

Ottawa, Tuesday, October 15, 1996

Appeal No. AP-92-063

IN THE MATTER OF an appeal heard on March 5, 1996, 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 April 16, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

JOHN STEPHEN RICHARDS

Appellant

AND

THE MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Desmond Hallissey

Desmond Hallissey

Presiding Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Member

Anita Szlazak

Anita Szlazak

Member

Michel P. Granger

Michel P. Granger

Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-92-063

JOHN STEPHEN RICHARDS

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellant entered into a contract for the construction of a new home in the fall of 1990 and took possession on March 28, 1991. The appellant contracted to purchase the home with the basement only partially finished, and he completed the basement on his own. The appellant filed an application for a federal sales tax new housing rebate under section 121 of the *Excise Tax Act* on the basis of the total floor space in the house, including the basement. The respondent eventually allowed the rebate, in part, and disallowed the portion of the claim relating to the basement. This portion was disallowed on the basis that, as the floor space in issue was completed by the appellant and not the builder, it did not qualify as “prescribed floor space” as defined in subsection 4(2) of the *Federal Sales Tax New Housing Rebate Regulations*. The issue in this appeal is whether the basement floor space completed by the appellant qualifies for a rebate under subsection 121(2) of the *Excise Tax Act*.

HELD: The appeal is dismissed. Although the Tribunal has some sympathy for the unfortunate confusion that the appellant experienced in this case, the Tribunal is of the view that section 4 of the *Federal Sales Tax New Housing Rebate Regulations* is clear; for the basement floor space to be included in calculating the appellant’s rebate, that floor space had to be finished by the builder. As the evidence is clear that it was not, the appellant’s position must fail.

Place of Hearing: Edmonton, Alberta
Date of Hearing: March 5, 1996
Date of Decision: October 15, 1996

Tribunal Members: Desmond Hallissey, Presiding Member
Robert C. Coates, Q.C., Member
Anita Szlazak, Member

Counsel for the Tribunal: Hugh J. Cheetham

Clerk of the Tribunal: Anne Jamieson

Appearances: John S. Richards, for the appellant
Frederick B. Woyiwada, for the respondent

JOHN STEPHEN RICHARDS

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
 ROBERT C. COATES, Q.C., Member
 ANITA SZLAZAK, Member

REASONS FOR DECISION

This is an appeal under section 81.19 of the *Excise Tax Act*¹ (the Act) of a determination of the Minister of National Revenue that disallowed the appellant's application for a federal sales tax (FST) new housing rebate under section 121 of the Act.²

The appellant entered into a contract for the construction of a new home in the fall of 1990 and took possession on March 28, 1991. The appellant contracted to purchase the home with the basement only partially finished, and he completed the basement on his own. The appellant filed an application for a rebate in the amount of \$9,700.00. The amount of the rebate claimed was based on the total floor space in the house, including the basement. The appellant assigned the rebate to the builder. By notice of determination dated September 24, 1991, the appellant was advised that his application was being denied on the basis that the transfer of the land on which the house was built took place prior to the completion of the house and, therefore, the appellant was deemed to be an owner-builder. By notice of objection dated September 26, 1991, the appellant objected to this determination. By notice of decision dated April 16, 1992, the respondent allowed the objection, in part, and disallowed the sum of \$2,508.83, being the portion of the claim relating to the basement. This portion was disallowed on the basis that, as the floor space in issue was completed by the appellant and not the builder, it did not qualify as "prescribed floor space" as defined in subsection 4(2) of the *Federal Sales Tax New Housing Rebate Regulations*³ (the Regulations).

The issue in this appeal is whether the basement floor space completed by the appellant qualifies for a rebate under subsection 121(2) of the Act.

Subsection 121(2) of the Act provides that the respondent shall pay a "builder" a rebate equal to the amount prescribed with respect to a "specified single unit residential complex" when certain conditions are met. "Builder" is defined in subsection 123(1), in part, as follows:

"builder" of a residential complex ... means a person who

but does not include

(h) a person described in any of paragraphs (a) to (c) whose only interest in the complex is a right to purchase the complex or an interest in it from a builder of the complex.

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1. R.S.C. 1985, c. E-15.
 2. S.C. 1990, c. 45, s. 12, as amended by S.C. 1993, c. 27, s. 7.
 3. SOR/91-53, December 18, 1990, *Canada Gazette* Part II, Vol. 125, No. 2 at 270.

“Specified single unit residential complex” is defined, in part, as follows in subsection 121(1) of the Act:

(a) that is a single unit residential complex or a multiple unit residential complex containing not more than two residential units.

The amount of the rebate is calculated based on the provisions of the Regulations. Only floor space that satisfies the definition of “prescribed floor space,” as provided in section 4 of the Regulations, is to be included in calculating the rebate. Subsection 4(2) of the Regulations provides, in part, as follows:

(2) The interior floor space of a complex ... does not include

(a) storage rooms, attics and basements, unless they are finished to a standard comparable to the living areas of the complex

(i) where the complex is a specified single unit residential complex, by the builder who supplies the complex to the person who is entitled to a rebate under section 121 in respect of the complex, and

(ii) in any other case, by a builder of the complex.

The appellant testified that the purchase of the house in issue resulted from him being transferred from Edmonton to Calgary, Alberta, in the summer of 1990. The lot for the house was purchased in the fall of 1990, after the appellant had been advised by officials of the Department of National Revenue that he would be entitled to a full rebate of the Goods and Services Tax (GST) paid in respect of the new house if it was completed by February 14, 1991. During these discussions, the appellant informed the officials that he intended to complete the basement of the new house himself and asked if this would also be covered by the rebate. He was advised that, if the basement was completed to the same quality as the other floors, it would be covered by the rebate.

Due to extremely cold weather in December 1990 and January 1991, construction of the appellant’s house was delayed. The appellant testified that he was advised that the deadline for completion had been extended to March 31, 1991. With respect to the construction of the basement, he testified that the builder did the electrical work in the walls and the plumbing and installed heating ducts, insulation and the outside framing on all the walls. The appellant did the inside framing, drywall and painting, as well as other electrical work. The drywall used by the appellant was purchased on the builder’s account.

The appellant testified that, after submitting his claim for the rebate, he was first advised that his application was being disallowed on the basis that the transfer of the land on which the house was built took place prior to the completion of the house and, therefore, the appellant was deemed to be an owner-builder. After numerous discussions with various officials and serving a notice of objection, the appellant was informed that his claim would not be disallowed on these grounds, but that it would be disallowed, in part, on the basis that he, not the builder, completed the basement.

In cross-examination, the appellant testified that the bulk of the materials that he used for the work that he performed were bought in January 1991 and that GST was paid on these materials. He stated that the only portion of the basement that was not finished on March 28, 1991, the day on which his family moved in, was the floor. In response to questions from the Tribunal, the appellant estimated that the amount of materials purchased before 1991 would represent approximately one third of the total cost of materials. He also confirmed that, under his contract with the builder, the builder was only responsible for providing a partially finished basement.

In argument, the appellant submitted that, in his view, the government had given specific approval to proceed on the basis of the appellant completing the basement and receiving a rebate for the whole residence and that is what should happen. Both government officials and government publications at that time indicated that he was entitled to the rebate, and the government should not subsequently be able to change this position. In addition, the stated intent of the program was not to change the cost of transactions, but to keep

prices flat. This would only be achieved, in this case, if he received the full rebate. Furthermore, he felt that he had done everything that could reasonably be expected of a taxpayer before proceeding as he did.

Counsel for the respondent submitted that the Regulations are clear; the basement could only be included in calculating the rebate to the extent that it was finished to a standard comparable to the living areas of the residence and, then, only if it was finished by the builder himself, not the appellant. The evidence is clear that the appellant was the one who finished the basement and, on this ground alone, the appeal should be dismissed. Counsel continued that, even if the Tribunal did wish to find for the appellant, there was no reason to do so in this case. This is because, counsel argued, the Act and Regulations worked exactly as intended, as no double payment had occurred because most of the materials in issue were purchased after the GST came into effect and, thus, no FST was paid on them. With respect to any materials purchased before the GST came into effect, only FST was paid. With respect to the amount of the rebate received by the appellant, the price of the house came down an appropriate amount because this portion would apply to materials in those floors that the builder completed and that were charged to the appellant through the contract price of the house.

In reply, the appellant submitted that the builder was, in fact, the supplier of the residence in issue and reiterated his point that the real issue here should be the responsibility of the government to give clear directions as to how new policies or programs are to work, which it did not do here.

Although the Tribunal has some sympathy for the unfortunate confusion that the appellant experienced in this case, the Tribunal is of the view that section 4 of the Regulations is clear; for the basement floor space to be included in calculating the appellant's rebate, that floor space had to be finished by the builder of the house, to a standard comparable to the living areas of the house, i.e. the other floors. As the evidence is clear that the basement floor space was not finished to this extent by the builder, the appellant's position must fail. In coming to this decision, the Tribunal is mindful that the rebate program was meant to facilitate the transition from the FST to the GST, to ensure that FST included in the cost of houses partially or fully completed prior to January 1, 1991, but sold after that date, was rebated to purchasers, so as to avoid double taxation. The Tribunal agrees with counsel for the respondent that there does not appear to be any double taxation in this case, as no GST would have been paid on materials purchased before the GST came in effect and no FST would have been paid on materials purchased after the GST came into effect. In addition, as the appellant himself testified, the price that he paid for the house was based on an unfinished basement and, thus, presumably reflected a lower cost for obtaining the house in this condition.

Accordingly, the appeal is dismissed.

Desmond Hallissey

Desmond Hallissey
Presiding Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Anita Szlazak

Anita Szlazak
Member