

Date: 20080104

Docket: A-519-06

Citation: 2008 FCA 2

**CORAM: LINDEN J.A.
NADON J.A.
SHARLOW J.A.**

BETWEEN:

NORTH SHORE HEALTH REGION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on November 8, 2007.

Judgment delivered at Ottawa, Ontario, on January 4, 2008.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This appeal involves a disputed assessment of goods and services tax (“GST”) under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15. The principal issue is whether the Tax Court of Canada was correct in finding North Shore Health Region liable for GST on the fair market value of Kiwanis Care Centre, a health care facility in North Vancouver, British Columbia, as of the date of its substantial completion in May of 1998 (2006 TCC 585). The amount of tax in issue is approximately \$1.5 million.

General statutory scheme

[2] Part IX of the *Excise Tax Act* came into effect in 1991. It imposes GST on most supplies of goods and services, calculated as a percentage of the consideration paid. During the period relevant to this appeal, the GST rate was 7%.

[3] Generally, GST is paid by the recipient of goods or services but it is collected by the supplier, who remits it to the Canada Revenue Agency. A recipient of goods or services who uses them in a commercial activity is entitled to a refund of the GST it has paid (an “input tax credit”). The recipient must in turn collect and remit GST on the goods or services it provides to its own customers. The intended result is that GST is imposed on the value added at each stage in the supply of goods or services until it reaches the final user or consumer, who bears the full economic burden of the GST.

[4] Certain supplies are exempt from GST. The term “exempt supply” is defined in subsection 123(1) of the *Excise Tax Act* as “a supply included in Schedule V”. Schedule V of the *Excise Tax Act* is divided into eight parts, each containing a list of “exempt supplies”. Part I of Schedule V deals with real property. Part II of Schedule V deals with health care services.

[5] The GST burden on goods and services obtained to produce an exempt supply does not fall on the final user or consumer of the supply, but on someone further back in the supply chain. There are a number of different statutory devices that are used to determine how that burden is quantified, and who should bear it.

[6] In the case of newly constructed residential rental accommodation, the combined effect of an exemption for residential rents and a statutory self-supply rule is that a one-time GST burden is imposed on the value of the building upon its completion. In the case of a newly constructed health care facility built by a health authority or a charity, the combined effect of an exemption for institutional health care services and provision for a GST rebate is that the GST burden on the cost of the building is borne by the health care facility, but at a reduced rate. These two statutory schemes are described more fully below.

Statutory scheme relating to health care facilities

[7] The term “health care facility” is defined as follows in section 1 of Part II of Schedule V.

"health care facility" means

(a) a facility, or a part thereof, operated for the purpose of providing medical or hospital care, including acute, rehabilitative or chronic care,

(b) a hospital or institution primarily for individuals with a mental health disability, or

(c) a facility, or a part thereof, operated for the purpose of providing residents of the facility who have limited physical or mental capacity for self-supervision and self-care with

(i) nursing and personal care under the direction or supervision of qualified medical and nursing care staff or other personal and supervisory care (other than domestic services of an ordinary household nature) according to the individual requirements of the residents,

« établissement de santé »

a) Tout ou partie d'un établissement où sont donnés des soins hospitaliers, notamment aux personnes souffrant de maladie aiguë ou chronique, ainsi qu'en matière de réadaptation;

b) hôpital ou établissement pour personnes ayant des problèmes de santé mentale;

c) tout ou partie d'un établissement où sont offerts aux résidents dont l'aptitude physique ou mentale sur le plan de l'autonomie ou de l'autocontrôle est limitée :

(i) des soins infirmiers et personnels sous la direction ou la surveillance d'un personnel de soins infirmiers et médicaux compétent ou d'autres soins personnels et de surveillance (sauf les services ménagers propres à la tenue de l'intérieur domestique)

(ii) assistance with the activities of daily living and social, recreational and other related services to meet the psycho-social needs of the residents, and

(iii) meals and accommodation.

selon les besoins des résidents,

(ii) de l'aide pour permettre aux résidents d'accomplir des activités courantes et des activités récréatives et sociales, et d'autres services connexes pour satisfaire à leurs besoins psycho-sociaux,

(iii) les repas et le logement.

[8] A hospital authority or a charity that builds a health care facility is not entitled to claim input tax credits to recover the GST it pays on building costs. Instead, the hospital authority or charity may claim a rebate of a portion of the GST paid. The amount of the rebate is 83% of the GST if the builder is a hospital authority, and 50% if the builder is a charity. The resulting GST burden for the cost of building a health care facility is approximately 1% of the building cost (17% of the GST at the rate of 7%) if it is built by a hospital authority, and 3.5% (50% of the GST at the rate of 7%) if it is built by a charity. (The terms “hospital authority” and “charity” are defined in subsection 123(1) of the *Excise Tax Act*. For reasons that are explained below, those definitions are not relevant for the purposes of this appeal.)

[9] Part II of Schedule V lists the health care services that are “exempt supplies”. By virtue of section 2 of Part II, a payment for a health care service supplied by a health care facility is exempt from GST if it meets the statutory definition of “institutional health care service”. Section 2 reads as follows:

2. A supply of an institutional health care service made by the operator of a health care facility if the service is rendered to a

2. La fourniture de services de santé en établissement, rendus à un patient ou à un résident d'un établissement de santé,

patient or resident of the facility, but not including a supply of a service related to the provision of a surgical or dental service that is performed for cosmetic purposes and not for medical or reconstructive purposes.

effectuée par l'administrateur de l'établissement, à l'exclusion de la fourniture de services liés à la prestation de services chirurgicaux ou dentaires exécutés à des fins esthétiques plutôt que médicales ou restauratrices.

[10] The term "institutional health care service" is defined as follows in section 1 of Part II:

"institutional health care service" means any of the following when provided in a health care facility:

« services de santé en établissement » Les services et produits suivants offerts dans un établissement de santé :

(a) laboratory, radiological or other diagnostic services,

a) les services de laboratoire, de radiologie et autres services de diagnostic;

(b) drugs, biologicals or related preparations when administered, or a medical or surgical prosthesis when installed, in the facility in conjunction with the supply of a service included in any of paragraphs (a) and (c) to (g),

b) lorsqu'elles sont accompagnées de la fourniture d'un service ou d'un bien figurant à l'un des alinéas a) et c) à g), les drogues, substances biologiques ou préparations connexes administrées dans l'établissement et les prothèses médicales ou chirurgicales installées dans l'établissement;

(c) the use of operating rooms, case rooms or anaesthetic facilities, including necessary equipment or supplies,

c) l'usage des salles d'opération, des salles d'accouchement et des installations d'anesthésie, ainsi que l'équipement et le matériel nécessaires;

(d) medical or surgical equipment or supplies

d) l'équipement et le matériel médicaux et chirurgicaux :

(i) used by the operator of the facility in providing a service included in any of paragraphs (a) to (c) and (e) to (g), or

(i) utilisés par l'administrateur de l'établissement en vue d'offrir un service figurant aux alinéas a) à c) et e) à g),

(ii) supplied to a patient or resident of the facility otherwise than by way of sale,

(ii) fournis à un patient ou à un résident de l'établissement autrement que par vente;

(e) the use of radiotherapy, physiotherapy or occupational therapy facilities,

e) l'usage des installations de radiothérapie, de physiothérapie ou d'ergothérapie;

(f) accommodation,

(g) meals (other than meals served in a restaurant, cafeteria or similar eating

establishment), and

(h) services rendered by persons who receive remuneration therefor from the operator of the facility [...].

f) l'hébergement;

g) les repas (sauf ceux servis dans un restaurant, une cafétéria ou un autre établissement semblable où l'on sert des repas);

h) les services rendus par des personnes rémunérées à cette fin par l'administrateur de l'établissement.

[11] Paragraphs (f) and (g) of the definition of “institutional health care service” reflect the fact that the provision of health care services in an institutional setting necessarily includes the provision of living accommodation and meals.

Statutory scheme for rental living accommodation

[12] Part I of Schedule V of the *Excise Tax Act* deals with real property. By virtue of paragraphs 6(a) and (b) of Part I of Schedule V, most residential rents are exempt from GST.

[13] Generally, the burden of GST on the cost of building rental accommodation is borne by the owner of the rented property rather than the tenant. That is achieved by means of section 191(3) of the *Excise Tax Act*, the “self-supply rule”, which reads in relevant part as follows:

191. (3) For the purposes of this Part, where

(a) the construction or substantial renovation of a multiple unit residential complex is substantially completed,

191. (3) Pour l'application de la présente partie, lorsque les conditions suivantes sont réunies :

a) la construction ou les rénovations majeures d'un immeuble d'habitation à logements multiples sont achevées en grande partie,

(b) the builder of the complex

(i) gives, to a particular person who is not a purchaser under an agreement of purchase and sale of the complex, possession of any residential unit in the complex under a lease, licence or similar arrangement entered into for the purpose of the occupancy of the unit by an individual as a place of residence, [...]

the builder shall be deemed

(d) to have made and received, at the later of the time the construction or substantial renovation is substantially completed and the time possession of the unit is so given to the particular person or the unit is so occupied by the builder, a taxable supply by way of sale of the complex, and

(e) to have paid as a recipient and to have collected as a supplier, at the later of those times, tax in respect of the supply calculated on the fair market value of the complex at the later of those times.

b) le constructeur, selon le cas :

(i) transfère à une personne, qui n'est pas l'acheteur en vertu du contrat de vente visant l'immeuble, la possession d'une habitation de celui-ci aux termes d'un bail, d'une licence ou d'un accord semblable conclu en vue de l'occupation de l'habitation à titre résidentiel, [...]

Le constructeur est réputé :

d) avoir effectué et reçu, par vente, la fourniture taxable de l'immeuble le jour où les travaux sont achevés en grande partie ou, s'il est postérieur, le jour où la possession de l'habitation est transférée à la personne ou l'habitation est occupée par lui;

e) avoir payé à titre d'acquéreur et perçu à titre de fournisseur, au dernier en date de ces jours, la taxe relative à la fourniture, calculée sur la juste valeur marchande de l'immeuble ce jour-là.

[14] The self-supply rule applies to a building that meets the definition of “multiple unit residential complex”, as defined in Part I of Schedule V. That definition, and the definitions of “residential complex” and “residential unit”, read as follows:

123. (1) In section 121, this Part and Schedules V to X,

"multiple unit residential complex" means a residential complex that contains more than one residential unit, but does not include a condominium complex.

123. (1) Les définitions qui suivent s'appliquent à l'article 121, à la présente partie et aux annexes V à X.

« immeuble d'habitation à logements multiples » Immeuble d'habitation, à l'exclusion d'un immeuble d'habitation en copropriété, qui contient au moins deux habitations.

"residential complex" means

(a) that part of a building in which one or more residential units are located, together with

(i) that part of any common areas and other appurtenances to the building and the land immediately contiguous to the building that is reasonably necessary for the use and enjoyment of the building as a place of residence for individuals, and

(ii) that proportion of the land subjacent to the building that that part of the building is of the whole building [...].

« immeuble d'habitation »

a) La partie constitutive d'un bâtiment qui comporte au moins une habitation, y compris :

(i) la fraction des parties communes et des dépendances et du fonds contigu au bâtiment qui est raisonnablement nécessaire à l'usage résidentiel du bâtiment,

(ii) la proportion du fonds sous-jacent au bâtiment correspondant au rapport entre cette partie constitutive et l'ensemble du bâtiment [...].

"residential unit" means

(a) a detached house, semi-detached house, rowhouse unit, condominium unit, mobile home, floating home or apartment,

(b) a suite or room in a hotel, a motel, an inn, a boarding house or a lodging house or in a residence for students, seniors, individuals with a disability or other individuals, or

(c) any other similar premises,

or that part thereof that

(d) is occupied by an individual as a place of residence or lodging,

(e) is supplied by way of lease, licence or similar arrangement for the occupancy thereof as a place of residence or lodging for individuals [...].

« habitation »

Maison individuelle, jumelée ou en rangée, unité en copropriété, maison mobile, maison flottante, appartement, chambre d'hôtel, de motel, d'auberge ou de pension, chambre dans une résidence d'étudiants, d'ânés, de personnes handicapées ou d'autres particuliers ou tout gîte semblable, ou toute partie de ceux-ci, qui est, selon le cas :

a) occupée à titre résidentiel ou d'hébergement;

b) fournie par bail, licence ou accord semblable, pour être utilisée à titre résidentiel ou d'hébergement [...].

[15] To understand the operation of the self-supply rule, it is convenient to consider the example of a newly constructed rental apartment building. There is no doubt that the self-supply rule applies to such a building.

[16] The builder of a rental apartment building must pay GST on the building costs. The builder may then claim input tax credits to recover the GST it has paid. However, the self-supply rule requires the builder to pay GST on the fair market value of the building when it is substantially completed and a person is given possession of an apartment under a lease, licence or similar arrangement entered into for the purpose of the occupancy of the apartment as a place of residence. The result is that the GST burden on a rental apartment building, equal to 7% of the fair market value of the completed building, is borne entirely by the builder.

Facts

[17] The relevant facts relating to Kiwanis Care Centre as of its completion in May of 1998 are undisputed. They were established either by formal admissions or by the uncontradicted evidence of the only witness, Ms. Shannon Trevor-Smith, a senior employee of North Shore Health Region. I summarize those facts as follows.

[18] Kiwanis Care Centre has 180 single rooms and 6 double rooms. The double rooms are made available to related persons, but are not necessarily limited to related persons. The rooms are arranged in units around nursing stations that resemble and are used in the same manner as nursing stations in a hospital.

[19] The rooms are equipped with hospital beds and basic furniture. Each room contains a lavatory with a sink and toilet, and is equipped with special handholds and other safety devices. Oxygen is available in the rooms, either directly from a central supply or in tanks that are readily available throughout the facility. Photographs in the record indicate that the rooms resemble hospital rooms. For example, the beds in the double rooms are surrounded by hospital curtains.

[20] The occupants of the rooms within a unit share bathing facilities. The bathrooms are equipped with handholds and other safety equipment.

[21] The first individuals admitted to Kiwanis Care Centre upon its completion in May of 1998 came from two other facilities operated by North Shore Health Region that initially were assisted living facilities, and became care facilities as the needs became greater. Those first individuals, like all later admissions, were of advanced age and suffered from one or more physical or mental infirmities that made it impossible for them to live independently in the community. They required personal and medical care and supervision in varying degrees, but not the relatively high degree of medical care that is typically provided by an acute care hospital.

[22] The occupants of Kiwanis Care Centre are divided into three categories for administrative purposes. Those in the first group are mobile but require some assistance with the activities of daily living, such as feeding and bathing. They have various physical or mental infirmities but are medically stable. Those in the second group have more limited mobility, or an ongoing medical condition that requires supervision by a physician. Some of those in the second group suffer from

one or more psychiatric or psychological conditions that require frequent monitoring. The third group, known as the extended care group, consists of individuals with multiple diagnoses of medical conditions, including cardiac or pulmonary conditions and restricted mobility, requiring 24 hour per day monitoring.

[23] Admission to Kiwanis Care Centre is not available on demand. Applicants for admission are subject to a fairly elaborate evaluation by a physician and a community caseworker. The evaluation is intended to ensure that the applicant needs the degree of care available at Kiwanis Care Center. Upon admission, a monthly charge is fixed for each individual, based upon ability to pay. These charges range from \$750 to \$1,500 per month, and are payable by direct debit from the individual's bank account. The operating costs are subsidized by the provincial government.

[24] Upon admission, an individual is assigned a room. It is not clear exactly what degree of privacy the occupant of a room is entitled to expect, although it appears that the only person who is permitted to occupy a room is the individual to whom that room is assigned. However, a room assignment may change if the staff determines that the individual's needs have changed. For example, an individual who initially requires the lowest degree of care may be moved to a room in a unit designated for those with a higher degree of care. Such moves are made at the initiative of staff. The record does not disclose whether the consent of the individual involved is sought or required.

[25] Individuals admitted to Kiwanis Care Centre receive medical care and living assistance that is appropriate for their physical and mental conditions. They have their meals prepared for them. The required medical care is provided by a full-time nursing staff. The nurses administer medications as prescribed by the attending physician, including intravenous medication, and attend to first aid and other relatively routine medical needs that arise. Hospital-style charts are maintained for each patient. When required, Kiwanis Care Centre provides palliative care that is the same as the palliative care that would be provided by an acute care hospital.

[26] Kiwanis Care Centre has no staff physicians. Individuals are admitted only if they have a personal physician willing to attend to them in Kiwanis Care Centre. A geriatrician conducts rounds twice each month, and a dentist, optometrist and podiatrist are available to the patients as needed, at fees negotiated for them by Kiwanis Care Centre.

[27] A number of steps are taken to make Kiwanis Care Centre as homelike as possible. Individuals may, upon admission, bring a chair and other small items of furniture if approved by the staff, as well as personal items such as pictures, ornaments and blankets or comforters. They may subscribe to telephone and cable television services at their own cost. Personal items can be displayed in a memory box, which is a locked glass case near the door of the room. However, prescription medications are not kept in the rooms, but in the nursing stations.

[28] Individuals admitted to Kiwanis Care Centre have the use of a library, a function room that is available for family and other social gatherings, and a tuck shop. There is also a rehabilitation

facility. There is no pharmacy. Prescriptions are filled at a local pharmacy and delivered to Kiwanis Care Centre, where a nurse checks the deliveries.

[29] By 2004, about 25% of the individuals originally admitted to Kiwanis Care Centre in May of 1998 were still living there. The remainder had passed away. The expectation is that most individuals admitted to Kiwanis Care Centre will die there.

[30] Kiwanis Care Centre operates under the laws of British Columbia relating to health care, not residential tenancies. It is funded through and regulated by the Ministry of Health. It is classified as a “hospital” under the *Hospital Act* R.S.B.C. 1979, c.180, but only for purposes related to certain funding. It does not provide emergency care or acute medical care of the kind that might be expected of a typical general hospital.

[31] In the course of discussing an issue that is not relevant to this appeal, the Tax Court Judge concluded that Kiwanis Care Centre is not a “hospital” within the ordinary meaning of that word because the degree of medical care offered is not sufficiently complex. The Crown relied on that conclusion to support its position that Kiwanis Care Centre should be seen primarily as a place of residence. In my view, that submission has little merit. Kiwanis Care Centre looks like a hospital, and in many respects it is operated like a hospital. The most important services it provides, the services that are its *raison d’être*, are medical services provided by health care professionals. There can be no doubt that Kiwanis Care Centre can fairly be described as a medical facility.

[32] It is also true, in a certain sense, to say that individuals who are admitted to Kiwanis Care Centre live there. However, it is difficult to imagine that anyone would choose to live there, if it were not for the medical services offered. And those medical services can be obtained only upon being admitted.

Overlapping definitions

[33] It is common ground that Kiwanis Care Centre meets the statutory definition of “health care facility” in Part II of Schedule V. The position of the Crown is that Kiwanis Care Centre also meets the definition of “multiple unit residential complex” as defined in Part I of Schedule V, and further that the self-supply rule applied at the relevant time. North Shore Health Region does not argue that the definitions of “health care facility” and “multiple unit residential complex” are mutually exclusive, or that it is impossible as a matter of law for a facility to meet both definitions. Its argument is focussed instead on certain statutory conditions in the self-supply rule.

Analysis

[34] North Shore Health Region argues that the self-supply rule in subsection 191(3) of the *Excise Tax Act* does not apply because the conditions in subparagraph 191(3)(b)(i) are not met.

This argument is based on three propositions, which I summarize as follows:

- (a) The occupant of a room in Kiwanis Care Centre does not occupy it for the purpose of residence.

- (b) The arrangement under which an individual occupies a room in Kiwanis Care Centre is not a “lease, licence or similar arrangement” within the meaning of subparagraph 191(3)(b)(i).
- (c) The occupant of a room in Kiwanis Care Center is not given “possession” of the room within the meaning of subparagraph 191(3)(b)(i).

[35] This argument echoes the elements of subparagraph 191(3)(b)(i) of the *Excise Tax Act*. Subsection 191(3) is quoted above, but I repeat subparagraph 191(3)(b)(i) here for ease of reference (my emphasis):

(b) the builder of the complex

(i) gives, to a particular person who is not a purchaser under an agreement of purchase and sale of the complex, possession of any residential unit in the complex under a lease, licence or similar arrangement entered into for the purpose of the occupancy of the unit by an individual as a place of residence, [...]

b) le constructeur, selon le cas :

(i) transfère à une personne, qui n’est pas l’acheteur en vertu du contrat de vente visant l’immeuble, la possession d’une habitation de celui-ci aux termes d’un bail, d’une licence ou d’un accord semblable conclu en vue de l’occupation de l’habitation à titre résidentiel, [...]

[36] The Tax Court Judge referred to subparagraph 191(3)(b)(i) but he did not analyze it. Instead, he considered the statutory definitions quoted above and, based on his understanding of those definitions, concluded that the self-supply rule applied. His analysis relies particularly on the following elements of the definition of “residential unit” (my emphasis):

"residential unit" means	« habitation »
[...]	[...] chambre d'hôtel, de motel, d'auberge ou de pension, chambre dans une résidence d'étudiants, d'ânés, de personnes handicapées ou d'autres particuliers ou tout gîte semblable, ou toute partie de ceux-ci, qui est, selon le cas :
(b) a suite or room in a hotel, a motel, an inn, a boarding house or a lodging house or in a residence for students, seniors, individuals with a disability or other individuals, or	a) occupée à titre résidentiel ou d'hébergement;
(c) any other similar premises,	b) <u>fournie par bail, licence ou accord semblable, pour être utilisée à titre résidentiel ou d'hébergement</u> [...].
or that part thereof that	
(d) is occupied by an individual as a place of residence or lodging,	
(e) <u>is supplied by way of lease, licence or similar arrangement for the occupancy thereof as a place of residence or lodging for individuals</u> [...].	

[37] This is explained in paragraphs 13 and 14 of his reasons (footnotes omitted):

[13] The real question to be answered on this aspect of the appeal, therefore, is whether the [North Shore Health Region] gave to the patients possession of a room under a lease, license or similar arrangement for the purpose of occupancy as a place of residence. There is no lease in the present case. Whether the patients have a license to occupy their rooms, or something less than that is not a question that needs to be answered. It is clear that in using the phrase "... lease, license or similar arrangement for the occupancy thereof as a place of residence or lodging ...", Parliament intended to cover any lawful basis under which a person might, with permission, take up residence in premises. Whether in the English or the French version of the Act, it is difficult to think of any broader form of words that could have been used to describe a situation where an individual is, by agreement with the owner, permitted to take up residence. If the arrangement in this case is not a license, it is certainly a "similar arrangement".

[14] Nor is it possible to conclude that the rooms in [Kiwaniis Care] Centre that are occupied by the patients are not their place of residence. They live, eat and sleep at [Kiwaniis Care] Centre on a full-time basis; they have some common amenities beyond the confines of their rooms; they receive their mail and, if they wish, newspapers there; they have social events with their families there. Finally, there is no evidence that they have any expectation of going in the future to live elsewhere. To conclude that [Kiwaniis Care] Centre is not a place of residence for the patients would be to conclude that they are

homeless, which patently would be wrong. The parts of the building that are occupied by the patients are in my view "residential units" as defined, and [Kiwaniis Care] Centre is a "multi-unit residential complex" as defined. It follows that upon the happening of the second of two events, substantial completion and the first patient taking up residence, there was a deemed supply by the [North Shore Health Region] to the [North Shore Health Region] of the complex, and the [North Shore Health Region] was deemed to have paid, and to have collected, tax at the rate of 7% on the fair market value of the complex.

[38] Because of the definition-based approach adopted by the Tax Court Judge, he did not consider expressly whether the statutory conditions in subparagraph 191(3)(b)(i) were met. In my view, that omission led the Tax Court Judge to an incorrect interpretation of the self-supply rule, and an incorrect conclusion as to its applicability. Specifically, the Tax Court Judge erred in failing to give meaning to the word "possession", which appears in subparagraph 191(3)(b)(i) but does not appear in the statutory definitions upon which his analysis relies.

[39] Subparagraph 191(3)(b)(i) must be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of Parliament. See, for example, *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, [2006] 2 S.C.R. 560 at paragraph 26; *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601 at paragraph 10; Driedger, Elmer A., *Construction of Statutes* (2nd ed., Toronto: Butterworths, 1983) at page 87. In this case, the object of subparagraph 191(3)(b)(i), and the intention of Parliament in enacting it, must be discerned from the words of the statute and the relevant portions of the statutory scheme in which they are found, as summarized above. There is no guiding jurisprudence.

[40] North Shore Health Region submits that the right of occupancy given to the occupant of a room in Kiwanis Care Centre is no different than the right of occupancy given to patient in a hospital room, which does not amount to “possession” of the room. In my view, the factual comparison is an apt one. The main evidence cited by North Shore Health Region on this point is found in the following testimony of Ms. Trevor-Smith:

Q. So when a resident is admitted, from the time they admit until the time that they leave the facility presumably by passing away, would they stay in the same room the whole time?

A. If we can, and with the extended care almost without exception yes, they would. However, we do move them and we move them because the care needs change, the medical needs change of the patient, and we move the patient to the area or the program where we can best provide that care.

[41] As I understand this evidence, North Shore Health Region, acting through officials employed at Kiwanis Care Centre, has the right to move an individual from one room to another, and exercises that right when required to accommodate a change in the required level of care. The question is whether that kind of tenure amounts to “possession” within the meaning of subparagraph 191(3)(b)(i) of the *Excise Tax Act*.

[42] The word “possession” does not have a fixed legal meaning (see Bruce Ziff, *Principles of Property Law*, 4th ed. (Toronto: Thomson Carswell, 2006), at pages 117-118). However, when used in a legal context, “possession” generally implies elements of dominion and exclusivity:

1. The fact of having or holding property in one’s power; the exercise of dominion over property.

2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object.

Black's Law Dictionary (8th edition)

“Possession” is a word of ambiguous meaning and its legal senses do not coincide with the popular sense [...].

“Possession” may mean legal possession: that possession which is recognized and protected as such by law. The elements normally characteristic of legal possession are the intention of possessing together with that amount of occupation or control of the entire subject matter of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering.

Halsbury's Laws of England (4th edition)
Reissue, Volume 35, page 732

[43] The Tax Court Judge did not conclude, as the Crown argues, that an individual assigned to a room in Kiwanis Care Centre has “exclusive private occupancy” of the room, and therefore has “possession” of the room. Indeed, it is difficult to see how he could have reached any such conclusion on the basis of a record that is notably sparse on the question of expectations of privacy. Rather the Tax Court Judge either disregarded the word “possession” in paragraph 191(3)(b)(i) or presumed, without saying so, that merely being assigned to a room and actually occupying it was sufficient to establish the requisite degree of possession.

[44] In my view, the word “possession” in the context of subparagraph 191(3)(b)(i) of the *Excise Tax Act* is intended to describe a right of possession that is equivalent or analogous to the right of possession normally enjoyed, for example, by the tenant of a residential apartment. That would suggest, generally speaking, a right to the exclusive use and enjoyment of a particular apartment for a defined period of time for residential purposes, a right that cannot be defeated during the stipulated period except upon a breach by the tenant of the terms of the tenancy. In my view, the right of occupancy of an individual admitted to Kiwanis Care Centre is decidedly unlike the right of occupancy normally enjoyed by a residential tenant, in one crucial respect.

[45] According to the evidence, an individual who is admitted to Kiwanis Care Centre has the right to be assigned to a room, but not to a particular room. Further, the room assignment can be changed at the will of North Shore Health Region. I accept that the policy of North Shore Health Region is to make such a change only when required because of a change in the individual’s physical or mental condition. I also accept that individuals admitted to Kiwanis Care Centre know of that policy and may be presumed to have accepted it. Nevertheless, it is North Shore Health Region alone that is entitled to determine the use and disposition of any particular room, and can exercise that right from time to time. If the right of an individual to occupy a particular room is entirely at the discretion of North Shore Health Region, then in my view the person does not have a right of “possession” as that term is normally used in the context occupying a residential space.

[46] I conclude that the tenure of an individual admitted to Kiwanis Care Centre is not “possession” within the meaning of subparagraph 191(3)(b)(i) of the *Excise Tax Act*. It follows

that the conditions for the application of the self-supply rule were not met in May of 1998 when Kiwanis Care Centre was substantially complete and the first individuals were admitted.

[47] I have not ignored the portions of the definition of “residential unit” (quoted above) that contemplate residential premises that may be quite unlike an apartment in an apartment building. A residential unit may be a detached house, a semi-detached house, a rowhouse unit, a condominium unit, a mobile home, a floating home, or a suite or room in a hotel, motel, inn, boarding house, lodging house or a residence for students, seniors, individuals with a disability or other individuals. The list is extensive and may well include many forms of subsidized or special purpose accommodation. However, in determining whether the self-supply rule applies in a particular case, it is not enough to determine the nature of the accommodation. It is also necessary to determine the rights of occupancy, and if those rights do not amount to “possession”, then the self-supply rule cannot apply.

Estoppel

[48] During the period of the construction of Kiwanis Care Centre (1996 to 1998), North Shore Health Region or its predecessor periodically claimed input tax credits in relation to GST paid on building costs. That was done because its own advisers, who had consulted with the tax authorities, were of the view that upon the completion of Kiwanis Care Centre and the first admission, the self-supply rule would apply. The input tax credit claims were paid at various times from 1996 to 2000. The Crown submits that if the self-supply rule does not apply, the input tax

credit claims were paid in error. The Crown may assess to recover input tax credit claims paid in error, subject to a statutory limitation of three years.

[49] As indicated above, Kiwanis Care Facility was completed and the first individuals admitted in May of 1998. However, for reasons that are not explained, North Shore Health Region did not act on a timely basis to file the return necessary to give effect to the self-supply rule. The return was filed late, in August of 1999. At that time, North Shore Health Region's advisers still believed that the self-supply rule applied, and the return was filed on that basis.

[50] The late filed return resulted in an assessment dated July 9, 2001 giving effect to both the self-supply rule and the rebate (which had been claimed at 87% and allowed at 50%). The delay in assessing the return apparently was the result of a debate between the tax authorities and North Shore Health Region as to the correct rate of rebate. During the period of deliberations, the Crown became statute barred from any attempts to recover the input tax credits previously paid to North Shore Health Region that the Crown now says were paid in error.

[51] The July 9, 2001 assessment was the subject of a notice of objection filed October 5, 2001, which led ultimately to this appeal. It was in that notice of objection that North Shore Health Region first asserted its position that the self-supply rule did not apply to Kiwanis Care Centre. The Crown argues that, because it was then too late for the Crown to recover the input tax credits that had been claimed and paid on the basis that Kiwanis Care Centre would be subject to the self-supply rule, North Shore Health Region should be estopped from arguing in this appeal that the

self-supply rule did not apply. The Tax Court Judge did not consider it necessary to deal with that issue because he found that the self-supply rule applied.

[52] Generally, the Crown may invoke the doctrine of estoppel in the context of a tax appeal if a taxpayer appeals an assessment that is based in whole or in part on a factual misrepresentation in a return or other communication from or on behalf of the taxpayer upon which the tax authority relied to the Crown's detriment. The expiry of a statutory limitation period may be relevant to the element of detriment.

[53] In this case the parties' opposing positions are not based on a factual dispute, but a dispute on a question of statutory interpretation namely, the scope of subparagraph 191(3)(b)(i) of the *Excise Tax Act*. Indeed, the Crown's pleadings do not allege that any misrepresentation of fact was made. My review of the record discloses no factual misrepresentation on the part of North Shore Health Region or its predecessor, or its advisers. I conclude that this is not a case in which the doctrine of estoppel can be applied to bar the argument upon which North Shore Health Region has based this appeal.

Entitlement to rebate

[54] In the proceedings in the Tax Court, an issue was raised as to whether North Shore Health Region meets the statutory definition of "hospital authority" (which would entitle it to a rebate of 87% of the GST paid on building costs) or the statutory definition of "charity" (which would entitle it to a rebate of 50% of the GST paid on building costs). The Tax Court agreed with the

Crown that the North Shore Health Region is a charity and not a hospital authority. That conclusion is not challenged in this appeal. I do not consider it necessary to express an opinion on this point.

Conclusion

[55] I would allow this appeal, set aside the judgment of the Tax Court of Canada and refer this matter to the Minister for reconsideration in accordance with these reasons. I would grant North Shore Health Region its costs in this Court and in the Tax Court of Canada.

“K. Sharlow”
J.A.

“I agree.
A.M. Linden J.A.”

“I agree.
M. Nadon J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY: LINDEN J.A.
NADON J.A.

DATED: January 4, 2008

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