

Ottawa, Monday, May 2, 1994

Appeal No. AP-92-278

IN THE MATTER OF an appeal heard on November 5, 1993,  
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 October 16, 1992, with respect to a  
notice of objection served under section 81.17 of the *Excise  
Tax Act*.

**BETWEEN**

**MICHAEL AND ARLENE TUGWELL**

**Appellants**

**AND**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Anthony T. Eyton

Anthony T. Eyton  
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh  
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**UNOFFICIAL SUMMARY**

**Appeal No. AP-92-278**

**MICHAEL AND ARLENE TUGWELL**

**Appellants**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

*This is an appeal under section 81.19 of the Excise Tax Act of a determination of the Minister of National Revenue dated February 11, 1992, rejecting an application for a federal sales tax (FST) new housing rebate in the amount of \$7,369.99 on the basis that no Goods and Services Tax (GST) was paid on the purchase of the appellants' land, as it was purchased in March 1990.*

**HELD:** *The appeal is dismissed. The appellants purchased land on March 8, 1990, i.e. prior to January 1991, on which no FST or GST was paid. On October 10, 1990, the appellants entered into a contract with a builder, Universal Homes & Design Ltd., and construction commenced. FST was paid on the cost of materials purchased up to and including December 31, 1990, as is the case for all taxpayers in this situation. Subsequent to December 31, 1990, only GST was paid on the construction costs incurred. Therefore, there was no double taxation. FST was paid on the cost of materials used in the construction before January 1, 1991, and GST only was paid on construction costs incurred after December 31, 1990. As there was no taxable supply by way of sale of a residential complex, the appellants could not be considered builders under the Excise Tax Act; therefore, the appeal must fail.*

*Place of Hearing: Calgary, Alberta  
Date of Hearing: November 5, 1993  
Date of Decision: May 2, 1994*

*Tribunal Members: Anthony T. Eyton, Presiding Member  
Sidney A. Fraleigh, Member  
Robert C. Coates, Q.C., Member*

*Counsel for the Tribunal: Joël J. Robichaud*

*Clerk of the Tribunal: Anne Jamieson*

*Appearances: Arlene Tugwell, for the appellants  
Brian Tittlemore, for the respondent*

**Appeal No. AP-92-278**

**MICHAEL AND ARLENE TUGWELL**

**Appellants**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

TRIBUNAL: ANTHONY T. EYTON, Presiding Member  
SIDNEY A. FRALEIGH, Member  
ROBERT C. COATES, Q.C., Member

**REASONS FOR DECISION**

This is an appeal under section 81.19 of the *Excise Tax Act*<sup>1</sup> (the Act) of a determination of the Minister of National Revenue (the Minister) dated February 11, 1992, rejecting an application for a federal sales tax (FST) new housing rebate made under section 121 of the Act.<sup>2</sup> The application was filed on January 17, 1992, and was in the amount of \$7,369.99. On May 8, 1992, the appellants served a notice of objection, which was rejected by the Minister in a notice of decision dated October 16, 1992.

At the hearing, the appellants were represented by Mrs. Arlene Tugwell. She was also the appellants' only witness. She basically agreed with the statement of facts contained in the respondent's written submission.

On March 8, 1990, the appellants purchased land in Calgary, Alberta. On October 10, 1990, they entered into a contract with Universal Homes & Design Ltd. (Universal) for the construction of a residence on part of the land. Construction commenced on October 25, 1990. The appellants took possession of the residence on March 30, 1991. The Minister rejected the application for an FST new housing rebate because the Goods and Services Tax (GST) had not been paid on the supply of the complex. The appellants did not pay any GST on the purchase of their land, as it was purchased in March 1990. GST was only paid on a portion of the cost of materials used in the construction. The Minister found that, regardless of the identity of the builder, the appellants' residence did not meet the criteria for them to be entitled to an FST new housing rebate.

The issue in this appeal is whether the appellants are entitled to an FST new housing rebate under section 121 of the Act with respect to the residence which was built by Universal.

The appellants' representative argued that the appellants should be granted the FST new housing rebate, as they had purchased a new residence that was built by Universal. She argued that they had purchased, from Universal, a "residential complex" and, consequently, that they should be entitled to a rebate under the Act. She accepted that the appellants had not paid any GST on the purchase of their land; however, she submitted that they had paid GST and FST on

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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.

the materials which were used in the construction of their residence after December 31, 1990. Accordingly, she argued that the appellants should be granted a rebate for the FST that was paid on these materials.

The appellants' representative also argued that the appellants are not builders and that land ownership should not be the determining factor in establishing entitlement for FST rebate purposes and for defining "builder." She contended that they met every requirement under the Act and that they should be granted the rebate.

Counsel for the respondent argued that subsection 121(2) of the Act provides that the Minister shall pay a "builder" or an individual a rebate for a specified single unit residential complex when certain requirements are met and that the appellants did not meet these requirements. Paragraph 121(2)(a) of the Act provides that a "builder" must make a taxable supply of the complex by way of sale, lease, licence or similar arrangement. Subsection 123(1) of the Act provides that a "builder" must have an interest in the real property on which the complex is situated, which, counsel submitted, the appellants possessed. He argued, however, that subsection 123(1) of the Act also provides that a "builder" does not include a person who engages another person to carry on the construction or substantial renovation for the individual, otherwise than in the course of a business or an adventure or concern in the nature of trade. Therefore, the appellants did not meet the requirements to qualify as builders. Further, counsel argued that there was no taxable supply by way of sale of the residential complex. Rather, the contractor supplied only materials and labour for the construction of the residence on land owned by the appellants. No "residential complex" was supplied or sold, as the appellants owned the real property throughout the time period in question. Finally, under paragraph 121(2)(b) of the Act, tax is payable in respect of the supply. In the present case, GST was not paid on the supply of a "residential complex," but only on a portion of the construction costs.

The purpose of the rebate provision is to ensure that there is no double taxation. It is not intended to relieve anyone from paying tax. It allows individuals who purchased a house in 1991, the construction or substantial renovation of which started before 1991, and builders that own residential complexes, the construction or substantial renovation of which started before 1991, to be entitled to and to apply for an FST new housing rebate.

In the present case, the appellants purchased land on March 8, 1990, i.e. prior to January 1991, on which no FST or GST was paid. On October 10, 1990, the appellants entered into a contract with a builder, Universal, and construction commenced. FST was paid on the cost of materials purchased up to and including December 31, 1990, as is the case for all taxpayers in this situation. Subsequent to December 31, 1990, only GST was paid on the construction costs incurred. Therefore, there was no double taxation. FST was paid on the cost of materials used in the construction before January 1, 1991, and GST only was paid on construction costs incurred after December 31, 1990. The Tribunal notes that, under the Act before 1992, a person could apply for an FST rebate for tax-paid goods held in inventory for sale, lease or rental as of January 1, 1991. It is possible that Universal would have been entitled to such a rebate of FST paid on goods held in inventory and subsequently incorporated into the appellants' residence.

Rebates are granted to individuals following a taxable supply of a residential complex by a builder. In the present case, the appellants purchased the land before they hired Universal to build their residence. Thereafter, the appellants paid the costs of the materials and labour used in the construction. There was, therefore, never any taxable supply of a residential complex by

way of sale, or by any other way, to the appellants which would have allowed them to be entitled to an FST new housing rebate. In other words, the appellants did not pay for anything on which both FST and GST was assessed in order for them to be entitled to an FST new housing rebate. Furthermore, the appellants could not be considered builders under the Act.

Accordingly, the appeal is dismissed.

Anthony T. Eyton

Anthony T. Eyton  
Presiding Member

Sidney A. Fraleigh

Sidney A. Fraleigh  
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Member