately misled by the fraudulent statement made by the agent for the Society. However, the wording in the *Act* is clear and I find that the Appellant is responsible for the GST on the sale.

[19] The appeal is dismissed without costs.

Signed at Vancouver, British Columbia, this 20th day of August 2004.

"L.M. Little"

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Little J.

CITATION: 2004TCC537

COURT FILE NO.: 2004-804(GST)I

STYLE OF CAUSE: *Lee Hutton Kaye Maloff &  
Paul Henriksen and  
Her Majesty the Queen*

PLACE OF HEARING: Nelson, British Columbia

DATE OF HEARING: June 25, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: August 20, 2004

APPEARANCES:

Agent for the Appellant: Paul Henriksen

Counsel for the Respondent: Bruce Senkpiel

COUNSEL OF RECORD:

For the Appellant:

Name: Ronald S. Bogusz

Firm: Nasmyth Morrow Goody & Bogusz  
Nelson, British Columbia

For the Respondent: Morris Rosenberg  
Deputy Attorney General of Canada  
Ottawa, Canada