Docket: 2007-3779(IT)G

BETWEEN:

STAN WIRE APPLICATION LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeal of *Stan Wire Application Ltd.* (2007-4174(GST)I) on March 30, 2009 at Calgary, Alberta

Before: The Honourable Justice Diane Campbell

Appearances:

Agent for the Appellant:	Agata Nowak
Counsel for the Respondent:	Margaret M. McCabe

AMENDED JUDGMENT

The appeals from the assessments made under the *Income Tax Act* with respect to the 2002, 2003 and 2004 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached **Amended** Reasons for Judgment.

There shall be no order as to costs.

Signed at **Ottawa**, **Ontario**, this **23rd** day of **October** 2009.

"Diane Campbell"

Campbell J.

Docket: 2007-4174(GST)I

BETWEEN:

STAN WIRE APPLICATION LTD.,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Stan Wire Application Ltd.* (2007-3779(IT)G) on March 30, 2009 at Calgary, Alberta

Before: The Honourable Justice Diane Campbell

Appearances:

Agent for the Appellant:	Agata Nowak
Counsel for the Respondent:	Margaret M. McCabe

AMENDED JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, Notice of Assessment number 10CT0600129, dated May 11, 2005 for the period March 1, 2001 to February 29, 2004 is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached **Amended** Reasons for Judgment.

There shall be no order as to costs.

It is further ordered that the filing fee of $100.00 be refunded to the Appellant.

Signed at **Ottawa**, **Ontario**, this **23rd** day of **October** 2009.

"Diane Campbell"

Campbell J.

Citation: 2009 TCC 425
Date: 2009**1023**
Dockets: 2007-3779(IT)G
2007-4174(GST)I

BETWEEN:

STAN WIRE APPLICATION LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Campbell J.

[1] The appeals were heard together on common evidence and involve issues under both the *Income Tax Act* (the "*Act*") and the *Excise Tax Act* (the "*ETA*"). The Appellant was involved in the construction of homes for sale with some of these transactions involving transfers to the sole shareholders and directing minds of the Appellant corporation, Agata and Boguslaw Nowak. The Minister of National Revenue (the "Minister") assessed under the *Act* on the basis that these transfers between the Appellant and the Nowaks did not occur at fair market value ("FMV"). The issues under the *ETA* arise largely as a result of the income tax matters and involve an analysis of whether the Appellant properly reported net GST with respect to several transfers, whether input tax credits ("ITCs") were over-claimed and whether the Appellant can deduct the New Housing Rebate ("NHR") with respect to several of these transfers together with the amount of these deductions.

The Facts:

[2] I heard evidence from both Mr. and Mrs. Nowak as well as David Jang, the Respondent's property appraiser for one of the properties.

[3] The Appellant was incorporated in 1998 with its main operation being the installation of stucco wiring. Several years later, the Appellant became involved in the construction of houses for resale. The assessments involve taxation years ending February 2002, February 2003 and February 2004. These appeals focus on four properties: 1169 Strathcona Drive ("1169"), 3139 Signal Hill Drive ("3139"), 3135 Signal Hill Drive ("3135") and 160 Strathlea Place ("160").

[4] In 2001, the Nowaks personally purchased the lot at 1169 Strathcona Drive ("1169"). The Offer to Purchase (Exhibit A-34) stipulates that Mrs. Nowak was the purchaser of this lot. A home was built and the Nowaks resided there from December 2001 to May 2002. Mrs. Nowak testified that she and her husband built the residence personally with their own funds using contractors at market price (Transcript, page 18) and then sold it in May 2002. The Respondent argued that some of the 1169 construction costs were incurred by the Appellant and were debited to the Nowaks' shareholder account; that the Appellant was listed as the person responsible for building the house on inspection; and that it was the Appellant that gave a one-year builder's warranty on 1169 at the May 2002 sale to a third party. The Respondent also asserted that the Appellant claimed ITCs with respect to the 1169 construction. Further the Respondent produced cheques (Exhibit R-2) to demonstrate that the Nowaks used the Appellant corporation as a conduit with respect to certain supplies for the 1169 construction.

[5] The Appellant argued that it did not claim any ITCs for 1169 because these ITCs were in fact in connection with another construction which occurred concurrently with the construction of 1169 (Transcript, page 19). The apparent practice of the Appellant was to isolate funds respecting each of its constructions and maintain a separate GST number for each (Transcript, page 43).

[6] The Nowaks maintained that 1169 was constructed with the intention that it would be their residence but that unforeseen circumstances, which included the construction of additional new homes in the area, the installation of a bus stop in front of the property causing noise problems and increased traffic in the area, forced them to move from 1169.

[7] In March 2002, the Nowaks purchased the lot at 3139. The Nowaks funded the construction and the Appellant erected the house on this lot. They were charged

via journal entries in the Appellant's books. The Appellant reported $234,453.00 as the consideration of the supply of 3139 to Mrs. Nowak. In September/October 2002, the Nowaks moved into 3139 although they testified that it was not fully completed.

[8] According to the evidence, their intention respecting the purchase of 3139 was personal. Mr. Nowak, in his search for business lots, located two lots – 3139 and 3135 – and decided that 3139 was an ideal location for a personal residence. However, the land developer would not deal directly with individuals but only with corporations, necessitating the involvement of the Appellant corporation acting on behalf of the Nowaks in the purchase of 3139.

[9] The transfer of title to 3139 occurred directly from the land developer to the Nowaks personally. This was a so-called "skip transfer", a common practice in Alberta, where the transfer of title "skips" the builder. Payment for the 3139 lot occurred in July 2002 via the shareholder loan account of the Appellant. The Appellant reported $234,453.00 as income from the transfer of 3139 to Agata Nowak. The Appellant did not remit GST. Instead, according to common practice in the industry, the Appellant swapped GST numbers with the land developer which was presumably done under subsections 221(2) and 228(4) of the *ETA* in respect of self-assessment on acquisition of real property. The Appellant would therefore be required to remit GST payable, if any, directly as opposed to paying it to the developer.

[10] It should be noted that the Respondent submits that, as of June 7, 2002 prior to the Nowaks moving into 3139, the Appellant was already using 160 as its mailing address prior to the construction of the house on that lot.

[11] 3139 was sold in May 2003 to a third party for $366,000.00 ($23,943.93 of tax included) after being listed in January 2003.

[12] Accordingly, the Minister assessed the Appellant in respect to 3139 on the basis that the FMV at the time of transfer to the Nowaks was $342,056.00 ($366,000.00 - $23,944.00 GST). An amount of $107,603.00 ($342,056.00 - $234,453.00) was included in the income of the Appellant for the 2003 taxation year.

[13] In calculating its net tax, the Appellant claimed a deduction of $5,956.31 as a NHR in respect to 3139. The Minister disallowed this rebate because it viewed

the underlying intention of the Nowaks' acquisition of 3139 as one to resell at a profit.

[14] In March 2002 the Appellant had also purchased the lot at 3135, which was adjacent to 3139. The Appellant entered into an agreement of purchase and sale with respect to 3135 with Derek Selwent to build a house on a cost plus basis. Mr. Selwent became the Nowaks' neighbour but according to their evidence, together with the police reports (Exhibit A-4), he became a threatening, violent and malicious presence in their lives with incidents of vandalism against them. To preserve their safety and quality of life, the Nowaks maintain that they had good reason to leave 3139 after a short duration of residing in that property.

[15] With respect to Mr. Selwent's property, 3135, the Appellant was to supervise all aspects of construction and provide a one-year warranty. The supplier/developer of the vacant lot transferred 3135 directly to Mr. Selwent, the homeowner, despite the involvement of the Appellant corporation (Exhibit A-7). This document stipulated that a "skip transfer" occurred respecting 3135.

[16] Construction of 3135 was substantially completed in November 2002 and the purchaser assigned the corresponding NHR (Exhibit A-16) to the Appellant, which then credited the rebate amount to Mr. Selwent by reducing his final amount payable. To date the Appellant has not received complete payment from Mr. Selwent (Transcript, page 156). In calculating its net tax, the Appellant claimed a deduction of $5,743.54 as the NHR for 3135. The Minister is denying this NHR on the basis that the purchase was not made from a builder under the *ETA*. The Respondent contends that the Appellant did not supply a residential complex to Mr. Selwent but provided only construction services.

[17] In January 2002, the Appellant purchased 160 via a shareholder loan (Transcript, page 59). Construction commenced in September 2002. Mrs. Nowak testified that the intention for 160 was to build a "spec" home for resale. This did not materialize due to the problems which they were having with their neighbour, Mr. Selwent, while they resided at 3139. The Nowaks claim that they had no alternative but to relocate from 3139 to 160 in May 2003. According to the Nowaks, they moved into 160 prior to its completion because they had nowhere else to go and they desperately wanted to escape their neighbour, Mr. Selwent.

[18] The property, 160, was transferred from the Appellant to Mrs. Nowak on April 29, 2003 for a stated purchase price of $266,276.00 excluding GST. The

Nowaks paid $11,929.18 of GST to the Appellant, being an amount equal to the difference between the full GST and the NHR of $6,710.17 (Transcript, page 59).

[19] The Nowaks had the property appraised in July 2006 to determine its value as of May 2003. The value was established at $375,000.00, including GST (Exhibit A-31). The Appellant failed to produce the author of this appraisal as a witness. The Respondent contends that the FMV of 160 at June 6, 2003 was $399,000.00, excluding GST, as determined by Mr. Jang's appraisal.

[20] Therefore, the Respondent submits that the Minister correctly included $132,724.00 ($399,000.00 - $266,276.00) in the income of the Appellant for the 2004 taxation year to reflect a FMV transfer between the Appellant and the Nowaks in respect to 160.

[21] In calculating its net tax, the Appellant claimed a deduction of $6,710.17 with respect to 160 for a NHR.

The Income Tax Issues:

[22] The issue is whether the Minister correctly reassessed the Appellant corporation to include in income the amounts of $107,603.00 in respect to property 3139 and $132,724.00 in respect of 160 in the taxation years ending in 2003 and 2004, respectively.

[23] The Minister's income inclusions arise as a result of the Appellant's transfer of 3139 and 160 to its shareholder, Agata Nowak, where the Minister asserts that these transfers occurred at less than FMV.

[24] The 2003 income tax assessment also includes an amount of $761.36 which the Respondent claims the Appellant failed to report in the amount it received ($173,775.04) for the contractor services it provided to Mr. Selwent in building the house at 3135.

The GST Issues:

[25] The GST issues involve a determination of whether the Minister properly assessed the Appellant net GST owing after considering the following:

(1) the appropriate FMV to be assigned to 3139 and 160;
(2) the disallowance of the NHR regarding 3139 and 3135;

(3) the failure to report GST stemming from over-claiming ITCs with respect to 1169; and
(4) the over-claiming of the NHR in respect to 160 considering the difference in FMV and transfer value of this property.

[26] In addition to the above issues, penalties pursuant to section 280 of the *ETA* in the amount of 6% and interest at the prescribed rate were imposed.

Analysis:

[27] I will deal first with the income tax issues and specifically with properties 3139 and 160 because a resolution of the GST issues is dependent to a large extent on a determination of the income tax matters.

[28] Based on the Respondent's submissions (Transcript, page 319), the argument is that the Appellant received virtually no profit as a result of its transfer to the Nowaks of the houses it built. According to the evidence, the Appellant decided that approximately $25,000.00 would be a sufficient profit on the construction of each house. The Respondent's position suggests that the Minister sees the true profit source in the hands of the Appellant's shareholders, the Nowaks, when they resold these properties within short periods of time of moving into each. Given this view, it seems odd that the Minister chose not to pursue this arrangement directly to the Nowaks conduct of trading houses or, alternatively, via shareholder benefits. However, that avenue was not pursued and the Minister instead has chosen to pursue the Appellant corporation as having had its property appropriated by its shareholders for consideration which is less than the FMV.

[29] Most of the Respondent's submissions were based on the decision of *Happy Valley Farms Ltd. v. The Queen*, 86 DTC 6421, and the tests enunciated there to distinguish between an activity carried on as a business and one that is an investment. I remain as unconvinced today, concerning the relevancy of the tests in this decision to these appeals, as I was when I heard these submissions. First, I have no doubt, according to the evidence adduced, that the Appellant corporation was in the business of both building and selling homes. The tests enunciated in *Happy Valley Farms* may have been useful if the proceeds from the resale of the homes by the Nowaks had been assessed as business income of the Nowaks. The Nowaks however were not assessed personally and it is only the corporation that is an appellant with the income assessed in its coffers only.

[30] As I understand the Respondent's submissions, with respect to the income tax issues in connection to properties 3139 and 160, reliance is placed on section 69 of the *Act* to include in the Appellant's income the proceeds of disposition of both these properties at FMV as established on resale by the Nowaks. I am assuming that the Respondent is arguing that the alleged unreported income is to be included in the Appellant's income pursuant to subsection 69(4) of the *Act* in regard to shareholder appropriation or by way of subparagraph 69(1)(b)(i) of the *Act* in regard to inadequate consideration for both 3139 and 160. I am making this assumption pursuant to the Respondent's remarks at pages 309-310 of the transcript:

> … And in this case, the minister relies on that provision to submit that the appellant transferred the houses to non-arm's length persons when it transferred it to the shareholders. In so doing -- and it is in the business of building houses, the minister takes the position that the appellant should have transferred and is deemed to have transferred the properties at 3139 and 160 at fair market value. And for clarity, of course, the minister takes the position that fair market value for 3139 is the $366,000, that was the amount of 3139 sold to third-party persons, non-arm's length within six months of the shareholders taking possession of the property. So that sale took place in April of 2003. So the minister relies on that figure as the fair market value, the properly reflective value of that house.
>
> With respect to the house at 160, the minister, of course, relies on the evaluation provided through the evaluation expert of the Canada Revenue Agency, Mr. David Jang, and just to note, Madam Justice, that, of course, that amount is different than what is in our pleadings because in our pleadings, the evaluation we relied on was Tom Liu's which was 400,000. Mr. Jang's evaluation report brings the value of that house in $399,000, so we would, of course, rely on Mr. Jang's and the current evaluation report that is before this Court for the value of that house.

[31] While section 69 was named generally in the Respondent's Reply regarding the income tax issues, it was not explicitly referred to during the hearing. I am however making my inference that the Respondent is utilizing subsection 69(4) and subparagraph 69(1)(b)(i) as the basis of her argument respecting the income tax issues relating to 3139 and 160.

[32] Alternatively, it may be that the Respondent is attempting to argue that the proceeds from the disposition of the homes recognized at the shareholder level, that is, the Nowaks' resale of the homes, should be imputed to the corporate entity. Therefore, what may be potentially business income in the hands of the shareholders should constitute business income in the hands of the Appellant

corporation which is owned and directed by these same shareholders. If I am correct in this inference respecting the Respondent's position, I must reject it because clearly the Appellant and the shareholders are separate legal entities. It may be a different situation where a sham or fraud are alleged but that is not the case in these appeals. At page 316 of the transcript, the Respondent submitted the following:

> … What we're asking the Court to consider is whether the appellant's claim that these were primarily built for personal residence is to be accepted over what the minister believes is the true intention which is to reside in the houses for a very short period of time and then sell them for a profit.

The Respondent's position is not clear but if the Minister wished to attack a possible house swapping by the Nowaks, then an assessment of the proceeds from the resale of these homes as business income in their hands personally should have been pursued.

[33] The above inferences and remarks have been made because the Respondent's submissions respecting the income tax issues were primarily confined to the application of the *Happy Valley Farms*' test to the facts of this appeal to render the Appellant in the business of building and selling houses. According to the pleadings and the evidence adduced, I do not believe that the Respondent's approach to the issues in these appeals is the appropriate one.

Property 160:

[34] The Respondent argued that the difference between the FMV and the transfer value of 3139 and 160 should be included in the business income of the Appellant because the Appellant transferred these properties to the Nowaks for a price that was less than the FMV at the time of the transfers. It is subsection 69(4) and subparagraph 69(1)(b)(i) that would come into play in accordance with this argument. Those provisions state:

> 69(1)(b) where a taxpayer has disposed of anything
>
> (i) to a person with whom the taxpayer was not dealing at arm's length for no proceeds or for proceeds less than the fair market value thereof at the time the taxpayer so disposed of it,
>
> …

> 69(4) Where at any time property of a corporation has been appropriated in any manner whatever to or for the benefit of a shareholder of the corporation for no consideration or for consideration that is less than the property's fair market value and a sale of the property at its fair market value would have increased the corporation's income or reduced a loss of the corporation, the corporation shall be deemed to have disposed of the property, and to have received proceeds of disposition therefor equal to its fair market value, at that time.

[35] Both of these provisions are deeming provisions that require that the properties, 3139 and 160, form part of the assets of the Appellant corporation. Subparagraph 69(1)(b)(i) refers to “disposing” of something, which necessitates that the transferor have certain ownership rights over the item at the time of transfer.

[36] In *Boardman et al. v. The Queen*, 85 DTC 5628, a court ordered, during divorce proceedings, the vesting in the wife’s name of two homes owned by a company of which the husband was the main shareholder. The company was reassessed to add a taxable capital gain to its income in respect of the conveyance, based on the difference between the FMV and the adjusted cost base (“ACB”) of the houses. The Court held that subsection 69(4) is applicable to deem the company to have sold the property at FMV and to have received the proceeds. At page 5633 the Court made the following comments:

> While I think it may be more fairly debatable whether subparagraph 69(1)(b)(i) is applicable to this situation, I need not decide that as I conclude that subsection 69(4) is applicable. This latter subsection gives rise to two issues argued by counsel and not otherwise dealt with in my reasons above. It was contended by counsel for the taxpayer corporation that the property was not "appropriated" and even if it were the transaction was not an income transaction, the company not being in the business of buying and selling houses, and therefore could not be said to have increased the corporation's "income". With respect to the first point, counsel contended that the word "appropriate" implies action by the owner of the property or by the person acquiring it, and that in the present case the effective action transferring the property was that of a third party, namely the Court of Queen's Bench. While these are valid meanings of the terms "appropriate" when used as an active verb, there are other meanings provided in the Oxford English Dictionary cited by counsel, such as "to assign or attribute specially or exclusively to . . ." or "to make, or select as, appropriate to . . .". These would embrace the action of a third party as well. Apart from that, it must be noted that the verb is used in subsection 69(4) in the passive voice as it refers to property that "has been appropriated". It does not say that the property must have been appropriated by the company to the shareholder or for the benefit of the shareholder but only that the property must have been "appropriated in any manner whatever to, or for the benefit of, a shareholder. . .". I therefore think that the action of the Court of Queen's Bench

> in choosing this particular property to be used for satisfying Dr. Boardman's personal obligations to his wife can be regarded as an appropriation within the meaning of subsection 69(4).
>
> I am also satisfied that this appropriation, if sold at fair market value, "would have increased the corporation's income" for this taxation year. I must assume that the word "income" is used in the meaning attributed to it by the *Income Tax Act*. It is clear in section 3 of the Act, for example, that taxable capital gains are to be calculated as part of income for the purposes of the Act. It appears to me that any sensible reading of subsection 69(4) would indicate that it covers capital transactions if, had there been a real sale and fair market value received, the effect would have been to increase the corporation's income as calculated under the Act. That surely would have been the case here.

[37] According to the decision in *Park Haven Designs Inc. et al. v. The Queen*, 2007 DTC 350, there can be no disposition, deemed or otherwise, unless the so-called transferor “had” the property to dispose of it. This case involved a “skip transfer” in Alberta which provided for a transfer directly from the land developer to the owner avoiding the cost associated with an intervening title deed involving the builder. The Appellant in the present appeals claims to have implemented this technique in dealing with its customers.

[38] The circumstances in *Park Haven Designs* are similar to the facts respecting property 160. At paragraph 31 of *Park Haven Designs*, Miller J. stated:

> … Patrick House was built as a spec house. It was not built as a custom house for the Jaques, though ultimately they did reside in it. The Jaques did not transfer funds in trust on a progressive basis to Park Haven to have Patrick House built: they instead lent money on two occasions so that Park Haven could afford to build that House. The evidence supports the position that Park Haven intended to build a spec home, which Park Haven would eventually sell to a customer. Its income was not to be derived from a management fee, but from the ultimate disposition of the property. Under these circumstances, I find the monies used by Park Haven to buy the land were not trust monies from the Jaques - they were borrowed monies. It was intended that Park Haven acquire the property. Unlike the transfer of land of the Slopes House, which indicated consideration was received from Mr. Jaques, in the transfer of land for Slopes House, from the developer, Patterson Hills Development Corp. to Mr. Jaques, it stated:
>
> > In consideration of the sum of $76,000.00 paid to it by Park Haven Designs, receipt of which is hereby acknowledged, transfer to David Jaques.

> This is evidence of a Skip Transfer and supports the finding that Park Haven did have the property to dispose of. That being the case, subsection 69(4) does come into play.

According to this decision, even in the context of a skip transfer, the builder still "has" the property to dispose of it, despite the fact that title "skips over it" direct to the purchaser's hands.

[39] Lot 160 was purchased in January 2002 by the Appellant from the developer via a shareholder's loan. Construction of the house commenced in September 2002. According to the evidence of the Nowaks, the initial intention was to build a spec home and put it on the market for sale but this changed when the Nowaks, who were residing at 3139, had problems with their neighbour, Mr. Selwent, and had no other place to go. They moved into 160 in May 2003 despite only basic amenities being completed in order to escape this neighbour. The executed Offer to Purchase Residential Lot 160 (Exhibit R-11) listed the Appellant as "Purchaser" of this lot. At clause 6, it stipulates that the developer shall convey the lot to the Appellant, subject to permitted encumbrances. At Exhibit A-33, a lawyer's correspondence dated April 11, 2003 references the transfer of 160 as a sale to the Appellant with a resale to the Nowaks. In addition, it references a deed of conveyance from the developer, United Inc./Hidden Valley Holdings Ltd. This deed dated April 11, 2003 is contained at Exhibit R-13, the CRA Appraisal Report, and refers to the developer receiving the consideration for the lot from the Appellant but that the transfer is to the Nowaks "as joint tenants at the request of Stan Wire Application Ltd.".

[40] Whether this may properly be called a skip transfer or not, the end result is the same. Although I believe this is a skip transfer, the significant factor is that the Appellant made a request to have the land transferred to the Nowaks. As a pre-condition to the Appellant making such a request, it had to have some type of ownership interest or authority or power in conjunction with this property in order to be able to direct title to the Nowaks. It is reasonable to conclude that the Appellant disposed of 160 to the Nowaks. In addition, this lot was purchased with the Appellant's funds, obtained from a shareholder loan account. My conclusion is further supported by the evidence that 160 was initially purchased by the Appellant in order that a spec house could be built. This was not pursued because 160 was transferred instead to the Nowaks. All of this supports that the Appellant did have 160 to dispose of or which could be appropriated and therefore subparagraph 69(1)(b)(i) and subsection 69(4) can apply. It is a question of valuation whether these deeming provisions should apply in these appeals. Therefore, if there is to be

any deemed income inclusion pursuant to section 69, the FMV of 160 at the moment of its transfer from the Appellant to the Nowaks must be established.

[41] The value assigned to 160 by the Appellant at the time of the transfer in April 2003 to the Nowaks was $266,276.00 excluding GST. The Respondent relied on the appraisal dated November 9, 2007 completed by David Jang (Exhibit R-13) to argue that the FMV of 160 was $399,000.00 excluding GST, as of June 6, 2003. This appraisal was based on the value of comparable properties (Transcript, page 224) but was based on an exterior inspection only as the property had been resold at the date of the appraisal.

[42] For the purposes of section 69, property 160 is to be valued at the time of transfer to the Nowaks. If the house was incomplete as the Nowaks contend, then this must be factored into the valuation. Comments made by Miller J. in *Park Haven Designs* (paragraph 34 of the decision) also confirm this view. Miller J. found that the FMV of the property can be "… reached by adding an amount of 10% of construction costs … The management fee represents what a third party purchaser would have had to pay." This is essentially the business practice employed by the Appellant.

[43] Mrs. Nowak had the following comments in respect to the degree of completion of 160 (Transcript, page 62):

> …the house was not completed at that time, especially the things on the outside were not done because it was wintertime when the construction was going on, so things like stucco outside was not done, driveways -- driveways was not done, sidewalk, landscaping, deck and on the inside there was carpet, tile, shelving, they were not -- they were not done at that time. Landscaping was not done until 2005, and after moving into the house, lots of things were completed after that, and they were completed by Nowaks, not by Stan Wire.

[44] I accept Mrs. Nowak's evidence in respect to the condition of 160 at the time it was transferred from the Appellant to them. Substantial portions of the residence had not been completed and it was the Nowaks that completed the house subsequent to the transfer. The Appraisal Report (Exhibit R-13) does not account for this important factor. I am therefore rejecting the Report's suggested valuation of $399,000.00. Because the house was substantially incomplete, I believe the Appellant's valuation of $266,276.00 to be the more reasonable. In addition, the cost plus value consists of a profit margin that is in line with what the Appellant charged to third party clients (for example Mr. Selwent) which was approximately $25,000.00. Since this clearly was the Appellant corporation's usual business

practice, it seems to me to be unreasonable to permit the Minister to substitute its business judgment for that of the taxpayer.

[45] In summary, neither subparagraph 69(1)(b)(i) nor subsection 69(4) of the *Act* are applicable in respect of the transfer of 160 on the basis that the property was in fact transferred by the Appellant to the Nowaks at the appropriate FMV. As such the transfer of 160 by the Appellant to the Nowaks was not at a value that was less than FMV.

[46] A number of GST consequences flow from my conclusion concerning FMV. Since the NHR is calculated on FMV of the property (section 155 and paragraph 254(2)(b) of the *ETA*), the rebate claimed by the Appellant is accordingly accurate because 160 was in fact transferred at its FMV. Therefore, the Appellant is entitled to claim a NHR calculated on the amount the Nowaks paid the Appellant and not based on the Minister's suggested FMV in respect to property 160. In addition, I conclude that the Appellant did not under-report GST because the underlying value it used in its calculation was accurate in relation to my conclusion respecting FMV.

Property 3139:

[47] The same income tax issue is involved with property 3139, as it was for property 160, that is, whether section 69 of the *Act* applies to the transfer of 3139 from the Appellant to the Nowaks. Property 3139, unlike 160 which was initially purchased as part of the business of the Appellant, was from the outset purchased with the intent that it would become the personal residence for the Nowaks. When Mr. Nowak saw this lot he testified that he fell in love with the location but eventually, according to the Nowaks, problems with their neighbour rendered it impossible for them to continue to reside in this property. The Nowaks' evidence was that the Appellant's involvement in this purchase was solely in the capacity of acting for them personally in order to facilitate the purchase.

[48] The Nowaks testified that the developer's practice was to deal only with incorporated entities and therefore he refused to deal with the Nowaks personally. As a result, they used the Appellant corporation to complete the purchase in conjunction also with the Appellant's purchase of the adjacent lot 3135. The evidence supports that the Appellant was merely the conduit through which the Nowaks could complete the purchase and obtain the transfer of 3139 from the developer. The Nowaks were acting in their personal capacity in this purchase and not as shareholders on behalf of the Appellant. Essentially the Appellant acted on behalf of the Nowaks personally and pursuant to their instructions in what amounts

to an agency relationship in light of the common intention of all parties. Despite the lack of documentation to substantiate that 3139 was transferred from the developer to the Nowaks personally, using the Appellant corporation as the conduit, I am not persuaded that ownership was to have vested in the Appellant corporation for business purposes. As noted in *Dixon v. M.N.R.*, 92 DTC 1456, when considering oral testimony:

> … When the Court looks at non-arm's length transactions, it must balance the oral testimony carefully against the written documentation. It is incumbent upon a taxpayer to have the written documentation to a non-arm's length transaction in clear unequivocal form to back up the oral statements. …

[49] However, while I have no documentary evidence to support the Appellant's claim that 3139 transferred direct to the Nowaks personally, and this admittedly casts doubt on the entire arrangement, when I look at the evidence of the Nowaks as a whole I have no reason to disbelieve their testimony on this point. They were self-represented litigants who came to the hearing well prepared and I found their testimony to be straightforward and convincing. I have no reason to accept generally their evidence while rejecting what they told me respecting property 3139.

[50] Therefore, since the Appellant never acquired 3139, it could not later dispose of it at less than FMV nor could the property be appropriated by the shareholders. In these circumstances section 69 cannot come into play. Consequently, the FMV issue for income tax purposes is moot.

[51] Even if I had to determine the FMV of 3139, I would have concluded that the Minister's assumptions in this regard had been demolished so that a figure closer to that which the Appellant suggested would appear more reasonable in accordance with the evidence adduced. The Respondent's assessed value of $366,000.00 as of September/October 2002 was based not on an appraisal but on the sale price in April 2003. Again this is similar to the fact situation in *Park Haven Designs*. Here, as in *Park Haven Designs*, I must weigh the unsubstantiated evidence produced by the Respondent against the testimony of both Mr. and Mrs. Nowak respecting the degree of completion of 3139. While the Nowaks' valuation evidence is admittedly weak, it nevertheless remains stronger than the evidence produced by the Respondent.

[52] I turn next to the GST issues respecting 3139. According to the Respondent's Reply in the GST matter, the Nowaks acquired 3139 primarily for

the purpose of selling it at a profit, and not as their primary residence, which accordingly should disentitle them to the NHR which, pursuant to section 234 of the *ETA*, had been assigned to the Appellant. This issue is dependent upon whether the Nowaks purchased 3139 as their primary place of residence or primarily to resell at a profit. “Primary place of residence” is not defined in the *ETA* but a person can have only one primary place of residence, which is unlike the concept of “principal place of residence” for income tax purposes. Subsection 254(2) of the *ETA* states:

> *New housing rebate*
>
> (2) Where
>
> …
>
> (b) at the time the particular individual becomes liable or assumes liability under an agreement of purchase and sale of the complex or unit entered into between the builder and the particular individual, the particular individual is acquiring the complex or unit for use as the primary place of residence of the particular individual or a relation of the particular individual,
>
> …

[53] In *Seni v. The Queen*, [2005] G.S.T.C. 15, the meaning of “used primarily as a place of residence of the individual” as referenced in subsection 254(2) was discussed at paragraph 17:

> **17** I have no difficulty in concluding that Glengarry was not exempt from tax under Schedule V - Exempt Supplies, Part I - Real Property. As stated the Appellant stayed there on a temporary basis when he and his wife had marital difficulties. The expression "used primarily as a place of residence of the individual" was analyzed by Heald D.J. of the Federal Court of Appeal in Lacina v.Canada. He stated that the test set out by O'Connor J., the trial judge in the Tax Court of Canada, was valid and added:
>
> > There remains for consideration the question as to whether criteria (b) and (c) have been met in the circumstances of this case. It is the submission of the applicant that the word "primarily" as used in ss. 191(5) refers to the amount of space dedicated to a residence and not the enduring quality of the residence therein. On the other hand, the respondent submits that, used in this context, the word "primarily" refers to a personal intention to live there permanently

> and not to use the property as stock-in-trade or, in other words, as a disposable asset.
>
> I agree with the interpretation suggested by counsel for the respondent. The self-supply rules are designed to prevent a builder from gaining any advantage from occupying a residential complex, which is a part of his inventory, for a short time before selling it.
>
> Based on this interpretation of ss. 191(5), I conclude that the Learned Tax Court Judge correctly decided, on this record, that the applicant did not occupy Houses No. 1 or No. 3 primarily as places of residence. The occupants remained in House No. 1 for a period of approximately 2 to 4 months, and in House No. 3 for a period of approximately 4 to 7 months. The applicant's activities established an unmistakable pattern of operation. Clearly, the applicant built and sold the houses over a short period of time as an adventure in the nature of trade. His residence in these two houses did not possess the enduring quality required to support a finding that he occupied either of them "primarily as a place of residence".

[54] Although these comments were made in respect to exempt supplies of residential properties, section 3, Part I of Schedule V, the principles of statutory interpretation require that where the same words are used throughout a statute they be given the same meaning.

[55] The determination of whether an individual acquired the complex for use as the primary place of residence involves an evaluation of the intention of a purchaser at the time the agreement of purchase and sale is concluded. In *Coburn Realty Ltd. v. The Queen*, [2006] G.S.T.C. 54, Chief Justice Bowman made the following comments regarding the difficult task involved in determining a taxpayer's purpose and intent at a specific moment in time:

> **10** Statements by a taxpayer of his or her subjective purpose and intent are not necessarily and in every case the most reliable basis upon which such a question can be determined. The actual use is frequently the best evidence of the purpose of the acquisition. In *510628 Ontario Limited v. The Queen*, [2000] T.C.J. No. 451, 2000 G.S.T.C. 58, the following was said:
>
> > [11] It should be noted that the expression "for use primarily ..." (en vue d'etre utilisé) requires the determination of the purpose of the acquisition, not the actual use. Nonetheless, I should think that as a practical matter if property is in fact used primarily for commercial purposes it is a reasonable inference that it was acquired for that purpose.

> **11** I shall turn then to the actual use that was made of the boat. Mr. Coburn testified that the boat was used for entertaining clients and for rewarding his sales staff. He stated that the appellant was seeking to expand its business to cottage country. I accept that he wished to expand the appellant's business but I am not persuaded that the boat was used or was intended to be used primarily for business purposes. Although I think there was probably an element of business in some of its use, the evidence of its actual use does not support the conclusion that the primary purpose of its acquisition was for use in the appellant's business.

[56] In *Coburn Realty*, subsequent conduct was a consideration in determining intention at a relevant point in time. In applying this to the present appeals, the Appellant tendered into evidence a homeowner's insurance policy for 3139 (Exhibit A-3), which stipulated that the dwelling was not vacant or unoccupied and that it was classified as a "principal" dwelling type for the purposes of the policy. This policy was effective from October 31, 2002 to October 31, 2003. CRA Policy Statement P-228, issued March 30, 1999 and subsequently referred to in *Bérubé v. The Queen*, [2001] G.S.T.C. 129, referenced criteria which would be indicative of a primary place of residence and that list included the purchase of homeowner's insurance.

[57] In addition, the police reports (Exhibit A-4) support the testimony of the Nowaks that they moved from 3139 because of the unforeseeable circumstances with their neighbour at 3135 and not for reasons pertaining to resale of 3139 for a profit.

[58] However, I must weigh this evidence against the contradictory evidence that was suggestive of the motive for the acquisition being resale for profit. Within seven months of moving into 3139, the Nowaks sold to a third party for $131,000.00 more than the amount that had been paid for the initial transfer in the fall of 2002 ($366,000.00 – $235,000.00). There appeared to be an apparent pattern where the Nowaks would acquire houses and subsequently resell for a profit and therefore the Nowaks stated intention of purchasing 3139 as a primary place of residence becomes suspect. At the very least it hints that the possible motive could have been resale for a profit. Some of the statements respecting a mailing address made by Mrs. Nowak in cross-examination added to this suspicion. Mrs. Nowak testified that she chose to make property 160 their mailing address before even moving into 3139. This leads to the very valid question: did the Nowaks have the intention of moving into 160 prior to their move into 3139, leaving the impression that 3139 was not a true personal residence? There is no easy answer without a crystal ball to retroactively look into the thought processes of the Nowaks at that point in time. Without that crystal ball I must simply assess the evidence overall

and apply to all of it the most reasonable interpretation. After some reflection, I am accepting the Nowaks' explanation that 3139 had no mailing address while 160 did and that, for a period of time, this was the reason that they used 160 as their mailing address.

[59] Finally the Respondent also raised the doctrine of "secondary intention". In *Nowoczin v. The Queen*, 2007 DTC 949, the Court at paragraph 30 made the following comments respecting secondary intention:

> [30] An important issue to be examined is whether the circumstances disclosed by the evidence give rise to application of the doctrine of secondary intention. In order [for] to that to be present, the prospect of a resale at a profit must have been an operating motive for the purchase that existed at the point of acquisition. Whether such motive existed is a question of fact in each case to be determined from a reasonable, objective analysis of all the evidence…

[60] Upon review of all of the evidence, I remain unconvinced that an operating motivation for the construction and transfer of 3139 was in all probability a resale for profit. While the profit motive may have been in the back of their minds during the process, that is probably a common thought pattern with many people engaged in a real estate transaction.

[61] In summary, the Nowaks will be entitled to the NHR of $5,956.31, with the result that the assignment to the Appellant is validly made. Curiously, the Respondent did not rely on the alternative ground that it relied on in respect to property 3135; that is, that the Appellant was not a builder.

Property 3135:

[62] The issue respecting 3135 is whether the Appellant qualified as a "builder" as defined in the *ETA* which would entitle Mr. Selwent and by extension the Appellant to claim the NHR.

[63] To qualify for the rebate, the residential complex must be supplied by a "builder", in accordance with paragraph 254(2)(a) of the *ETA* which states:

> *New housing rebate*
>
> (2) Where

> (a) a builder of a single unit residential complex or a residential condominium unit makes a taxable supply by way of sale of the complex or unit to a particular individual,
>
> …

[64] The relevant portions of subsection 123(1) of the *ETA* defines "builder" as:

> *"builder"*
>
> "builder" of a residential complex or of an addition to a multiple unit residential complex means a person who
>
> (a) at a time when the person has an interest in the real property on which the complex is situated, carries on or engages another person to carry on for the person
>
> …
>
> (iii) in any other case, the construction or substantial renovation of the complex,
>
> …
>
> (Emphasis added)

This definition of "builder" is clearly different from its ordinary meaning because pursuant to this provision, a builder must have an interest in the property.

[65] The Respondent's position is that the Appellant is not a builder pursuant to subparagraph 123(1)(a)(iii) because the Appellant did not own the lot upon which the house was built. Because Mr. Selwent owned the lot and paid for it, the Appellant is not an owner of 3135 and it is not a builder (Transcript, page 324). This proposition is based on the fact that the Appellant arranged the transaction for 3135 so that transfer of ownership occurred directly from the developer to Mr. Selwent, the ultimate purchaser of 3135. This arrangement was outlined in the Preliminary Service Agreement (Exhibit A-6) between the Appellant and Mr. Selwent. Clause 1 of that Agreement, titled "Land Purchase", states:

> The contractor [the Appellant corporation in these appeals] agrees to purchase a lot on behalf of the purchaser [Mr. Selwent].
>
> Legally Described As …

> The purchaser agrees to pay for the above land the price set up by the Developer and fulfil the requirements set up in the Developer's purchase agreement. Land title will be transferred directly to the purchaser upon Developer receiving full payment.

[66] In addition, clause 2, titled "Construction", provides:

> (a) The contractor agrees to construct a residential dwelling according to the Alberta Uniform Building Code, City of Calgary by-laws …

[67] This Service Agreement is clearly not an agreement of purchase and sale. It is, as the name suggests, a contract to provide services including contracting, construction and related services to Mr. Selwent. Subparagraph 123(1)(a)(iii) merely requires that a builder acquire an interest in the property during the relevant period, as opposed to ownership *per se*. The term "acquisition of an interest" is by its very nature broader in scope than ownership. The provision, in referencing interest, does not specify that it must be an "ownership interest". The question therefore that must be addressed is whether the Appellant acquired an interest during the construction period in the lot at 3135 upon which it was constructing a dwelling for Mr. Selwent.

[68] Pursuant to the *Alberta Builders Lien Act*, subsection 6(1) allows for the creation of a lien in respect of work performed to the extent a person, which under that *Act* includes a corporation, remains unpaid for that work. The Appellant was not fully paid for its work performed on 3135 and so a lien created by this *Act* in its favour could have been potentially established pursuant to subsection 6(1) of this *Act*. Therefore, could the creation of a lien pursuant to this *Act* constitute an "interest in the property" as required by the definition of builder? According to former Chief Justice Bowman in *Superior Modular Homes Inc. v. The Queen*, [1997] G.S.T.C. 107, a mechanics lien is an interest in property. At paragraphs 6 and 7 he made the following comment:

> **6** I think a mechanics' lien, which under the provincial legislation arises when the work is begun or the material furnished, is an interest in land. It permits the lienholder to enforce his claim out of the land. I have no difficulty in concluding that a lienholder has an interest in the land to which the lien attaches until the claim is satisfied.
>
> **7** …

> In this jurisdiction the statute has included in the term "land" an equitable interest thereon. A mortgage and a mechanics' lien are each included in the term encumbrance. If a mechanics' lien does not constitute an equitable interest in land then a mortgage and encumbrance are in the same position, yet all of these have attached to them statutory rights and remedies in an against land which the Courts can pursue and make available for the payment of debt. …

[69] The evidence was unclear whether the Appellant ever registered a lien. A lengthy court case ensued with Mr. Selwent but it was never fully established that that was the result of the registration of a lien. In *Brial Holdings Ltd. v. M.N.R.*, [1993] G.S.T.C. 33 (CITT), the Canadian International Trade Tribunal, without any reference to the doctrine of mechanics liens, found that a taxpayer acquired an interest in a home while it was in the process of being built because it had supplied all the materials and labour. However, the caselaw in this area is inconsistent and in *Tugwell v. M.N.R.*, [1994] G.S.T.C. 31 (CITT), the NHR was disallowed even though the Tribunal was faced with a similar set of facts as in *Brial Holdings*. The distinction between contractor and builder was discussed in *494743 BC Ltd. v. The Queen*, [2007] G.S.T.C. 4, at paragraphs 25 to 28:

> **25** Section 254 of the *Act* enables a purchaser to recover the GST housing rebate directly from the builder by way of a payment of the rebate by the builder or credit against GST payable at the time of the sale. However, it is the submission of counsel for the Respondent that the Appellant is a general contractor and not a builder. Builder is defined in subsection 123(1) of the *Act.*
>
> **26** The definition in the *Act* for a "builder" is different from the ordinary connotations of the word. To be a builder under the *Act*, an interest in the real property is required or an interest in the complex had to have been acquired.
>
> **27** In this case, the land was owned by the purchasers not the Appellant. In this situation the Appellant had no interest in the land as is required to be a builder.
>
> **28** In this situation the purchasers hired the Appellant as a general contractor to construct their homes. For those reasons the Appellant does not meet the requirements of subsection 123(1) of the *Act* and is not a builder for the purposes of the *Act*. I have therefore concluded that the provisions in section 254 do not apply to the Appellant and it is not entitled to the New Housing Rebate.

[70] There is no way that these apparent inconsistencies in the jurisprudence can be reconciled. However, since the legislation requires that a builder have only an interest in the property, I believe that the Appellant had that interest as supported by the documentary evidence. Exhibit A-6, the Preliminary Service Agreement –

which according to Mrs. Nowak was the only service agreement – refers to the Appellant agreeing to purchase the lot on Mr. Selwent's behalf and supervising and assisting with all stages of the building process. This clearly identifies the Appellant as the builder of the residential complex although for the purposes of the Service Agreement, the Appellant is referred to as a contractor. According to the several pieces of correspondence at Exhibit A-7, the Appellant was required to authorize the direct transfer of title in 3135 to Mr. Selwent. The land developer, in its correspondence to solicitor David Block, encloses the skip transfer of title and references the written authorization by the Appellant for this transfer to occur. The developer also imposes several trust conditions on this transfer to Mr. Selwent, one of which was that the transfer document could not be used until "… Stan Wire's share of the City of Calgary 2002 Property Taxes …" be forwarded. All of this implies that all parties concerned with this transfer believed that the Appellant had an "interest" in 3135 that required its written consent before title could be transferred.

[71] In summary, the Appellant was a builder pursuant to subsection 123(1) of the *ETA* and therefore the Appellant is entitled to the NHR in respect to 3135 that had been assigned to it by the purchaser, Mr. Selwent. In addition, I accept the Appellant's evidence respecting the amount of $761.36, which the Respondent claimed that the Appellant failed to report. On cross-examination, Mrs. Nowak stated that she always reported the actual GST paid and not generally the tax because some small contractors and suppliers for various reasons did not charge GST.

Property 1169:

[72] Although the Minister did not assess a FMV difference in respect to 1169, the Respondent submits that the Appellant provided its services to build 1169 and that the Nowaks received goods and/or services on which GST should have been paid. The Appellant has been assessed therefore for unremitted GST. Because the Appellant and the Nowaks are not dealing at arm's length, section 155 of the *ETA* is triggered to deem any supplies by the Appellant to the Nowaks to be made at FMV, for which tax is to be remitted.

[73] The Nowaks submit that the Appellant was not involved in the construction process of 1169 and did not claim ITCs.

[74] The evidence supports that the Nowaks used the Appellant as a conduit through which they dealt with the suppliers. Exhibit R-2 makes this clear. In

particular cheques 0159, 0169, and 0174 of this exhibit substantiate that the Appellant was in fact involved in the construction process of 1169. What must be addressed therefore is whether the Appellant's involvement constituted a "supply" pursuant to the *ETA* and in particular did the Appellant render a service to the Nowaks.

[75] The Appellant set the Nowaks up with the suppliers and completed transactions on their behalf. The Appellant's involvement could be compared to the service performed by a placement agency where clients are put in touch with prospective employers. Because of the breadth of the scope of the definition of "service" pursuant to subsection 123(1), I think this involvement is a service and therefore a taxable supply.

[76] In terms of valuing this service, the only evidence adduced of the Appellant's involvement was the cheques contained at Exhibit R-2. A reasonable value of this service would seem to be the Appellant's normal management fee, that is 10 to 15%, in proportion to the amount of these cheques. In addition, the Appellant produced no evidence to counter the Minister's assumption that the Appellant provided a builder's warranty on 1169. This is also a service which the Appellant provided for which it should have charged and collected tax. However, there was no evidence adduced to enable me to attach a value to this service.

Section 280 *ETA* Penalties:

[77] Gross negligence penalties were assessed in accordance with the former penalty provision – section 280 of the *ETA*. This appeal is largely valuation driven and as a result varying opinions may exist without a precise resolution being produced. Bell J. in *Marall Homes Ltd. v. The Queen*, [1995] G.S.T.C. 70, stated:

> … This is a valuation case where difference of opinion is expected. To levy a penalty in a valuation case is, in my opinion, inappropriate unless the taxpayer's initial filing was demonstrably wrong and made without any attempt to determine market value. …

[78] The evidence supports that the Appellant made inquiries respecting the FMV of the properties. The Appellant also charged itself amounts which were similar to amounts it charged third party customers. In these circumstances, I do not believe that penalties are warranted.

[79] The appeals are therefore allowed to reflect the following:

Income Tax Issues:

(1) Property 160 was transferred by the Appellant to the Nowaks at the correct FMV, as assigned by the Appellant, of $266,276.00. Therefore there are no additional amounts to be included in the Appellant's income.

(2) The Appellant, having never acquired property 3139, cannot dispose of it thereby rendering the FMV issue moot.

(3) The Nowaks' testimony, respecting the amount of $761.36, which the Respondent asserts was not reported by the Appellant, provided a satisfactory explanation for this difference.

GST Issues:

(1) Based on my conclusion that property 160 was transferred at its FMV, the Appellant will be entitled to the NHR as assigned by the Nowaks.

(2) There was no under-reporting of GST because the underlying value of 160 used in the Appellant's calculation was accurate.

(3) Property 3139 was purchased as a primary place of residence as defined in the *ETA* and therefore the Nowaks will be entitled to the NHR with the result that the assignment to the Appellant has been validly made.

(4) In respect to property 3135, based on my finding that the Appellant was a builder pursuant to subsection 123(1) of the *ETA*, the Appellant will be entitled to the NHR assigned to it by the Purchaser.

~~(5) The Nowaks' testimony, respecting the amount of $761.36, which the Respondent asserts was not reported by the Appellant, provided a satisfactory explanation for this difference.~~

(5) In respect to property 1169, the Appellant provided a service in assisting the Nowaks with this construction and therefore the value of this service shall be the Appellant's usual management fee 15% in proportion to the amount of the cheques at Exhibit R-2: $294.00, $1,401.05 and $2,461.76.

Penalties:

(1) Penalties shall be deleted.

[80] There shall be no order as to costs.

Signed at **Ottawa**, **Ontario**, this **23rd** day of **October** 2009.

"Diane Campbell"

Campbell J.

CITATION:	2009 TCC 425
COURT FILE NO'S.:	2007-3779(IT)G and 2007-4174(GST)I
STYLE OF CAUSE:	Stan Wire Application Ltd. and Her Majesty the Queen
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	March 30, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	September 9, 2009
DATE OF AMENDED JUDGMENT:	**October 23, 2009**

APPEARANCES:

Agent for the Appellant:	Agata Nowak
Counsel for the Respondent:	Margaret M. McCabe

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada