

Docket: 2011-778(GST)I

BETWEEN:

CLAUDE MERCURE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 7, 2012, at Québec, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

For the appellant: The appellant himself

Counsel for the respondent: Olivier Julien

JUDGMENT

The appeal from the assessment made pursuant to Part IX of the *Excise Tax Act*, the notice of which is dated September 24, 2009, and bears number 85345 6457 RT001, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of May 2012.

"Alain Tardif"

Tardif J.

Translation certified true
on this 9th day of January 2013

François Brunet, Revisor

Citation: 2012 TCC 148
Date: 20120529
Docket: 2011-778(GST)I

BETWEEN:

CLAUDE MERCURE,

Appellant,

and

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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision refusing an application for rebate on the grounds that it was filed after the time limit set out in subsection 256(3) of the *Excise Tax Act* (the Act), which reads as follows:

256 (3) A rebate under this section in respect of a residential complex shall not be paid to an individual unless the individual files an application for the rebate on or before:

(a) the day (in this subsection referred to as the "due date") that is two years after the earliest of

(i) the day that is two years after the day on which the complex is first occupied as described in subparagraph (2)(d)(i),

(ii) the day on which ownership is transferred as described in subparagraph (2)(d)(ii), and

(iii) the day on which construction or substantial renovation of the complex is substantially completed; or

(b) any day after the due date that the Minister may allow.

[2] To explain her decision, the respondent assumed the following facts:
[TRANSLATION]

- (a) The appellant received a building permit from the City of Lévis on November 9, 2005, for a term of one year and did not subsequently apply for an extension of the said permit;
- (b) The appellant's spouse notified the respondent of her change of address on December 1, 2005;
- (c) The appellant proceeded with his change of address on his driver's licence on February 20, 2006;
- (d) The appellant notified the respondent of his change of address on March 27, 2006;
- (e) The appellant acknowledged that he moved into the building in April 2006;
- (f) The appellant's spouse proceeded with her change of address on her driver's licence on May 8, 2006;
- (g) On or around October 25, 2006, the building located at 258 rue des Mésanges in Saint-Nicolas was entered on the municipal roll;
- (h) The appellant received a municipal tax adjustment for the completed house, entered on the roll, for the period from October 25, 2006, to December 31, 2006;
- (i) The invoices submitted by the appellant were checked during the verification carried out by the respondent;
- (j) The respondent noted that the cost of the work from the start of construction to December 31, 2006, was \$182,572.24;
- (k) The respondent noted that the cost of the work in 2007, for the purchase of exterior stones, mouldings and ceramics, was \$2,389.50;
- (l) The respondent noted that the cost of the work in 2008, for the purchase of paint, sod and exterior membranes, was \$2,463.20;

- (m) The respondent noted that the cost of the work in 2009, for the purchase of paint and lighting fixtures, was \$191.60;
- (n) Consequently, the work performed after 2006 was minimal and the house was substantially completed in December 2006.

[3] In support of his case – and he had the burden of proof – the appellant first admitted that all the facts assumed to be true were correct. He explained the difficulties he had experienced before the filing of his claim.

[4] This was a self-construction project; he and his spouse were the contractors and performed some of the work themselves. Their planning for their project was disrupted when they received a very good offer for the condo they were living in. After accepting the offer and since they did not have any children, they decided to live in their home under construction, even though the premises were practically uninhabitable. Then another unexpected event occurred: a child was on the way.

[5] With a baby on the way, they had to give priority to some work that would make the premises less dusty and healthier for the baby over other work that may have helped them live there more normally. Aware that the work could not proceed according to the initial planning, the appellant took a number of measures vis-à-vis the authorities to prevent his application from being disqualified because of exceeded time limits.

[6] The only issue is whether the appellant's claim is admissible or not. In other words, was the application for rebate filed within the specified time period?

[7] According to the relevant provisions, the commencement of the rebate time period is based on the state of the premises, and read as follows:

256 (2) Where

(a) a particular individual constructs or substantially renovates, or engages another person to construct or substantially renovate for the particular individual, a residential complex that is a single unit residential complex or a residential condominium unit for use as the primary place of residence of the particular individual or a relation of the particular individual;

(b) the fair market value of the complex, at the time the construction or substantial renovation thereof is substantially completed, is less than \$450,000;

(c) the particular individual has paid tax in respect of the supply by way of sale to the individual of the land that forms part of the complex or an interest therein or in respect of the supply to, or importation by, in individual of any improvement thereto or, in the case of a mobile home or floating home, of the complex (the total of which tax under subsection 165(1) and sections 212 and 218 is referred to in this subsection as the "total tax paid by the particular individual"),

(d) either

(i) the first individual to occupy the complex after the construction or substantial renovation is begun is the particular individual or a relation of the particular individual, or

(ii) the particular individual makes an exempt supply by way of sale of the complex and ownership of the complex is transferred to the recipient before the complex is occupied by an individual as a place of residence or lodging.

the Minister shall, subject to subsection (3), pay a rebate to the particular individual ...

[8] The purpose and objectives of these provisions are numerous, and include fostering access to ownership, job creation, support for young families, and so on.

[9] In the light of these objectives, the provisions must have some flexibility, particularly in the case of a self-build construction project where the interested persons are particularly concerned about costs. They embark on the undertaking in order to save, which often leads to delays in filing their application for rebate; they want to recover as much as possible, which is completely legitimate.

[10] However, it is also normal for time limits to be set, failing which the program would become completely unmanageable. In this case, the appellant provided explanations that were specific and endearing.

[11] In a self-built construction project, the owners, in this case the appellant and his partner, are generally more flexible, and more tolerant and accepting of the relatively difficult living conditions. Managing how the project progresses, often by performing the usually very costly finishing work themselves, the interested persons are more open to the constraints created by unfinished work.

[12] To be admissible, the application for rebate is clearly subject to requirements and time limits. The main difficulty is identifying "D" day. The references and criteria provided to pinpoint "D" day are not as clear as those for the date of an accident, the date of a fire, the date of a document, and so on. The time limit is determined and applied in accordance with subsection 256(3) of the Act.

[13] This situation gives rise to some subjectivity in the assessment since the calculation is based on the state of the premises, which cannot be determined in absolute terms. Thus, over time, the notion of 90% completed has been introduced; this measurement is not absolute from the point of view that a claim can be admissible on a specific day and not the next day.

[14] To pinpoint the date from which the time period should be calculated, we refer to an assessment in the context of a reasonable person. Yet, even for a reasonable person, it is not easy to draw the line and determine precisely what "substantially completed" means. In a self-construction project, the interested persons often assign the rough work to third parties and do the finishing work, usually longer and more expensive, themselves.

[15] In this case, the appellant clearly explained the developments in his very well organized case. He submitted a case of irreproachable quality. The explanations about the date of certain invoices taken into account by the respondent are plausible and very credible.

[16] Beyond the explanations provided, the appellant made admissions, the scope of which is determinative of the appeal. To illustrate the situation, I think it is useful to provide the following excerpt of the appellant's testimony:

[TRANSLATION]

TESTIMONY OF CLAUDE MERCURE (duly sworn):

HIS HONOUR: Mr. Mercure, following your objection and your notice of appeal, in particular, there was what's called a "reply to the notice of appeal".

MR. MERCURE: Correct.

HIS HONOUR: In the reply to the notice of appeal, the Department described the facts or chronology of the facts on which it based itself to ultimately render the decision with which you disagree. If you'll allow me, we'll go through these facts and you'll tell me whether you admit that the alleged facts are true, don't know or deny them. That will enable us to identify more quickly what is specifically at issue.

MR. MERCURE: Perfect.

HIS HONOUR: OK?

MR. MERCURE: Hmm.

HIS HONOUR: So the paragraph on page 3:

"In denying the application for rebate, the Department based itself on the following conclusions and assumptions of fact..." -- As read.

MR. MERCURE: I'll just get out my document..

HIS HONOUR: Yes. Do you have a pencil or a pen?

MR. MERCURE: Yes, of course.

HIS HONOUR: At this point, you can perhaps take notes at the same time so as to...

MR. MERCURE: Yes, well, I had already taken---

HIS HONOUR: OK

MR. MERCURE: ---a few, but go ahead.

HIS HONOUR: Paragraph (a), and you say "I admit it", "I don't know" or "I deny it".

MR. MERCURE: I admit it.

HIS HONOUR: (b)?

MR. MERCURE: In fact, if you want to save time, I admit all of them.

HIS HONOUR: Yes, but...

MR. MERCURE: Very well, my spouse, yes, I admit it.

HIS HONOUR: (c)?

MR. MERCURE: I admit it too.

HIS HONOUR: (d)?

MR. MERCURE: I admit it.

HIS HONOUR: (e)?

MR. MERCURE: I admit it.

HIS HONOUR: (f)?

MR. MERCURE: I admit it. g), I admit it.

HIS HONOUR: (h)?

MR. MERCURE: I admit it too.

HIS HONOUR: (i)?

MR. MERCURE: I admit it.

HIS HONOUR: (j)?

MR. MERCURE: I admit it.

HIS HONOUR: (k)?

MR. MERCURE: I admit it.

HIS HONOUR: (l)?

MR. MERCURE: I admit it.

HIS HONOUR: (m)?

MR. MERCURE: I admit it.

HIS HONOUR: And finally (n)?

MR. MERCURE: I admit it too.

- HIS HONOUR: And the controversy: do you understand what is primarily in dispute?
- MR. MERCURE: Yes.
- HIS HONOUR: I'm listening.
- MR. MERCURE: Well..
- HIS HONOUR: I'll tell you right away... I'll explain very briefly how the proceedings are conducted. When someone decides to appeal, that person assumes what we call, in legal jargon, the "burden of proof".
- MR. MERCURE: Yes.
- HIS HONOUR: That means that it's your responsibility to assume the burden of proof and show that your claims are well founded. Following your testimony, the opposing party can cross-examine you. If the opposing party decides to hear witnesses, you'll have the same right to cross-examine them.

[17] The appellant is someone who grasps matters quickly and thoroughly. He is very organized and articulate. He was also very well prepared. In the light of that, I cannot set aside his admissions, which are very clear.

[18] The objective of the appellant's appeal is, effectively, that the Court should set aside the provisions of the Act.

[19] Certainly these provisions leave room for interpretation so that the fateful day from which the time limit is calculated can vary. In this case, the appellant made an admission that left no room for ambiguity or interpretation. That admission clearly pinpoints the date from which the time limit is calculated.

[20] The jurisdiction of the Court has limits; these limits are that it must comply with the provisions of the Act. Only Parliament can amend the Act. The appellant himself identified, through his admissions, the date from which the time limit was calculated.

[21] Consequently, the appeal must be dismissed since the claim was filed after the expiry of the time limit specified by the Act.

Signed at Ottawa, Canada, this 29th day of May 2012.

"Alain Tardif"

Tardif J.

Translation certified true
on this 9th day of January 2013

François Brunet, Revisor

CITATION: 2012 TCC 148

COURT FILE NO.: 2011-778(GST)I

STYLE OF CAUSE: CLAUDE MERCURE AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: February 7, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENT: May 29, 2012

APPEARANCES:

For the appellant: The appellant himself

Counsel for the respondent: Pier-Olivier Julien

COUNSELS OF RECORD:

For the appellant:

Name:
Firm:

For the respondent: Myles J. Kirvan
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