

Docket: 2019-3295(GST)G

BETWEEN:

2437299 ONTARIO INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on September 26th-29th, 2022, at Toronto, Ontario

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant: Muhammad Abbas

Counsel for the Respondent: Natasha Tso

JUDGMENT

The appeal as to the reassessments under the *Excise Tax Act* raised June 13, 2019 for the reporting periods of January 1, 2017 to March 31, 2017 and April 1, 2017 to June 30, 2017 respectively, is allowed, with costs.

Both reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant had not substantially renovated the Fourth Road property in Mississauga, and also had not substantially renovated the Craven Road property in Toronto.

Signed at Winnipeg, Manitoba, this 7th day of December 2023.

“B. Russell”

Russell J.

Citation: 2023 TCC 165
Date: December 7, 2023
Docket: 2019-3295(GST)G

BETWEEN:

2437299 ONTARIO INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Russell J.

I. Overview:

[1] The appellant, 2437299 Ontario Inc., was engaged in the business of building and renovating residential premises. The appellant has appealed two reassessments of GST/HST collectible, both raised June 13, 2019 under the federal *Excise Tax Act* (Act) for the respective reporting periods of January 1, 2017 to March 31, 2017 and April 1, 2017 to June 30, 2017.

[2] The appeal concerns renovations made by the appellant to two residential properties, each of which the appellant in the conduct of its business had purchased, renovated and then sold to an arm's length party. One of these residential properties is situated on Craven Road in Toronto (the Craven Road property) and the other is situated on Fourth Street in Mississauga (the Fourth Street property).

II. Statutory Context:

[3] At all material times the appellant was aware of the concept of “substantial renovation”. The Minister of National Revenue (Minister) raised the appealed reassessments on the basis of her assumption that the appellant had engaged in “substantial renovation” in renovating each of the two said properties.

[4] The term “substantial renovation” is defined at subsection 123(1) of the Act as follows, in relevant part:

“substantial renovation” of a residential complex means the renovation or alteration of the whole, or that part of a building, [...] to such an extent that all or substantially all of the building [...] other than the foundation, external walls, interior supporting walls, floors, roof, staircases [...] that existed immediately before the renovation or alteration was begun has been removed or replaced...

[5] Notably a key aspect of this definition is that the renovation or alteration be, “to such an extent that all or substantially all of the building was...removed or replaced”.

[6] The respondent pleads that for each property that the appellant had substantially renovated, the appellant accordingly met the Act’s subsection 123(1) definition of “builder”. The respondent further pleads that this caused each sale of the two properties by the appellant to not be exempted from application of section 2 of Part V of the Act. The respondent thus pleads that each property sale constituted a taxable supply in the course of the appellant’s commercial activities and accordingly was subject to GST/HST, as reflected by each of the two appealed reassessments for GST/HST collectible.¹

[7] The respondent also has pleaded that the appellant is not entitled to the new housing rebate in respect of the sale of each of the properties. This is because, in the absence in each case of an agreement between the appellant and the property purchasers in the appellant’s sale of the properties, the rebate belongs to the purchasers pursuant to subsections 254(2) and (4) of the Act.²

III. Issue:

[8] Only one issue was pursued in this appeal, being whether the appellant’s renovation work in respect of each of the two properties constituted “substantial renovation”. The appellant submits that both appealed reassessments are wrong on the basis that the renovation work it carried out in respect of each property did not constitute “substantial renovation”.

¹ Respondent’s Reply, paras. 15-18

² Ibid., para. 20

IV. CRA Bulletin:

[9] In January 2005, the Canada Revenue Agency (CRA) issued a GST/HST Technical Information Bulletin identified as B-092, entitled, “Substantial Renovations and the GST/HST New Housing Rebate”. This non-legally binding but detailed and lengthy document identifies three methods as being “typically” used to determine the extent of renovations; i.e., whether or not “substantial”. They are (1) square footage of floor space of areas renovated compared to total floor space of the building; (2) square footage of floor and wall space of the areas, renovated compared to the total floor and wall space of the building; and (3) number of rooms renovated compared to the total number of rooms in the building. The method accepted by both parties here is the second of these three - being the total area of renovated floor and wall spaces in comparison with the building’s total area of floor and wall spaces.

[10] Also, CRA bulletin B-092 states in part that “substantial renovations” means renovations to 90% or more of the building. As noted in *Whittall v. R.*, 2017 TCC 212 per Boccock J., this 90% figure generally has been judicially accepted as reflective of the phrase “all or substantially all”.³ However, typically the Court finds it unfeasible or otherwise undesirable to engage in a complex arithmetic analysis as to whether the 90% threshold specially was met. As noted the 90% figure does not appear in the “substantial renovation” statutory definition.

V. Evidence:

[11] At the hearing three witnesses testified – Messrs. S. Ahmad and S. Shaikh for the appellant and Mr. N. Nandakumar for the respondent. Mr. Ahmad is professional civil engineer with a PhD in structural engineering. He founded the appellant and its business and was its president. Mr. Shaikh has a university degree and worked for the appellant in 2015 and 2016 as project manager of both of these property renovation projects. Mr. Nandakumar has an accounting degree and is an Ontario chartered professional accountant. He was the CRA Appeals Officer in this matter.

[12] Each witness testified credibly as to his recollection and/or understanding as to what renovation work was done.

A. Craven Road property

³ *Whittall*, paras. 9, 10

[13] The oral and documentary evidence establishes that the Craven Road property was a basic bungalow when purchased by the appellant for renovation and re-sale. In its pre-renovation state, this house had an unfinished basement with a concrete foundation. On the main floor, there was a bedroom, kitchen, bathroom, combined living/dining room and small study. There were no other floors.

[14] The kitchen had a substantial portion of its interior perimeter wall constructed of plaster. The appellant replaced that plaster with drywall. The remainder of the kitchen wall and all other interior walls were already constructed of drywall. Also, the appellant re-located the kitchen from the rear to the middle of the main floor.

[15] Also, the work done by the appellant on the Craven property included constructing two additions, one being an extension of the main level at the back of the house and the other being the addition of an entire second floor, complete with three bedrooms, plus an ensuite and a regular bathroom.

[16] On the main floor in addition to the kitchen being moved the bedroom was taken out, a family room was in the extension at the back of the house, the former living/dining room was not significantly changed but became simply the dining room, and interior stairs were added extending from the basement to the two upper levels.

[17] Windows on the side walls of the main level were closed off, a window at the front was enlarged and a window was added to the back extension. The front door was replaced. Apart from these described changes on the main floor the interior walls of that floor remained as is, albeit touched up with fresh painting.

[18] The main floor hardwood was further covered with laminated wood. I do not believe the underlying hardwood was removed. The sub-floor was not altered. The main floor bathroom was changed to a powder room. In the unfinished basement, the interior perimeter walls were drywalled, and a laminate wood flooring was installed, this over the concrete floor, other than in the furnace area.

[19] The new rear section of the basement became a storage space, accessible using a newly installed sliding door. The unfinished basement was further finished by the addition of a bathroom, laundry room and flex space. I understand that the basement

interior perimeter walls remained as brick and concrete, which is contrary to the Minister's assumption that all walls in the house had been renovated.⁴

B. Fourth Street property

[20] On the basis of oral and documentary evidence, I have determined that pre-renovation the Fourth Street property was (and remains) a two-story house. Prior to the appellant's renovation and additions, the basement had two rooms, almost if not wholly finished to be used as an apartment. I understood that one of these rooms may have been used as a study. There was a separate entrance at the rear of the building. Also, there was a mechanical room. On the main floor, there was a living room, dining room, kitchen, bedroom and bathroom. On the second floor, which was only over the rear of the building's main level, as opposed to extending over all of the building's main level, there were three small bedrooms with one washroom.

[21] In the basement, the appellant relocated the mechanical room. A bathroom was added. A room was added where the furnace area had been. The two rooms in the basement referenced above were unchanged. Laminate flooring was installed over the concrete floor. The stairs were moved from the back to one side.

[22] On the main floor, an interior partition wall was removed to make a relatively large "open concept" area. The interior perimeter wall was kept as is. Also, the front window was enlarged. The front door was moved slightly and a rear patio door was added, and windows. Laminate wood flooring replaced a carpet on the main floor.

[23] Patching and painting of existing walls also were carried out.

[24] Finally, in the second story, as stated there were three small bedrooms and a bathroom. The sub-flooring of that upper story was extended to the front of the house, to accommodate addition at that second level of a large master bedroom and ensuite plus two smaller bedrooms each with an ensuite, and finally also a laundry room. Large windows were installed in the newly extended front of the original second story of this building.

VI. Analysis:

⁴ Respondent's Reply, para. 12(g)

[25] As noted, the Minister determined that the appellant substantially renovated each of these two properties, in accordance with the subsection 123(1) definition of “substantially renovate” set out above.

[26] For the Craven Road property, the Minister concluded that the total relevant area of the floor and wall space of the basement and main floor prior to renovation was 340.80 square metres, and that the total area renovated was also 340.80 square metres, i.e. 100% of the total relevant space.⁵

[27] For the Fourth Street property, the Minister concluded that the total relevant area of the floor and wall space of the basement, main floor and second floor prior to renovation was 626.45 square metres, and that the total area renovated was 567.57 square metres, i.e. 90.6% of the total relevant space was renovated.⁶

[28] The appellant had not specifically measured the walls and floors of the various rooms and spaces in either of the two properties. Dimensions had been estimated. While some drawn plans were entered in evidence by both parties, such plans were not sufficiently accurate and detailed to readily enable calculation of a specific percentage of renovation.

[29] In the jurisprudence, there is often reference to whether or not the particular property had been “guttled” in the course of renovation having occurred. The implication is that a property would have to have been gutted to have been 90% renovated. As stated above, that percentage appears in the CRA Bulletin B-092 as the minimum percentage for a property to be considered as having been “substantially renovated”.

[30] There is some confusion inherent in measuring what has or has not been renovated. The “substantially renovated” definition states that “floors” is one of several residential elements to be excluded in determining whether “substantially renovated” has occurred. Yet, Bulletin B-092 refers to flooring, both renovated and not, as factors in determining whether the minimum 90% measure was reached.

[31] The appellant urged that the word “flooring” in the definition must mean “sub-flooring” as distinguished from whatever flooring was installed covering over the sub-flooring. I am inclined to agree. Putting down a new carpet, or new laminate

⁵ CRA’s April 4, 2018 letter enclosing statements of adjustments sent to witness Syed Ahmed, director of the appellant; Ex. A-30.

⁶ Ibid.

wood flooring, does not strike me as sufficiently significant to contribute to whether a building might be said to have been “gutted”.

[32] I turn to the Fourth Street property. As stated above, I heard testimony from both of the appellant’s witnesses that the respondent had not recognized two rooms wholly or almost wholly established in the otherwise unfinished basement of this property. The rooms were not changed by the renovation other than that laminate flooring was put down in place of carpet.

[33] However, the partitioning walls at least of these two rooms, should have been recognized as not having been renovated or altered. In fact, the Minister concluded that all the floor and walls of the basement had been renovated (184.11 square metres) as shown in CRA’s adjustment figures, which reflect total renovation of 90.6% of the house as a whole.⁷

VII. Conclusion:

[34] I find that the Fourth Street property had two rooms in the supposedly unfinished basement that went unrecognized by the Minister as already existing and untouched except as to changing the floor covering (from carpet to laminate flooring). I note as well the “borderline” percentage of 90.6% by which the Minister barely (just very slightly over 90%) found the building to have been substantially renovated. These factors lead me to conclude that the Fourth Street building, while significantly renovated, was not substantially renovated. Note that new extensions to the existing building are not to be included in determining degree of renovation.

[35] As for the Craven Road property, I have to say that given the renovations as described above, I cannot conclude that the building in effect was “gutted”. Yes, it was largely renovated. No, it was not all or substantially all renovated.

⁷ Exhibit A-30, p. 269 of Appellant’s Book of Documents

[36] Thus, the appeal of both reassessments will be allowed, with costs.

Signed at Winnipeg, Manitoba, this 7th day of December 2023.

“B. Russell”

Russell J.

CITATION: 2023 TCC 165
COURT FILE NO.: 2019-3295(GST)G
STYLE OF CAUSE: 2437299 ONTARIO INC. AND HIS MAJESTY THE KING
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DATE OF JUDGMENT: December 7, 2023

APPEARANCES:

Counsel for the Appellant: Muhammad Abbas
Counsel for the Respondent: Natasha Tso

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