



Ottawa, Tuesday, July 27, 1993

Appeal No. AP-92-039

IN THE MATTER OF an appeal heard on November 5, 1992, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated March 31, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

BRIAL HOLDINGS LTD.

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Michèle Blouin
Michèle Blouin
Presiding Member

John C. Coleman
John C. Coleman
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-039

BRIAL HOLDINGS LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 81.19 of the Excise Tax Act from a decision of the Minister of National Revenue dated March 31, 1992. The issue in this appeal is whether the appellant is entitled to the federal sales tax new housing rebate.

HELD: *The appeal is allowed. The Tribunal finds that the appellant is entitled to the federal sales tax new housing rebate. The applicants assigned their interest in the rebate to the appellant that is a builder and that made a taxable supply of a detached home by way of sale to the applicants.*

Place of Hearing: Vancouver, British Columbia

Date of Hearing: November 5, 1992

Date of Decision: July 27, 1993

*Tribunal Members: Michèle Blouin, Presiding Member
John C. Coleman, Member
Sidney A. Fraleigh, Member*

*Counsel for the Tribunal: Brenda C. Swick-Martin
Shelley Rowe*

Clerk of the Tribunal: Nicole Pelletier

*Appearances: Brian Hemingway, for the appellant
Wayne D. Garnons-Williams, for the respondent*

Appeal No. AP-92-039

BRIAL HOLDINGS LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: MICHÈLE BLOUIN, Presiding Member
JOHN C. COLEMAN, Member
SIDNEY A. FRALEIGH, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) from a decision of the Minister of National Revenue (the Minister) dated March 31, 1992. The issue concerning whether the appellant had standing to appeal the respondent's determination with respect to an application for a federal sales tax new housing rebate (the rebate) in the amount of \$4,466.67 that was filed by the owners of the house was withdrawn by the respondent at the hearing. The only issue in this appeal, therefore, is whether the appellant is entitled to the rebate.

In a building contract agreement (the agreement), dated December 15, 1990, the appellant, a contractor carrying on business as a developer and builder of residential housing in Comox, British Columbia, agreed to build a house for Mr. August Abel and Mrs. Thelma Eileen Abel (the Abels) on real property owned by them. The agreement provided that the Abels were to receive a credit for any federal sales tax paid on materials. Prior to the signing of the agreement, the appellant obtained the building permit from the City of Courtenay, authorizing the construction of the house, and actually began construction of the house. The Abels took possession of the house on February 28, 1991.

The application for the rebate on Form GST 212 was dated March 12, 1991, and filed March 14, 1991, in the names of the Abels. A notice of assignment of rebate signed by both the appellant and the Abels was filed as part of the application. This notice of assignment was intended to give the appellant (identified as the builder on the application) the right to receive the amount of \$4,466.67, which was the amount calculated as the rebate. By notice of determination addressed to the Abels and dated April 16, 1991, the respondent disallowed the rebate on the basis that "Owner-built homes do not qualify for the FST New Housing Rebate." The appellant then served a notice of objection dated June 10, 1991, in which it disputed the respondent's determination that the house was an owner-built home, since it had obtained the building permit, paid all the accounts for materials, labour and subtrades, and had constructed the house himself. In the notice of decision, the respondent disallowed the claim on the basis that the appellant was not the builder of the house within the meaning of subsection 123(1) of the Act,² since it did not own the land.

The appellant's representative stated that the appellant paid an amount of money to the Abels, estimated to be the amount of the rebate available, after having reviewed several booklets

1. R.S.C. 1985, c. E-15.
2. S.C. 1990, c. 45, s. 12.

outlining the procedures to claim the rebate. The appellant had contacted the Goods and Services Tax (GST) office in Victoria, was informed that the estimation was correct and was told to obtain an assignment of \$4,466.67, that being an estimation of the Abels' rebate entitlement. On this advice, the appellant claims that it gave the credit to the Abels and obtained the assignment of the right to receive the rebate from the Abels.

On April 18, 1991, the Abels were advised by a representative of the District Excise office in Victoria that owner-built homes do not qualify for the rebate, contrary to advice given by the appellant's accountant and the representative of the GST office in Victoria.

The appellant's representative argued that an owner-built home is one in which the owner obtains the building permit himself, supplies the materials and builds the home himself, or with the help of subcontractors. If the home is built by a contractor, it is not an owner-built home. The appellant's representative submitted that the Abels were over 70 years old and were out of the country for three months when the home was being built and, therefore, could not have built the home. It was the appellant that obtained the building permit, insurance and workers' compensation coverage for the subcontractors. The appellant's representative stated that the appellant had paid tax on the income that it earned from providing contracting services to the Abels and, therefore, had supplied a taxable item.

Counsel for the respondent referred to paragraph 121(2)(a) of the Act which provides that where a builder gives possession of the complex to a person under a lease, licence or similar arrangement, or makes a taxable supply by way of sale of the complex to an individual, the Minister shall pay a rebate to the individual or, in the case described in subparagraph 121(2)(a)(i), to the builder. Counsel submitted that the appellant neither gave possession of the residential complex to the Abels under a lease or a similar arrangement nor made a taxable supply by way of sale of the complex to the Abels.

Counsel further claimed that the appellant must be a "builder" as defined in subsection 123(1) of the Act in order to qualify for the rebate under paragraph 121(2)(a) of the Act. Counsel submitted that, since the Abels owned the real property, the appellant had no interest in the real property on which the residential complex was built and does not fall within the definition of "builder." The Abels are not the builders because the residential complex was built for purposes of residing therein, and paragraph (e) of the definition of "builder" found under subsection 123(1) of the Act excludes a person who constructs, or has another person construct such a residential complex otherwise than in the course of a business or an adventure or concern in the nature of trade.

In response to the appellant's allegations regarding misrepresentations by representatives of the Department of National Revenue, counsel submitted that the respondent is not bound by representations made and interpretations given to taxpayers by its representatives, if the representations are contrary to the clear provisions of the law.

The Tribunal notes that the portion of the application for the rebate identified as Section E and entitled "Notice of Assignment of Rebate" provides that,

[it] is to be completed only where an individual who is entitled to a rebate under subparagraph 121(2)(a)(ii) of the Excise Tax Act assigns the rebate to a builder who made a taxable supply by way of sale to the individual of a detached, semi-detached or attached house.

Subparagraph 121(2)(a)(ii) of the Act provides as follows:

(2) *Where*

(a) *a builder of a specified single unit residential complex*

...

(ii) *makes a taxable supply by way of sale of the complex to an individual,*

...

the Minister shall, subject to subsection (5), pay a rebate to the individual or, in the case described in subparagraph (a)(i), to the builder, equal to the amount, if any.

A "builder" is defined under subsection 123(1) of the Act as follows:

"builder" of a residential complex or of an addition to a multiple unit residential complex means a person who

...

(b) *acquires an interest in the complex at a time when*

...

(ii) *in any other case, the complex is under construction or substantial renovation.*

Under subsection 123(1) of the Act, a "residential complex" is defined as "that part of a building that is... a residential unit," and a "residential unit" is defined as "a detached house."

Given the above statutory requirements, in order to find for the appellant in this appeal, the Tribunal must be satisfied that a builder of a specified single unit residential complex made a taxable supply by way of sale of the complex to the Abels, thereby entitling them to the rebate and that the Abels assigned their interest in the rebate to the appellant. Since there is no dispute with respect to whether the Abels assigned their interest, the only issue to be determined is whether the appellant is a builder of a specified single unit residential complex and whether it made a taxable supply by way of sale of the complex to the Abels.

First, the Tribunal has to consider whether the appellant is a builder as required under paragraph 121(2)(a) of the Act. Subparagraph (b)(ii) of the definition of "builder" found under subsection 123(1) of the Act provides that a "builder" is a "person who acquires an interest in the complex at a time when... the complex is under construction." In the Tribunal's view, the appellant had an interest in the home during the time that it was being built since it was supplying all the materials and labour. The Tribunal notes that the respondent relied on paragraph (a) of the definition of "builder" found under subsection 123(1) of the Act and submitted that the appellant was not a builder since it did not have "an interest in the real property on which the complex is situated." However, as is indicated after paragraph (d) of the definition under subsection 123(1) with the use of the word "or," a person does not have to meet all of the requirements under each subparagraph in order to qualify as a "builder" and need only meet the requirements of one of the subparagraphs.

The word "builder" under paragraph 121(2)(a) of the Act is further qualified by the words "of a specified single unit residential complex." From the evidence presented at the hearing, the Tribunal finds that the house in question is a detached home and, therefore, falls under the definition of a residential complex.

Having found that the appellant is a builder of a specified single unit residential complex, the Tribunal must consider whether the appellant made a "taxable supply" by way of sale of the home. Under subsection 123(1) of the Act, a "taxable supply" is defined as a "supply that is made

in the course of a commercial activity," and "supply" is defined as "the provision of property or a service in any manner, including sale." The agreement between the Abels and the appellant provided that the appellant was to build a home on land owned by the Abels in exchange for the price of \$71,700.00. The appellant is in the business of constructing homes and entered into the agreement with the Abels in its capacity as a contractor. The building of the home by the appellant for the Abels, in exchange for payment, therefore, qualifies as a taxable supply by way of sale.

Accordingly, the Tribunal allows the appeal.

Michèle Blouin
Michèle Blouin
Presiding Member

John C. Coleman
John C. Coleman
Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member