TAX COURT OF CANADA

IN RE: THE EXCISE TAX ACT

2004-3010(GST)I

BETWEEN:

DAVID K. ANDERSON and WENDY ANDERSON,

Appellants;

- and -

HER MAJESTY THE QUEEN,

Respondent.

Held before Mr. Justice Teskey at Courts Administration Service, Courtroom No. 602, 6th Floor, 701 West Georgia Street, Vancouver, B.C., on Tuesday, January 11, 2005.

APPEARANCES:

Mr. D.K. Anderson, For the Appellants;

Mr. S. Repas, For the Respondent.

THE REGISTRAR: L. Giles

Allwest Reporting Ltd.
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Per: S. Leeburn

REASONS FOR JUDGMENT

(Delivered Orally in Vancouver, B.C. on January 11, 2005)

JUSTICE: The appellant appeals a reassessment of tax assessed under the *Excise Tax Act of Canada*, the GST provisions thereof.

The facts are not in dispute. The appellants, David Anderson and Wendy Anderson, are husband and wife and they are a partnership. The only evidence given was by David Anderson (Anderson), and counsel for the respondent did not cross-examine Anderson on his testimony, therefore the facts given by Anderson are accepted by the Court without reservation.

The partnership is in the business of land development and house construction. The partnership is registered under the *Excise Tax Act* for GST purposes and files its returns annually.

In December of 2000, a written residential tenancy agreement was entered into by Anderson as landlord, with a tenant by the name of Tom Ball (Ball). At the time this agreement was entered into, it was contemplated that the appellants would construct a 3,600 square foot residence on a specified parcel of land. It was a term of the agreement that the basement would be finished and available to rent to a tenant. This tenancy agreement was obviously prepared by lay people, and was executed. No plans or specifications are

attached to it. I am satisfied that the parties had a meeting of mind as to what was going to be produced, namely a completed 3,600 square foot house in which the basement could be rented out to third parties.

Early in the year 2000, the appellants applied for and received a building permit, which only covered the completion of the first and second floor and not the basement. The building progressed. It was not a straight forward progression in that there was a general contractor, Parkridge Homes, that was doing some of the construction; the appellants were also doing some of the work and they also hired subs directly, usually the subs that Parkridge Homes were using. At the same time, the proposed tenant, Ball, was doing some of the work.

I find as a fact that the written tenancy agreement contemplated a complete building, with three floors completed, namely a basement and the first and second floors. I find as a fact that Ball and his wife moved in when the basement had not even been started, cement floor and nothing else. I find as a fact that there was no landscaping whatsoever at that time. I find as a fact that by August of 2001, that the first and second floors for all intents and purposes were substantially complete.

Ball moved into the premises and occupied only the first and second floor. He did this without permission of

either the general contractor Parkridge Homes, or the appellants. The appellants did not bring an action for trespass, did not bring an action to eject them from the premises, but condoned the occupation and negotiated with them that the rent would be $1,500 a month until the basement apartment was completed, the agreement calling for $2,300 a month for all three floors on completion. It is immaterial whether you look at the written tenancy agreement as having been amended or whether it was just a new oral agreement. That is what was done.

The basement was completed in February of 2002, and the rent went up to the $2,300 as originally agreed upon. At that time it was agreed that the value of the property was $306,000.

Almost to a year later, the parties entered into a written agreement wherein Ball, the tenant, would purchase the completed house from the appellants. The written contract is quite clear. House price 350,000. Appliances and equipment 10,000. Total house, appliances and equipment 360,000. GST 25,200. Total price 385,200. Paragraph 9(b) of this written purchase and sale agreement states:

> "The purchase price includes GST. The vendor will pay the applicable house and land GST. The purchaser will sign any necessary documentation prepared by the vendor to complete the GST new

> home rebate application for the vendor. The purchaser warrants that the property will be his principal residence. This condition is for the sole benefit of the vendor."

It is agreed that about March 1st, 2002, the value of the property was $360,000. The appraiser who prepared the evaluation took into consideration that the landscaping had not been done but that figure reflected as if the landscaping was done or would be done.

The respondent's position is that the moment the tenant moved into the property, there was a deemed self-supply pursuant to the provisions of Section 191(1) of the *Excise Tax Act.* Although it is not clear what the appellant's position is, it appears to me his best position is that "I was building a house for Ball in which he was to get 3,600 square feet all completed, the bottom 1,200 feet was to be a self-contained unit available to be leased to a tenant, and that since the basement 1,200 feet was not available for occupancy until the end of February in 2002, that is when the building would be substantially complete."

Section 191(1) under the heading "Self-Supply of Single Unit Residential Complex" -- Section 191(3) deals with self-supply of a multi-unit residential complex. I am satisfied that the wording of those two sections is so similar that they both say the same thing. I believe that in this case

the assessment should be pursuant to Section 191(3) and not 191(1), what was being supplied here was a building containing two units, with separate tenants to occupy each unit.

There was a bulletin from the CCRA in 2004, # 10, thus if this was a single unit, 3,600 square feet, we are under 191(1). If it is two units, we are under 191(3). The bulletin is not the law, what governs is the wording of the statute. The bulletin talks about where there are more than one unit, and it says that when the first unit is occupied you have a deemed sale.

I would point out that Exhibit A-5 does not contain any options to purchase. It is simply a residential house agreement. The purchasers had no right enforceable in law to buy that house from the appellants until the written contract (Exhibit A-7) was executed. It may have been understood all along between Ball and the Andersons that they were going to buy it, however Ball certainly had no enforceable rights to purchase the complex.

Several cases have been referred to me. The first case is by my former colleague Mogan J. in *Lawson (W.) v. Canada*, 1995 CarswellNat 49, [1995] G.S.T.C. 59. In that case, Mogan J. was dealing with a single family house that was completed in June of 1990. That is when the real estate market crashed right across this whole country, and the appellant builder therein could not sell the house. It was

listed with real estate agents. Although it was completed in June, it had actually been listed the month before. That was in 1990 and in October of '91, a year and some-odd later, the property not having sold the appellant therein put a tenant in the house.

It should be pointed out that Mogan J. was dealing with 191(1)(*a*). If I can presume to translate this subsection into more understandable language, it states that where a new housing unit has been constructed, the builder is deemed to have made and received a taxable supply by way of sale of the housing unit at the later of two times, either the time when the construction was substantially completed - (that would have been June '90) -- or the time when possession of the housing unit was first given. Mogan J. held that the deemed self-supply was when it was first rented.

The provision of the *Act* is quite clear:

> "The builder shall be deemed to have made and received at the latter of the time construction or substantial renovation is substantially completed, and the time possession of the complex is so given."

It is not the first, and that is what Mogan J. says.

My colleague Beaubier J., in *Phillips (L.E.) v. Canada*, 1995 CarswellNat 36, [1995] G.S.T.C. 39, was dealing with a builder occupier, owner occupier, and he held

in paragraph 6:

> "Mr. Johnson testified that the house was completely closed in, and from his testimony and his description of the premises at the time, the Court finds that it was completely capable of being inhabited. As Mr. Johnson stated, the outside work remaining to be done was seasonal. The interior was capable of being lived in while the appellant and his wife, who did much of the interior work and painting, completed the minor finishing that remained."

So he came to the conclusion that the house was fully capable of being used for the purposes it was constructed, and was occupied.

My colleague Sarchuk J., in *Kornacker (A.) v. Canada*, 1996 CarswellNat 638, [1996] G.S.T.C. 21, 4 G.T.C. 3057, dealt specifically with the penalty and interest and says that the language found in Section 280 of the *Excise Tax Act* is extremely similar to some sections in the *Income Tax Act,* and I particularly make reference to the phrase:

> "... the person shall pay on the amount not remitted or paid
>
> (a) a penalty ... and
>
> (b) interest ..."

He held that the word "shall" in Section 280 of the *Excise Tax*

Act was mandatory. Thus when the conditions required are met, the penalty and interest must be imposed. It is not a discretionary thing on behalf of the Minister.

My former colleague Hamlyn J., in *Vallières v. R.*, 2001 CarswellNat 1689, 2001 G.T.C. 545,[2001] G.S.T.C. 97, [2001] T.C.J. No. 528 (Q.L.), said:

> "To be 'substantially completed', a residential complex must be capable of being used for the purpose for which it was constructed.
>
> In determining what constitutes 'substantial completion'..., a certain common-sense assessment of what, ..., a reasonable person would regard as substantial completion."

He was dealing in that case with a taxpayer that was building a house for himself. A taxpayer that builds his own house has the right to apply to get a rebate. The taxpayer pays 7 percent for everything he does during the construction; pays 7 percent to the concrete people, 7 percent to the lumber yard, 7 percent to all his trades. A new house doesn't attract 7 percent if it's under a certain value. The *Act* states that you have to apply for the rebate within a certain length of time. Hamlyn was dealing with this situation.

You will find in all of these cases dealing with the required time to apply for the GST rebate, that the

Court is bending over backwards not to find that the application was late. A taxpayer is entitled to a rebate of approximately 3 percent.

MR. REPAS: 4.48, Your Honour. I can say 4.48.

JUSTICE: Yes. We have all had many of these cases where the CCRA were absolutely hard-nosed about it, and myself included, we would try and find where we could so that the taxpayer was not denied that 3 percent rebate that he or she was entitled to. I believe when you interpret these cases you must realize what the justices were trying to do.

Now my colleague Louise Lamarre Proulx J.'s in *Tessier v. R.*, 2001 CarswellNat 3791, [2001] G.S.T.C. 142, -- (and I must say she is one of my colleagues that I have the utmost respect for. I think her decisions are right on. We all disagree with each other at times, but Justice Lamarre Proulx is one I have never disagreed with in all her judgments) was dealing with a duplex. The upstairs was rented in May of '96. The taxpayer moved into the ground floor. The Minister took the position the construction had been substantially completed and therefore they only had till May of '98 to apply for the rebate, and it was not filed till May of 2000. She allowed the appeal. The evidence indicated the initial plan was to construct a multifamily residence with two floors, and the completion of the basement was part of the

plan. She held that the time period did not start until the residence was capable of being used for the purpose for which it was constructed. That had not been established.

I think her case is basically all on fours with the case before me. Yes, the tenant moved in. Yes, the tenant paid rent. But it was not what was agreed upon. There had to be a third floor, namely the basement, and that was not completed until 2002. The *Act* is quite clear:

> "The builder shall be deemed to have made and received at the latter of the time the construction was substantially completed, and the time possession of the complex is given."

It is not the first event, it's the latter event that governs. I find that the basement was not substantially complete. It had not even been started and was not substantially completed until February or March of 2002, and that is when the builder, the appellants herein, are deemed to have sold it.

The appeal is allowed. The assessment is referred back to the Minister for reconsideration and reassessment on the basis that in the year 2001, there was not a deemed sale of the property known as 1499 for 306,000, and therefore from the assessment the sum of $21,420 is to be removed therefrom and all penalties and interest relating thereto. Your assessor understands that?

MR. REPAS: I am sure the order will read -

- I understand that the appeal has been allowed.