File: 2001-1923(GST)G

BETWEEN:

AU PIED DU MONT SAINTE-ANNE
CONDOMINIUMS LE VILLAGE VACANCES ANIMÉES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 25, 2003, at Quebec City, Quebec

Before: The Honourable Judge François Angers

Appearances:

Counsel for the Appellant:	André Lareau
Counsel for the Respondent:	Michel Morel and Bernard Gaudreau (Student-At-Law)

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act*, notice of which is dated August 6, 1999, and numbered 9213435, is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 13th day of January 2004.

"François Angers"

Angers J.

Citation: 2004TCC40
Date: 20040113
File: 2001-1923(GST)G

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AU PIED DU MONT SAINTE-ANNE
CONDOMINIUMS LE VILLAGE VACANCES ANIMÉES INC.,

Appellant,

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REASONS FOR JUDGMENT

François Angers J.

[1] This is an appeal from an assessment made on August 6, 1999, under Part IX of the *Excise Tax Act* (the "Act"), numbered 9213435. The Deputy Minister of Revenue of Quebec ("Deputy Minister"), on behalf of the Canada Customs and Revenue Agency ("CCRA"), is claiming the sum of $24,148.86 for the period beginning November 1, 1994, and ended October 31, 1996. The Deputy Minister maintains that the Appellant failed to collect and remit the Goods and Services Tax ("GST") on a payment of $281,151.28 made to the Appellant. In his calculations, the Deputy Minister took into account the fact that the Appellant was entitled to input tax credits totalling $2,606.74. However, he also took into account the fact that the Appellant owed $2,977.48 in interest and $4,097.54 in penalties. These figures are not in dispute, and the Appellant has informed the Court that it would withdraw its appeal from the portion of the assessment that is prescribed.

[2] It should also be noted that the Appellant paid GST on the $3,750 payments received as management fees and that the Deputy Minister did not include the GST on these amounts in the calculation of the assessment at issue.

[3] The only point at issue, as the Respondent maintains, is whether the Appellant acted as an agent for the condominium corporations, and in so doing,

was not required to collect and remit the GST to the Deputy Minister, or whether it provided taxable management services to these corporations.

[4] The Appellant is a business corporation that, at all relevant times, operated a resort, rented out condominium units (the units), and offered various services to the occupants. It has approximately 80 shareholders, including some who are also owners of units located in this centre. At the time, 176 units were available for rental purposes. Five condominium corporations unite and represent all the owners of the units. Each condominium corporation represents the condominium owners of each of the phases of development of the project. Most of the units were sold as investments, thus intended for rental in the same manner as the Appellant's units. Approximately 120 units were entrusted to the Appellant for rental purposes by the five condominium corporations operating under the name Syndicat des copropriétaires de Place au Pied du Mont Sainte-Anne Phase I to V, depending on the year of development.

[5] In order to ensure the rental of the units, to have a permanent presence on-site, and to benefit from the cost savings arising from negotiations as a group, each of the condominium corporations had agreed, through a Memorandum of Agreement, to entrust the Appellant with some responsibilities respecting the management of current operations. The Appellant already owned a building on site which contained an administration office and reception area, a swimming pool, an activity room, and the equipment required to wash the bedding. It also had the staff on hand to provide these services.

[6] The Memorandum of Agreement between the Syndicat des copropriétaires de Place au Pied du Mont Phase III and the Appellant was filed in evidence as an example. A similar Memorandum was signed by the other condominium corporations, covering the period beginning October 1, 1995, and ended September 30, 1996. The preamble states that, among other points, the purpose of this understanding is to [Translation] "enable the realization of savings through group negotiation and shared management of the site." To this end, the Memorandum designates the Appellant [Translation] "as the manager of certain current activities under the responsibility of the Syndicat."

[7] The Memorandum specifies that:

1) the Appellant shall negotiate contracts for snow removal (par. 1(a)), container rental and transportation (par. 10(a)), and insurance (par. 12(a));

2) in addition to hiring the staff required to meet the requirements of the Memorandum (par. 18), the Appellant is required to hire a lifeguard for the swimming pool (par. 9(a)), a security guard for the night shift (part. 11), and activity leaders (par. 15(b));

3) the Syndicat is required to pay $3,750 per phase, per year, as “management fees”;

4) complaints are to be filed with Appellant and the Syndicat (par. 32 to 34). However, where a complaint is not related to the application of the memorandum, the director is to forward it to the Syndicat for follow-up (par. 35);

5) any increase in unforeseen expenses is to be assumed by the Syndicat. The Appellant agrees to render the shared services at cost, thereby realizing no profits (par. 39);

6) the Appellant is to inform the Syndicat of any budgetary item increase and obtain authorization before incurring the expense (par. 40).

[8] At the time, Pierre Petitclerc acted as President of one condominium corporation and Chairman of the Appellant’s Board of Directors. According to him, the objective of the Memorandum was to respond to the owners’ concerns, because if the units were not rented out and maintained, the investment would not be successful. The notion was to create a continuous presence.

[9] He summarized the functioning of the Memorandum by stating that the responsibility for the implementation of his role was conferred upon the Appellant’s Director General, Mr. Louis Michaud. Mr. Michaud was responsible for soliciting service proposals to submit to the condominium corporations for their approval. The same is true of tenders for snow removal, lifeguards for the swimming pools, insurance, and waste collection. The Appellant was to prepare a budget and submit it to the condominium corporations for their approval. A number of post-dated cheques were written and remitted to the Appellant. These payments were to cover the services paid for by the Appellant, at the Appellant’s cost. Where the costs came in below budget, the Appellant would not realize a profit, because a credit would be given to the Syndicat for the following year.

Where the costs were higher than budgeted, the Syndicat was to cover the increase, further to its approval.

[10] This Memorandum was in effect during the period at issue. In October 1996, the Appellant chose not to renew the agreement owing to its dissatisfaction with some elements. It decided to provide its management services at an agreed on rate. The Appellant was no longer required to render accounts, and it assumed all of the risks relating to the cost of services.

[11] The Appellant and the Respondent filed some contracts in evidence, such as:

1 — a contract for snow removal services with Ladufo Inc., in which only the name of the Appellant appears;

2 — a contract for insurance coverage with Les Assurances René Beauregard Inc. The name of the insured in this contract is “Condominiums Au Pied du Mont Phase I-II-III-IV-V”;

3 — a contract with Groupe Sani-Gestion Inc. for the rental of containers in the tenant’s name: Condominiums au Pied du Mont Inc.;

4 — a contract for bus transportation (shuttle service), concluded by the Appellant, Tours Côté de Beaupré Mont Sainte-Anne Inc., and Ms. Thérèse Saillant;

5 — a contract concluded by Senco and Condos au Pied du Mont, listing the address of work as Phases I-II-III-IV-V, 176 units, and the administrative centre;

6 — a contract concluded by the Appellant and Les Arpents Verts enr., which stipulates that the conditions are identical for Phases I to V.

[12] The Appellant’s financial statements show shuttle service expenses totalling $24,500 under “condominium fees,” which is the exact amount, not including GST, that is stipulated in the contract between the Appellant and Tours Côté de Beaupré. The financial statements also include salary and equipment rental expenses that appear to have been generated by the Memorandum of Agreement.

[13] The Director General, Louis Michaud, confirmed Mr. Petitclerc's testimony. He was responsible for soliciting proposals, submitting them to the condominium corporations for approval, and awarding contracts once approved. He stated that during the period at issue, the expenses incurred were paid by the Appellant on behalf of the condominium corporations from funds obtained in advance. Had the Appellant lacked funds, the Syndicat would have forwarded funds to it. The majority of the contracts were signed by the Appellant. Mr. Michaud was authorized to sign on behalf of the Appellant.

[14] Éric Morency works at landscaping maintenance. He operates a business under the company name "Les Arpents Verts." He is one of the service providers who signed a contract with the Appellant. He testified that the conditions were identical for all five phases (condominium corporations). He stated that Louis Michaud contacted him to solicit a tender. Mr. Michaud explained to him that he was obligated to consult with the condominium corporations' owners before accepting the tender. The contract was approved only the following spring. Although he had signed his contract with the Appellant, he stated that if he caused any type of damage, he would have to resolve any issues with the condominium corporations' managers, not with Louis Michaud. After 1996, he signed contracts with each condominium corporation and with the Appellant for the reception centre, but Louis Michaud remained the spokesperson, paid by the Appellant.

[15] Given the issue at hand, an analysis of the content of the contract is necessary to establish whether the Appellant acted as an agent for the condominium corporations in such a way that it was not required to collect GST. This is a relevant issue, owing to section 178 of the Act that was in effect during a portion of the period at issue. This section read as follows:

> 178 For the purpose of this Part, where in making a supply of a service a person incurs an expense for which the person is reimbursed by the recipient of the supply, the reimbursement shall be deemed to be part of the consideration for the supply of the service, except to the extent that the expense was incurred by the person as an agent of the recipient.

[16] For the period beginning April 24, 1996 (the date on which section 178 was repealed), and ended on October 31, 1996, the Appellant may submit that it was acting as an agent in order to contest the assessment, because the application of the provisions of the Act gives the same general result. In *Libra Transport (B.C.) Ltd. v. Canada*, [2001] T.C.J. no. 254 (Q.L.), Bowie J. arrived at the same conclusion, as stated in paragraph 15:

> . . . Section 178 of the Act, prior to its repeal, specifically excluded such amounts from the consideration for services. That section was repealed because it was redundant; the same result is arrived at as a matter of legal principle.

[17] The *Civil code of Québec*, S.Q. 1991, c. 64 (*C.c.Q.*) defines “mandate” in section 2130 as follows:

> Mandate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power.

[18] According to P. Popovici’s [*sic*] book, “La Couleur du mandat,” Éditions Thémis, 1995, on page 18, the essence of a mandate is the power of representation and the performance of a juridical act.

[19] The CCRA has established the essential qualities of agency in its policy statement P-182. The Federal Court of Appeal makes a reference to this policy in *Glengarry Bingo Association* v. *Canada*, [1999] F.C.J. no. 316 (Q.L.), as follows:

> ... Although not determinative of the meaning of "agency" in section 178, the draft policy statement P-182 referred to, although not binding, is a useful tool in determining whether an agency relationship exists.
>
> [32] P-182 identifies three essential qualities of agency. These are the consent of both the Principal and Agent, the authority of the Agent to affect the Principal's legal position and the Principal's control of the Agent's action. Since I find that GBA did not have the capacity to affect the legal position of its members, I find it unnecessary to address the other factors which Revenue Canada has indicated are required for a finding of agency.

[20] Regarding this last essential quality, the CCRA states in policy P-182 that:

> In a relationship of agency, it should be clear that the principal has a degree of power over the actions of the agent; the agent would be acting as an extension of the principal and, therefore, would be under the principal’s general direction and control.

[21] It appears to me that it is necessary to establish the presence of the following qualities in order to find that agency exists:

1 — the performance of a legal transaction;

2 — the consent of the principal and the agent;

3 — the authority of the agent to affect the legal position of the principal;

4 — the control that the principal exercises over the actions of the agent.

[22] In Policy P-182, the CCRA also recommends that the following indicators of agency be taken into consideration to determine whether agency exists, once the essential qualities have been established:

1 — Remuneration: the agent receives a set fee for the activities undertaken to be completed rather than the profit from a transaction;

2 — Ownership of property: generally speaking, an agent does not acquire any interest in the property obtained from a third party as ownership passes directly to or from the principal;

3 — Liability of contract/liability for payment: the principal is liable for contracts and payments;

4 — Accounting practice: the fact that a person segregates from his own funds any monies received or paid out in connection with another person is indicative of an agency capacity;

5 — Best efforts: an agent usually undertakes to use his best efforts in acting for his principal, rather than guaranteeing to achieve a certain result to or on the principal's behalf;

6 — Assumption of risk: would normally be borne by the principal;

7 — Alteration of property acquired: the principal is solely entitled to alter the nature of the property;

8 — Use of property or service by agent: the principal only should normally be entitled to use the property.

[23] It is the Appellant's responsibility to show, on a balance of probabilities, the existence of an agency relationship (see *Glengarry*, *supra*). To this end, the Memorandum of Agreement becomes an essential tool in determining the nature of the relationship the Appellant has established with the condominium corporations. The preamble expresses the intention of the parties to this agreement to realize savings through group negotiations and through shared management of Au pied du Mont Sainte-Anne resort. The Appellant is designated as the manager of some current activities for which the Syndicat is responsible. Management fees are payable to the Appellant under paragraph 27, and the expenses relating to commitments stipulated in the agreement are payable at their actual cost, based on the budget submitted.

[24] Counsel for each of the parties submitted criteria for application and the manner in which they are to be applied in the case at hand. The issue involves mainly the first criteria, that is, whether the Appellant had the authority to represent the condominium corporations in carrying out a legal transaction with a third party. According to policy P-182, this corresponds to the authority of the agent (Appellant) to affect the principal's (the condominium corporations) legal position. In *Glengarry*, *supra*, Sexton J. explained this criteria, saying that the most current example of the manner in which an agent can affect the principal's legal position is the conclusion of a contract in the principal's name.

[25] In this case, the Memorandum of Agreement authorizes the Appellant to negotiate a contract for snow removal, container rentals, waste collection, and insurance. The Appellant's Director General was to solicit proposals or tenders for services and have them approved by the condominium corporations prior to signing an agreement or a contract. Each of the contracts filed in evidence refer to the five phases of the condominium corporations, except the contract for container rentals (document I-3) and the contract for bus transportation (document I-4), in which neither the condominium corporations nor the phases are identified. It is my opinion that the fact of identifying phases or referring to them is not sufficient to conclude that a contractual commitment was made by the condominium corporations to these third parties. The same is true regarding references to the same street address. The confirmation of insurance provides a bit more detail about the name of the parties insured, but the policy was not filed in evidence. Therefore, it appears to me that it is impossible to conclude that in this case, the

Appellant had the capacity to affect the legal position of the condominium corporations, because it did not conclude any contracts with a third party in the name of the condominium corporations. It is my opinion that these are contracts signed and proposals made for the benefit of the Appellant and the condominium corporations with a view to realizing savings through group negotiation and shared management of the resort, as proposed in the preamble to the memorandum.

[26] The background for the creation of the Memorandum is this large group of owners who all have in common the goal of seeing the resort functioning smoothly. Given that the Appellant was retained exclusively by the co-owners of the resort, and that it has all the infrastructures in place to operate the resort, it is normal that the condominium corporations would have recourse to its services. In addition to the contracts that the Appellant was to negotiate and have approved, it was to ensure the services described in paragraph 26 of the memorandum. To do so, the Appellant needed employees such as lifeguards, security guards, and activity leaders. The condominium corporations' only contractual obligation was to give post-dated cheques to the Appellant every three months. That, in my opinion, does not give rise to a legal obligation of the condominium corporations toward the third parties. The responsibility under the contracts and for the staff, and the obligation to make payments belongs to the Appellant entirely. The Director General confirmed in his testimony that any third party was to address him directly, where this party had not received payment. The condominium corporations' only obligation was to make their payments to the Appellant in accordance with the memorandum. Where an excess amount was refunded to the condominium corporations or a deficit was to be covered by them, it is my opinion that these are not risks that a principal would usually assume in a principal-agent relationship.

[27] The fact that the condominium corporations pay for expenses at cost and that the payments are made to the Appellant for this purpose does not, in my opinion, make the condominium corporations' liable to the third parties. Moreover, such payments do not necessarily give rise to the conclusion of a principal-agent relationship (see *Glengarry*, *supra*).

[28] In this case, the Memorandum stipulates that the condominium corporations must approve the annual budget and subcontracts. At first glance, it would appear that the condominium corporations exercise control over the Appellant with respect to carrying out its functions. It is my opinion that this is a control over the expenses to be incurred in the management of the resort, rather than the control of a principal over its agent in concluding a legal transaction on behalf of the

principal. The evidence does not show conclusively that condominium corporations agreed to authorize the Appellant to render them liable in a legal transaction.

[29] In this case, there are some indications of the existence of an agent. For example, the Appellant does not realize any profits, because the condominium corporations pay its actual cost. The management fees are not calculated on the basis of the profits generated, but rather, they are set at a fixed rate, and the Appellant's responsibility in carrying out the Memorandum is one of a prudent and diligent person, in accordance with section 2138 of the C.c.Q. which stipulates that the agent is bound to fulfil the mandate it has accepted with prudence and diligence. These positive indications are, nonetheless, not sufficient to conclude that a principal-agent relationship was created in this case, because it is necessary, above all, to meet the requirements established in case law. See *Glengarry*, *supra; S.K. Management Inc. v. Canada*, [2003] T.C.J. No 131 (Q.L.); *Evergreen Forestry Services Ltd. v. Canada*, [1999] T.J.C. No 193 (Q.L.); and *Shvartsman v. Canada*, [2002] T.C.J. No 148 (Q.L.).

[30] For the reasons set out above, it is my opinion that a principal-agent relationship does not exist between the condominium corporations and the Appellant. Under the memorandum, the Appellant was not expressly authorized to act as an agent. The evidence does not indicate that the Appellant acted in such a manner that leads to the conclusion that such a relationship existed between the Appellant and the condominium corporations, that is, the authority to commit and bind the condominium corporations in a legal transaction. It is not sufficient to simply negotiate an agreement to create a principal-agent relationship; the agreement must commit and bind the principal. This is not so in this case. Even the rental of the units gave rise to a contractual relationship with the Appellant. All the evidence points to the creation of a management mandate rather than an agency agreement. For these reasons, the appeal is dismissed, with costs.

Signed at Edmundston, New Brunswick, this 13th day of January 2004.

"François Angers"

Angers J.

REFERENCE:	2004CCI40
COURT FILE NO.:	2001-1923(GST)G
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APPEARANCES:

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