

Ottawa, Thursday, May 23, 1996

Appeal No. AP-94-113

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 March 25, 1994, with respect to a notice of objection served under section 81.17 of the *Excise Tax Act*.

BETWEEN

DOUG AND MARCY BEDDOME

Appellants

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 Szlajak

Anita Szlajak
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-94-113

DOUG AND MARCY BEDDOME

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

The appellants entered into a contract for the construction of a detached house in November 1990. The appellants filed an application for a new housing rebate in respect of federal sales tax included in the contract price. The issue in this appeal is whether the appellants' house qualifies for a rebate under subsection 121(1) of the Excise Tax Act.

HELD: *The appeal is dismissed. In light of the fact that the appellants agreed that the construction of the house began in 1991 and that the builder's certification in the rebate application states that construction started on January 7, 1991, the Tribunal finds that construction of the house did not begin before 1991, as required by subsection 121(1) of the Excise Tax Act.*

Place of Hearing: Edmonton, Alberta

Date of Hearing: March 5, 1996

Date of Decision: May 23, 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: Doug and Marcy Beddome, for the appellants

Frederick B. Woyiwada, for the respondent

Appeal No. AP-94-113

DOUG AND MARCY BEDDOME

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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 disallowing the appellants' application for a federal sales tax (FST) new housing rebate under section 121 of the Act.²

The appellants entered into a contract for the construction of a detached house in November 1990. In June 1993, the appellants filed an application for a rebate in the amount of \$7,879.08 in respect of FST included in the contract price of the house. By notice of determination dated July 28, 1993, the appellants were advised that their application was disallowed on the basis that construction of the house had not begun before 1991. By notice of objection dated August 12, 1993, the appellants objected to this determination. By notice of decision dated March 25, 1994, the respondent disallowed the objection and confirmed the determination.

The issue in this appeal is whether the appellants' detached house qualifies for a rebate under subsection 121(1) of the Act.

Qualification for the rebate varies depending on whether the building is a single unit, an apartment building or a residential complex. As noted, the appellants purchased a detached house. A "specified single unit residential complex" is defined 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,*
- (b) the construction or substantial renovation of which began before 1991, and*
- (c) that was not occupied by any individual as a place of residence or lodging after the construction or substantial renovation began and before 1991.*

According to subsection 123(1) of the Act, the term "residential complex" in section 121 includes a "residential unit," and the definition of "residential unit" includes a detached house.

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. 6.

The appellants testified that the contract price for their house included FST and that the price was not adjusted downwards when they were required to provide an additional amount for the Goods and Services Tax (GST). They indicated that it was intended that construction begin in 1990, but that, due to unseasonably cold weather at the end of December and to the holiday season, groundbreaking did not take place until after January 1, 1991. The appellants testified that the contractor had moved a backhoe onto the property before January 7, 1991, and had difficulty beginning excavation because of the frozen ground. The appellants also testified that everything necessary for the commencement of construction had been in place prior to the end of 1990. The appellants acknowledged that the builder's certification in Part IV of their rebate application certified that construction began on January 7, 1991.

In argument, the appellants submitted the following definition of "construction": "the act of building, devising, or forming."³ They also submitted that the word "devising" should be interpreted to include the preliminary steps that must be taken before actual excavation begins and that, in this case, the necessary steps to allow for the building of the house had all occurred prior to 1991. Therefore, it could be said that construction had begun in 1990. The appellants asked the Tribunal to take into account the extenuating circumstances surrounding their case, including the confusion relating to information provided to them by the respondent.

Counsel for the respondent submitted that the Act was clear that, to qualify for the rebate, construction of the house must have begun before 1991. Counsel also submitted that the evidence was clear that construction had not begun before 1991. Not only had the appellants testified to this but the best evidence before the Tribunal, the builder's certification in the rebate application, states that construction began on January 7, 1991. With respect to the definition of "construction," counsel submitted that, even if the Tribunal accepted a definition that included excavation, as the Tribunal did in its decision in *Simon and Jean Clarke v. The Minister of National Revenue*,⁴ there was no evidence to show that excavation began before 1991. Counsel also submitted that, if the purpose of the rebate provisions was to avoid double taxation, there should have been no double taxation in this case, since building materials would not have had to be bought until after January 1, 1991, and, therefore, such materials would have only been subject to the GST. Finally, counsel referred the Tribunal to previous decisions in which it had acknowledged that it did not have jurisdiction to apply principles of equity.

It is clear to the Tribunal that, pursuant to subsection 121(1) of the Act, in order to qualify for the rebate, construction of the house must have commenced prior to 1991. The Tribunal is of the view that, consistent with its reasoning in *Clarke*, construction can be considered to include excavation. However, the Tribunal is not persuaded on the basis of the evidence provided in this case that it should expand the meaning of construction beyond that given to it in *Clarke*. The evidence indicates that, to the best of the appellants' knowledge, construction of the house began in 1991. Furthermore, the builder's certification in the appellants' rebate application specifically states that construction commenced on January 7, 1991. In the absence of any other evidence, the Tribunal cannot disregard the fact that construction did not commence before 1991.

3. Transcript of Public Hearing, March 5, 1996, at 12.

4. Appeal No. AP-92-065, March 18, 1994.

Although the Tribunal feels some sympathy for the appellants' situation, it has no basis on which to conclude that the appellants are entitled to the rebate. Furthermore, as previous decisions of the Tribunal make clear,⁵ the Tribunal has no jurisdiction to apply principles of equity.

Accordingly, the appeal is dismissed.

Desmond Hallissey

Desmond Hallissey
Presiding Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Anita Szlajak

Anita Szlajak
Member

5. See, for instance, *Pelletrex Ltée v. The Minister of National Revenue*, Appeal No. AP-89-274, October 15, 1991, and decisions referred to therein.