

Ottawa, Friday, February 18, 1994

Appeal Nos. AP-91-011, AP-91-012, AP-91-013 and AP-91-021

IN THE MATTER OF four appeals heard on
September 15, 1993, under section 81.19 of the *Excise Tax
Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF decisions of the Minister of
National Revenue dated April 11 and 23, 1991, with respect to
notices of objection served under section 81.17 of the *Excise
Tax Act*.

BETWEEN

DUFFERIN ASSOCIATION FOR COMMUNITY LIVING

AND

**CRANE DRIVE RESIDENCE
c/o ELMIRA & DISTRICT ASSOCIATION FOR THE RETARDED** **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeals are dismissed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary



UNOFFICIAL SUMMARY

Appeal Nos. AP-91-011, AP-91-012, AP-91-013 and AP-91-021

DUFFERIN ASSOCIATION FOR COMMUNITY LIVING

and

CRANE DRIVE RESIDENCE

c/o ELMIRA & DISTRICT ASSOCIATION FOR THE RETARDED Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The issue in these appeals is whether the respondent properly determined the amount of federal sales tax (FST) refundable to the appellants in respect of the newly constructed houses purchased by them for use as group homes. In their applications for refund, the appellants elected to use the "simplified method" to calculate the amount of FST paid in respect of the houses. The appellants calculated the amount of FST as 4.2 percent of the cost of the houses (inclusive of land) and claimed refunds accordingly. However, these claims were allowed in part only. The respondent determined the allowable FST refund in respect of each house under the Formula Refunds Regulations using a sales tax factor of 2.99 percent, as prescribed by the respondent for new buildings bought or constructed by certified institutions between June 1 and December 31, 1989. The appellants objected to these determinations, which were confirmed by the respondent. The appellants then appealed the determinations to the Tribunal.

HELD: *The appeals are dismissed. The essence of the appellants' argument was that the sales tax factor of 2.99 percent underestimated the actual amount of FST paid in respect of the group homes purchased by the appellants. In this regard, the Tribunal acknowledges that the national survey conducted by the respondent for purposes of determining the sales tax factor was limited and did not include residential houses similar to those in issue. However, the Tribunal has no reason to believe that the respondent was acting outside his authority in determining that the sales tax factor to be used for purposes of the simplified method was 2.99 percent.*

*Place of Hearing: Ottawa, Ontario
Date of Hearing: September 15, 1993
Date of Decision: February 18, 1994*

*Tribunal Members: Sidney A. Fraleigh, Presiding Member
Robert C. Coates, Q.C., Member
Desmond Hallissey, Member*

Counsel for the Tribunal: David M. Attwater

Clerk of the Tribunal: Anne Jamieson

*Appearances: Ralph Underwood, for the appellants
Yvonne E. Milosevic, for the respondent*

Appeal Nos. AP-91-011, AP-91-012, AP-91-013 and AP-91-021

DUFFERIN ASSOCIATION FOR COMMUNITY LIVING

and

CRANE DRIVE RESIDENCE

c/o ELMIRA & DISTRICT ASSOCIATION FOR THE RETARDED Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ROBERT C. COATES, Q.C., Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This decision encompasses four appeals under section 81.19 of the *Excise Tax Act*¹ (the Act). The appeals were heard together for several reasons: Appeal Nos. AP-91-011, AP-91-012 and AP-91-013 involved the same appellant, the Dufferin Association for Community Living (Dufferin); all four appeals involved the same issue; and the two appellants were represented by the same individual. The issue in these appeals is whether the respondent properly determined the amount of federal sales tax (FST) refundable to the appellants in respect of the newly constructed houses purchased by them for use as group homes.

The appellants, Dufferin and Crane Drive Residence (Crane), are certified institutions as defined in section 68.24 of the Act. In June and November 1989, Dufferin purchased three newly constructed houses in Orangeville, Ontario, for use as group homes. FST was included in the cost of the houses. In March 1990, after becoming a certified institution, Dufferin submitted separate applications under subsection 68.24(7) of the Act for refunds of FST paid in respect of the houses and other goods purchased.

In or before December 1989, Crane purchased a newly constructed house in Elmira, Ontario, for use as a group home. FST was included in the cost of the house. In August 1990, after becoming a certified institution, Crane submitted an application under subsection 68.24(7) of the Act for a refund of the FST paid in respect of the house and other goods purchased.

In their applications for refund, the appellants elected to use the "simplified method" to calculate the amount of FST paid in respect of the houses. The appellants calculated the amount of FST as 4.2 percent of the cost of the houses (inclusive of land) and claimed refunds accordingly. However, these claims were allowed in part only. The respondent determined the allowable FST refund in respect of each house under the *Formula Refunds Regulations*²

1. R.S.C. 1985, c. E-15.
2. C.R.C. 1978, c. 591.

(the Regulations) using a sales tax factor of 2.99 percent, as prescribed by the respondent for new buildings bought or constructed by certified institutions between June 1 and December 31, 1989. The appellants objected to these determinations, which were confirmed by the respondent. The appellants then appealed the determinations to the Tribunal.

Counsel for the respondent explained that, under section 68.24 of the Act, a certified institution is entitled to recover the full amount of FST paid in respect of goods purchased for the sole use of the institution and not for resale, provided the institution applies for the refund within two years after it purchased the goods. A refund claimed under this section may be calculated in one of two ways at the option of the claimant. The first method is known administratively as the "identification method." It is based on the strict wording of the Act and requires that the exact amount of FST paid by the claimant be determined from invoices or suppliers and substantiated by documentary evidence.

Where circumstances render it difficult to determine the exact amount of FST paid, section 76 of the Act authorizes the Minister of National Revenue (the Minister), with the consent of the claimant, to determine the amount of FST to be refunded in an alternate manner prescribed by regulation. The alternate manner is prescribed in the Regulations and is known administratively as the "simplified method." When this method is used to calculate the amount of FST included in contracts to construct new buildings, the "contract price" (i.e. the total progress payments under the contract exclusive of any payment for land and certain other costs, such as legal and architects' fees) is reduced by a percentage prescribed by the Minister to extract non-taxable price factors and, thus, to arrive at the "taxable value of materials" used in the construction of the building. This value is then multiplied by a prescribed sales tax factor to arrive at an amount which approximates the amount of FST actually paid on the construction materials. The sales tax factor prescribed by the respondent for use under the simplified method to calculate the FST paid on new buildings bought or constructed by certified institutions between June 1 and December 31, 1989, was 2.99 percent. This factor was subject to periodic review and adjustment.

The respondent's first witness, Mr. Art Santos, is presently Head of Audit Policy for the Goods and Services Tax (GST) Audit Programs, Department of National Revenue (Revenue Canada). Mr. Santos explained how the sales tax factor of 2.99 percent was determined. He explained how a national survey was conducted to look at the actual FST included in contracts executed between 1988 and 1989. The survey included three contracts involving certified institutions to determine the tax portion of the contracts. On questions from the Tribunal, it was clarified that these three contracts ranged in value from \$1.5 to \$20.0 million and involved no residential houses of the type purchased by the appellants.

The respondent's second witness, Mr. Tom McGirr, is presently a tax policy officer with the Department of Finance. Mr. McGirr explained how the FST paid on new residential housing, on January 1, 1991, was estimated to be 4.20 percent. He explained that this estimate included both direct (3.65 percent) and indirect taxes (0.55 percent), unlike the sales tax factor of 2.99 percent which included only direct taxes. Mr. McGirr explained the different methodologies used in calculating the two figures and concluded that it was not proper to compare them.

The appellants' representative submitted that the appellants chose the simplified method to determine the FST paid on their newly constructed houses because of the administrative difficulty in using the identification method to determine the exact FST paid on those buildings. Under the simplified method, the respondent has applied a sales tax factor of 2.99 percent to the purchase price after land costs have been deducted. The crux of his argument was that the sales

tax factor was low and underestimated the amount of FST paid in respect of the appellants' houses. He argued, in passing, that the identification method also underestimated the amount of FST paid on a new house.

The appellants' representative noted that, in the spring of 1990, the Department of Finance began running a series of media advertisements that stated that the GST on a newly constructed house, selling for less than \$350,000, would be about the same as the amount of tax payable under the old FST regime. Their advertisements stated that the FST added more than 4 percent to the price of a new house and showed the FST portion of the price of a new house to be much higher than the results obtained from the two methods authorized by Revenue Canada. Accordingly, the appellants adjusted their claims upwards.

Similarly, under the FST housing inventory rebate program, set up to compensate builders for the FST paid on new houses under construction or completed, but unoccupied on January 1, 1991, Revenue Canada adopted a figure of 4.25 percent of the sale price (including land costs) as one of the accepted methods of calculating the FST rebate. This figure is also significantly higher than that allowed to a certified institution which purchased a newly constructed house inclusive of FST.

The appellants' representative noted that the basis for the respondent's decision is Excise Memorandum ET 401,³ which is not legislative. Under section 68.24 of the Act, a certified institution is to receive a refund equal to the FST paid to Revenue Canada. It was submitted that the formula used in the FST housing inventory rebate program or that revealed in the media advertisements properly determines the actual amount of FST paid.

Counsel for the respondent argued that the gist of the appellants' complaint is that applying a sales tax factor of 2.99 percent to determine the amount of FST refundable under the simplified method resulted in an underassessment of the FST paid on the purchased houses. Having opted for the simplified method to determine the amount of the refund rather than establishing the amount of FST actually paid, the appellants now object to the formula used to calculate the refund.

Counsel for the respondent submitted that there was no error in the formula used by the respondent to determine the amount refundable to the appellants. The use of the prescribed sales tax factor in calculating the amount of refund under the simplified method has been held to be unobjectionable by the Federal Court of Appeal.⁴ Further, the sales tax factor of 2.99 percent prescribed for new buildings bought or constructed by certified institutions during the period from June 1 to December 31, 1989, was properly determined by the respondent in accordance with the requirements of the Regulations, taking into account the class of the goods and the nature of the parties to the transaction.

It was submitted that the fact that the FST portion of the price of other classes of new residential housing purchased after the implementation of the GST has been estimated in government literature and accepted for certain rebate purposes as 4.00 to 4.25 percent is not relevant to the determination of the present appeals.

3. Certified Institutions, Department of National Revenue, Customs and Excise, February 24, 1989.

4. *Re Kamloops School Board (District No. 24)*, 87 D.T.C. 5199 (F.C.A.).

In making its decision, the Tribunal acknowledges that the simplified method for calculating the FST refund available to the appellants flows from section 76 of the Act. Under this section, the Minister may, with the consent of the claimant, determine the amount of FST to be refunded as prescribed by regulation. The regulation for this purpose is the *Formula Refunds Regulations*. In accordance with subsection 3(2) of the Regulations, the Minister is authorized to determine the sales tax factor, which, for the period between June 1 and December 31, 1989, was 2.99 percent for certified institutions.

The essence of the appellants' argument was that the sales tax factor of 2.99 percent underestimated the actual amount of FST paid in respect of the houses purchased by the appellants. In this regard, the Tribunal acknowledges that the national survey conducted by the respondent was limited and did not include residential houses similar to those in issue. However, the Tribunal has no reason to believe that the Minister was acting outside his authority in determining that the sales tax factor to be used for purposes of the simplified method was 2.99 percent.

Accordingly, the appeals are dismissed.

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