CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, March 18, 1994

Appeal No. AP-92-285

IN THE MATTER OF an appeal heard on November 1, 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 30, 1992, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

EARL AND SHEILA CARLSON **Appellants**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

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

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-92-285

EARL AND SHEILA CARLSON **Appellants**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The issue in this appeal is whether the appellants are entitled to a federal sales tax new housing rebate under section 121 of the Excise Tax Act. Specifically, the Tribunal must determine whether a builder of a specified single unit residential complex made a taxable supply by way of sale of the complex to the appellants. In addition, the Tribunal has to determine whether the appellants' house, in respect of which the rebate application was filed, was substantially complete before July 1991.

HELD: *The appeal is allowed. There is nothing in the relevant definitions that would lead the Tribunal to the conclusion that a builder must supply a finished residential complex before the purchasers are entitled to a federal sales tax new housing rebate. Nor is the Tribunal persuaded to reach this conclusion by reference to the Federal Sales Tax New Housing Rebate Regulations. The Tribunal believes that the house was substantially complete before July 1991, as it was at a stage of completion whereby the appellants were able to reasonably inhabit the premises. The evidence available to the Tribunal convinces it that the work required to complete the house was not such that it reasonably impaired the use and enjoyment of the house as the appellants' place of residence.*

Place of Hearing:	*Calgary, Alberta*
Date of Hearing:	*November 1, 1993*
Date of Decision:	*March 18, 1994*
Tribunal Members:	*Sidney A. Fraleigh, Presiding Member* *Anthony T. Eyton, Member* *Robert C. Coates, Q.C., Member*
Counsel for the Tribunal:	*David M. Attwater*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Earl and Sheila Carlson, for the appellants* *Brian Tittemore, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-285

EARL AND SHEILA CARLSON **Appellants**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
ANTHONY T. EYTON, Member
ROBERT C. COATES, Q.C., 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 (the Minister) rejecting an application for a federal sales tax (FST) new housing rebate made under section 121[2] of the Act.

On May 24, 1991, the appellants purchased an unfinished house and land from A. Roth Construction (1987) Ltd. and moved into the premises on July 22, 1991. On January 7, 1992, they filed an application for an FST new housing rebate in the amount of $5,569.11. On March 31, 1992, the Minister issued a notice of determination rejecting the application on the basis that the unit was not substantially complete before July 1991. Responding to a notice of objection, the Minister issued a notice of decision dated October 30, 1992, confirming the determination. Earl and Sheila Carlson then appealed the determination to the Tribunal.

The issue in this appeal is whether the appellants are entitled to an FST new housing rebate under section 121 of the Act. Specifically, the Tribunal has to determine whether a builder of a specified single unit residential complex made a taxable supply by way of sale of the complex to the appellants. In addition, the Tribunal has to determine whether the appellants' house, in respect of which the rebate application was filed, was substantially complete before July 1991.

When the appellants purchased the house on May 24, 1991, the exterior was complete and ready for stucco. The builder advised the appellants that they would be entitled to the FST new housing rebate "if the interior finishing progress would bring the house to substantial completion (90 percent) by June 30, 1991." Speaking on behalf of the appellants, Mr. Earl Carlson told the Tribunal that, in a telephone conversation with officials of the Department of National Revenue (Revenue Canada) on June 27, 1991, his wife was informed that the legislation had been amended and that the June 30, 1991, deadline had been extended to December 31, 1991. As such, the appellants would be entitled to a rebate with respect to all usable floor space substantially complete before that date. On this understanding, the appellants stopped work on the house, believing that they had until the end of the year for its completion.

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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.

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During cross-examination, Mr. Carlson indicated that, when the appellants purchased the house, the interior was completely studded with only the finishing left to do. He testified that, by June 30, 1991, the drywall had been erected and painting done and that the sinks, toilets, carpeting, linoleum and most of the baseboards had been installed. In addition, he was building the kitchen cabinets and bathroom vanities. It was estimated that, if this woodwork cost $10,000, approximately $8,000 of that amount had been used for building purposes by June 30, 1991. However, in addressing questions from the Tribunal, Mr. Carlson explained that the cabinets had been made and that only a couple of them remained to be installed. In addition, "one or two vanities" had not been installed. He added that the electrical work had been completed and the lighting fixtures had been installed. However, the basement was not complete and the exterior stucco had not been applied. Mr. Carlson testified that it would take approximately four days of work to complete the entire house, but that the upper and main floors were 90 percent complete before July 1991. Mr. Carlson explained that they moved into the new house on July 22, 1991, because the people who purchased their old house took possession and paid for it on that day.

Mr. Carlson acknowledged that, since applying for the FST new housing rebate, he and his wife have filed two new housing applications for a rebate of the Goods and Services Tax (GST) in respect of the house. On the first application, they indicated July 22, 1991, as either the date that ownership of the property was transferred to them or the date of substantial completion of the house. The second application was necessary because the GST rebate was mistakenly sent to the builder of the house. Mr. Carlson explained that the second part of the application was completed according to the instructions of an official of Revenue Canada, and acknowledged that, under Part B of the application form, it was indicated that the rebate was in respect of an owner-built home.

Counsel for the respondent called Ms. Kathy Maberley, an auditor with Revenue Canada, as a witness for the respondent. Ms. Maberley explained that she was assigned to review the application after it was filed on January 7, 1992. On January 22, 1992, she phoned the appellants for information, which was sent the next day. However, there was no information on the substantial completion of the house. Ms. Maberley told the Tribunal that she had a subsequent conversation with Mrs. Sheila Carlson, who told her that the flooring was installed, that the painting was done, that the vanities and cupboards were built and installed in July 1991, and that the exterior stucco was installed in August 1991. Ms. Maberley claimed that Mrs. Carlson admitted that the house was not 90 percent complete by June 30, 1991. With this information, and because the appellants were considered the owners and builders of the house, Ms. Maberley recommended to her supervisor that the rebate application be rejected.

In explaining the amendments to the rebate legislation, Ms. Maberley noted that, for those homes that were substantially complete on December 31, 1990, the legislation was amended to extend the cutoff date for possession of a home until the end of 1991. As the appellants' house was not substantially complete on December 31, 1990, this amendment did not affect them.

In argument, the appellants' representative claimed that, in the telephone conversation with officials of Revenue Canada on June 27, 1991, the appellants were informed that they would be entitled to the rebate with respect to all usable floor space substantially complete before December 31, 1991. The appellants' representative argued that the appellants had been misinformed and unfairly treated by Revenue Canada and that they were entitled to the rebate, as they governed their affairs according to the advice of Revenue Canada. Regardless, he argued that the appellants were entitled to the rebate, as the house was substantially complete before July 1991.

Counsel for the respondent noted that there was conflicting evidence as to the state of the appellants' house on June 30, 1991. In this regard, counsel reminded the Tribunal of Ms. Maberley's testimony of her conversation with Mrs. Carlson and the contemporaneous notes of that conversation introduced as Exhibit B-4. Counsel explained that the expression "substantially complete" is not defined in the Act. He relied on the GST-Memorandum 500-4-5[3] to interpret the expression to mean "a stage of completion (generally, 90 per[cent] or more) whereby the purchaser is able to reasonably inhabit the premises. The minor repairs, adjustments or upgrades outstanding do not reasonably impair the use and enjoyment of the housing unit as a place of residence.[4]" In addition, a house is not substantially complete if the work remaining to be done is more than trifling or trivial, more than the correction of slight imperfections or slight deviations.[5] He submitted that Revenue Canada's administrative policy and interpretation of this term, while not determinative, are entitled to weight and can be an important factor in the case of doubt about the meaning of the legislation.[6] In conclusion, counsel submitted that the house was not substantially complete before July 1991.

Counsel for the respondent argued that there had not been a taxable supply by way of sale of a specified single unit residential complex within the meaning of the Act. He noted that the appellants purchased a house with the interior being incomplete. It was submitted that the intent of the legislation is to provide an FST new housing rebate on the supply of a finished residential unit. In support of this contention, counsel referred to subsection 121(1) of the Act that provides the formula for calculating the estimated FST for a specified single unit residential complex. Under the formula, the prescribed floor space in a complex is multiplied by a prescribed tax factor. The prescribed floor space is determined by referring to the *Federal Sales Tax New Housing Rebate Regulations*[7] (the Regulations) which, at subsection 4(2), indicate that the interior floor space of a complex does not include "storage rooms, attics and basements, unless they are finished to a standard comparable to the living areas of the 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." On this basis, counsel insisted that a builder must supply a finished residential complex for the purchaser to be entitled to an FST new housing rebate.

In further support of this contention, counsel for the respondent referred to the definition of "builder" found at subsection 123(1) of the Act. Though counsel referred to legislation that had been repealed at the time of the hearing, his point, which is supported by the amended legislation, was that a builder does not include a person who carries on the construction otherwise than in the course of a business. He noted that the appellants built a substantial portion of the house for use as a residence and not in the course of a business. As such, there had not been a taxable supply by a builder of a single unit residential complex as required by the FST new housing rebate legislation.

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3. Housing Rebates, Department of National Revenue, Customs and Excise, March 26, 1991.
4. *Ibid.* at 7.
5. *Engineering & Plumbing Supplies Ltd. v. City of Quesnel*, [1988] B.C.D. Civ. 2598-01 (B.C. Div. Ct.).
6. *Gene A. Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.
7. SOR/91-53, December 18, 1990, Canada Gazette Part II, Vol. 125, No. 2 at 270.

Counsel for the respondent argued that the onus of proving that the respondent's determination was incorrect is on the appellants. If the appellants do not discharge this onus, the appeal must fail. In addition, counsel noted that there may have been some misunderstanding with respect to the amendments to the rebate provisions. However, this cannot detract from a proper interpretation of the Act.

Contrary to the arguments of counsel for the respondent, the Tribunal believes that, in this case, a builder[8] of a specified single unit residential complex[9] made a taxable supply[10] by way of sale of the house to the appellants. There is nothing in the relevant definitions that would lead the Tribunal to the conclusion that a builder must supply a finished residential complex before the purchasers are entitled to an FST new housing rebate. Nor is the Tribunal persuaded to reach this conclusion by reference to subsection 4(2) of the Regulations which deals with the inclusion of storage rooms, attics and basements within the meaning of "interior floor space" for purposes of determining the "prescribed floor space" of the residential complex. The Tribunal believes that the unfinished house purchased by the appellants qualifies as a specified single unit residential complex. In addition, it believes that A. Roth Construction (1987) Ltd. qualifies as a builder.

Upon considering the testimony of Mr. Carlson and the various invoices[11] for work done and materials consumed in the completion of the appellants' house, the Tribunal believes that the house was substantially complete before July 1991. Though no attempt was made to quantify the extent to which the house was actually complete by this date, the Tribunal has no doubt that it was at a stage of completion whereby the appellants were able to reasonably inhabit the premises. The evidence available to the Tribunal convinces it that the work required to complete the house was not such that it reasonably impaired the use and enjoyment of the house as the appellants' place of residence.

The Tribunal accepts that the appellants moved into the house on July 22, 1991, as a matter of convenience, as that was the date on which the person buying their previous house took possession and made payment. In addition, the Tribunal accepts that, when the appellants

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8. For purposes of this appeal, "builder" is defined to include a person who carries on the construction of a residential complex for the primary purpose of selling the complex at a time when the person has an interest in the real property on which the complex is situated.

9. For purposes of this appeal, a "specified single unit residential complex" means a residential complex that is (a) a single unit residential complex, (b) the construction of which began before 1991, and (c) that was not occupied by any individual as a place of residence or lodging after the construction began and before 1991. A "single unit residential complex" means a residential complex that does not contain more than one residential unit. A "residential complex" is defined to include a "residential unit," which is defined to include a "detached house."

10. For purposes of this appeal, "taxable supply" means a supply that is made in the course of a commercial activity. "Supply" means the provision of property in any manner, including sale.

11. Upon request of the Tribunal, Mr. Carlson undertook to provide the Tribunal with any invoices for work done and materials purchased prior to June 30, 1991.

indicated July 22, 1991, on their GST new housing rebate,[12] they were indicating the date on which they moved into the house and not their opinion that it was substantially complete on this date.

Accordingly, the appeal is allowed.

Sidney A. Fraleigh
Sidney A. Fraleigh
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

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

12. On rebate applications filed under section 254 of the Act, applicants must indicate either the date that ownership of the property was transferred to them or the date of substantial completion or renovation of the residential complex.