Docket: 2007-3967(GST)I

BETWEEN:

MICHAEL SOMERS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 17, 2008, at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Brandon Siegal

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* ("*Act*") and dated November 14, 2006, is allowed, with costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that for the purpose of determining the new housing rebate to which the Appellant is entitled under subsection 256(2) of the *Act*, the fair market value of the property in question was less than $350,000 as of March 3, 2004.

Signed at Halifax, Nova Scotia, this 15th day of May 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC239
Date: 20080515
Docket: 2007-3967(GST)I

BETWEEN:

MICHAEL SOMERS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] This appeal relates to the new housing rebate that was claimed by the Appellant following the construction of his residence. The only issue in this case is related to the fair market value of the property as of March 3, 2004. Both the Appellant and the Respondent agreed that the appropriate date to use for the purposes of determining the fair market value of the property was March 3, 2004. The Appellant filed his claim on the basis that the fair market value of his property was $310,000 and the Minister of National Revenue ("Minister") denied a portion of the rebate on the basis that the Minister had determined that the fair market value of the property was $400,000. The amount of the rebate that was denied (and hence the amount in dispute) is $4,348.66.

[2] Since the issue is the fair market value of the residence of the Appellant, it would have been expected that at least one of the parties would have called an expert witness to provide an opinion on the fair market value of the property. Neither party called any person as an expert witness and neither party filed an expert's report that would have been required by paragraph 7 of the *Tax Court of Canada Rules of Procedure Respecting the Excise Tax Act (Informal Procedure)* ("*Rules*") if that party was intending to call an expert witness.

[3] The relevance of the fair market value of the residence is related to the reduction in the new housing rebate that would have been applicable if the fair market value of the residence was greater than $350,000. Subsection 256(2) of the *Excise Tax Act* ("*Act*"), at the relevant time, provided as follows:

> (2) Where
>
> (a) a particular individual constructs or substantially renovates, or engages another person to construct or substantially renovate for the particular individual, a residential complex that is a single unit residential complex or a residential condominium unit for use as the primary place of residence of the particular individual or a relation of the particular individual,
>
> (b) **the fair market value of the complex, at the time the construction or substantial renovation thereof is substantially completed, is less than $450,000**,
>
> (c) the particular individual has paid tax in respect of the supply by way of sale to the individual of the land that forms part of the complex or an interest therein or in respect of the supply to, or importation by, the individual of any improvement thereto or, in the case of a mobile home or floating home, of the complex (the total of which tax under subsection 165(1) and sections 212 and 218 is referred to in this subsection as the "total tax paid by the particular individual"),
>
> (d) either
>
> (i) the first individual to occupy the complex after the construction or substantial renovation is begun is the particular individual or a relation of the particular individual, or
>
> (ii) the particular individual makes an exempt supply by way of sale of the complex and ownership of the complex is transferred to the recipient before the complex is occupied by any individual as a place of residence or lodging,
>
> the Minister shall, subject to subsection (3), pay a rebate to the particular individual equal to
>
> (e) **where the fair market value referred to in paragraph (b) is not more than $350,000**, the lesser of $8,750 and 36% of the total tax paid by the particular individual before an application for the rebate is filed with the Minister in accordance with subsection (3), and

> (f) **where the fair market value referred to in paragraph (b) is more than $350,000 but less than $450,000**, the amount determined by the formula
>
> A × ($450,000 – B)/$100,000
>
> where
>
> A is the lesser of $8,750 and 36% of the total tax paid by the particular individual before an application for the rebate is filed with the Minister in accordance with subsection (3), and
>
> B is the fair market value of the complex referred to in paragraph (b).
>
> (emphasis added)

[4] Therefore if the fair market value of the residence was $350,000 or less, the actual fair market value is not relevant. If the fair market value was greater than $350,000 and less than $450,000, the actual fair market value is relevant as the amount of the fair market value would reduce the new housing rebate that would otherwise be available. If the fair market value of the residence was $450,000 or more, the actual fair market value is not relevant as no new housing rebate is available for properties with a fair market value within this range.

[5] The Appellant is a firefighter and a farmer. The Appellant works on his father's farm. In 2003 the Appellant acquired a parcel of land in the corner of the farm from his parents for $50,000. The property is located in Beeton, Ontario, which is a rural farming area.

[6] The construction of the house commenced on November 2, 2003 and it was 85% to 90% complete on March 3, 2004. An Occupancy Permit was granted on March 5, 2004. Neither the Appellant nor the Respondent raised any issue in the pleadings or during the hearing with respect to whether the house was substantially completed as of March 3, 2004 and since both the Appellant and the Respondent agreed that the appropriate date to use was March 3, 2004 (which would mean that both the Appellant and the Respondent are agreeing that the house was substantially completed as of this date), I will accept that the appropriate date was March 3, 2004 and not make any determination of whether a building that is 85% finished is substantially completed.

[7] The Appellant did a lot of work in relation to the construction of the house. He described his involvement in part as follows:

> A. I was there every step of the way. By no means could I build a house by myself. I was there mainly to govern and watch what people were doing when they were there.

[8] The Appellant was also involved in making the decisions related to the design of the house and the materials that would be used.

[9] The total cost of construction to March 3, 2004 (determined by adding the amounts for the invoices dated before March 3, 2004 as stated on the construction summary work sheet that the Appellant filed in the support of the GST new housing rebate) was $338,034, including GST. There was also an additional sum of $10,000 paid to Michael Senay Construction for project management services to the date of occupancy. This would bring the total cost (including GST) to $348,034. The Appellant paid $50,000 for the land and therefore the total cost (including GST) of the land and building as of March 3, 2004, was $384,034.

[10] The assessed value of the property for municipal tax purposes as of February 1, 2005 was initially determined to be $358,000. The Appellant appealed this amount and reached a settlement with the Municipal Property Assessment Corporation ("MPAC"), as the Appellant described it "in the courtroom", for $310,000.

[11] The Respondent called Mr. A. J. Eustace as a witness. The Respondent did not qualify him as an expert, nor was any expert report filed in advance of the hearing as would have been required by the *Rules* if Mr. A.J. Eustace would have been called to give expert evidence. The only evidence that he did give was with respect to the background to the preparation of his report in which he determined that the market value of the property was $400,000.

[12] Mr. Eustace described the process in relation to the preparation of the report that he did prepare and the narrative report that he did not prepare, as follows:

> Q. Can you explain briefly what kind of report this is?
>
> A. This is a residential report. It's a form report. It takes me roughly 10 hours, without travelling time, to do.
>
> Q. This document here took you about 10 hours plus travel time as well?

A. Plus or minus.

Q. Aside from the drive-by report, what other types of report have you done?

A. The next step would be a narrative report which would be even more detailed discussing the property and sales. The narrative would be for court. It would normally take 50 to 60 hours. There would be a thorough investigation of each and every sale, et cetera.

…

Q (by the Appellant). How can you accurately get an assessment by being 210 feet from a home taking pictures? I saw you there the day you were there. You have no idea whether the house is bricked on the back. Or are you just taking MPAC's word on everything, the work that they have done, and using that and just standing back 210 feet and making your assessment? Is that how you make all your assessments, just drive up, take a picture how it looks from the exterior like that?

A. I will explain how we do the process.

According to the department's policy, we don't upset the owner of the property. We don't go into the property unless you want to renegotiate and then the owner will say, "Come and have a look." Or if it is going to go to court, then we go and look into it. These opportunities were not given to me. They didn't have to because of certain other things.

What we do is we go and get all the information about the house, whatever we can. We get information on the house more than anything else, and then we make sure that the house is existing. If you had said, "Do you want to have a look in the house?" I would have definitely come in, but we don't really want to come into the house. We never do that. That is a regulation we have.

When you do the photograph, that is to say, "This is the outside of the house." If I had come and prepared a narrative report, I would have requested that I should come into the house, and I would have seen every construction, all the details, and then my report would have been about 50 pages, or even more than that.

Every house we do this way but, when there is some disagreement with the owner, we try to get whatever the owner has to say and we agree and sometimes we don't.

[13] As noted by Mr. Eustace, when matters go to court he would normally do a narrative report which would be more detailed than the report that he did prepare and he would also do a “thorough investigation of each and every sale”. No narrative

report was done in this case, even though this matter did proceed to court. Presumably, since no narrative report was done, Mr. Eustace did not do a thorough investigation of the sales that he used as comparable sales. Mr. Eustace did not see any part of the Appellant's property other than what he could see from the road and in particular he did not see the inside of the house.

[14] The report prepared by Mr. Eustace included only three comparable properties. However, one of the properties that was included had 10.78 acres and another had 10.82 acres. The size of the lot owned by the Appellant was 1.03 acres. Since the land size for these "comparable" properties was over 10 times the size of the Appellant's lot and since the Appellant paid $50,000 for 1.03 acres (although this was purchased from his parents and therefore may not be indicative of fair market value), the value of the extra land would have to be taken into account in adjusting the sale price for 10.78 acre and 10.82 acre properties. Mr. Eustace's comments on this were as follows:

> Q. Another variable that seems to be quite different between the houses in question is the size of the lots. How was that comparable taken into account?
>
> A. North of Toronto, in Simcoe County sometimes you may have comparables with 10 acres, 15 acres or 25 acres, but you could sometimes compare that with smaller extents. We have to take into account the zoning on those properties. Sometimes they can't subdivide that.
>
> Some portions of the land could be zoned as open space or some other zoning designation which doesn't allow it to be developed.
>
> We do make a difference for that, but it shouldn't be a drastic drop in price because of the acreage.

[15] He never addressed the specific properties with 10.78 acres and 10.82 acres that were used as comparable sales in his report and how the acreage for these properties was taken into account. Without an adequate explanation for these particular properties that were included in his report, no weight should be given to these comparables.

[16] The Appellant submitted a Property Report that he had received from MPAC. In this report 13 properties were listed. Four of the properties had been sold (and the sale price was included) and for the other nine properties, no sale information was listed and the only value shown was the assessed value. The lot sizes for the four properties that had been sold ranged from 0.68 of an acre to 2 acres.

[17] The following table shows the selling price of the one remaining comparable property from Mr. Eustace's report and the four from the MPAC report submitted by the Appellant:

Property:	Date of Sale:	Lot Size:	Year Built:	Selling Price:
#2 from Mr. Eustace's Report	Aug. 04	0.54 of an acre	1986	$352,000
#1 from MPAC Report	Aug. 04	1.21 acres	1989	$379,000
#2 from MPAC Report	Sept. 03	2 acres	1996	$350,000
#3 from MPAC Report	Feb. 04	1.79 acres	1975	$350,000
#4 from MPAC Report	June 04	0.68 of an acre	1993	$419,800

[18] Mr. Eustace discussed the size of the lots and the age of the house as being factors in analyzing the comparable sales but he did not indicate that the size of the buildings was a factor in adjusting the sale price of the properties used as comparable sales. With respect to the MPAC report, the only comments by Mr. Eustace on the properties listed on that report related to the age of the houses. Therefore the size of the buildings was not included in the above table and no adjustment will be made for the different sizes of the buildings used as comparable sales.

[19] The average selling price of the above properties was $370,160. The age of the houses varied from 7 years to 29 years old. With respect to how the age of a property affects its value, Mr. Eustace stated that:

> Q. You mentioned that the age of the house was different from the age of the comparable properties.
>
> A. Yes.
>
> Q. Do you make any adjustment for the age of property in your appraisal report?
>
> A. Yes. For new houses the depreciation is almost none.
>
> Q. In terms of these houses, how would you account for the valuation versus the age of the property?

> A. The valuation for this subject property should be higher than the comparables.

[20] No explanation was provided with respect to exactly how much higher the subject property should be valued. In cross-examination by the Appellant, Mr. Eustace stated as follows:

> We are dealing with March 3, 2004. In hindsight it is out of my mind when I do the appraisal. The second part, if you ask if prices are going up, yes, they are going up. Even though there are two houses, one built in 2006 and another one built in 1973, of course there will be a slight difference in price. It is not only the house; it can be the layout, the location, the frontage, the depth. All that comes in.

[21] Since no details were provided with respect to the amount of any adjustment to be made in comparing the sale of an older house to a new house and since Mr. Eustace stated that there would only be a slight difference in price for a 30 year old house (which could also be explained by other differences), in attempting to determine the fair market value of the Appellant's property no adjustment will be made for the different ages of the comparable properties that were sold.

[22] As noted above the average selling price for the comparable properties was $370,160. As noted, the Appellant paid $50,000 for 1.03 acres. The Respondent did not lead any evidence to suggest that this amount was not accurate other than to point out that the Appellant acquired this land from his parents for an amount set by the Appellant's father. Therefore assuming a land value of $50,000 for each property in the above table, this would yield an average selling price for the buildings of $320,160. As of March 3, 2004 the Appellant's property was only 85% to 90% finished. Presumably each of the comparable properties was sold as a finished house. To adjust for an unfinished house, it seems logical to reduce the building value by 10% to 15% to reflect the work that would be required to finish the Appellant's house. When this reduction is reflected in the amounts, the "value" of the Appellant's property becomes $322,136 - $338,144.

[23] The Respondent argued that the Appellant failed to demolish the Minister's assumption with respect to the fair market value of the property and that the fair market value of the property cannot be less than the total amount of the cost of construction and the cost of the land. While the Appellant did not demolish the Minister's assumption, the Minister's assumption was simply that:

> 11. In so denying a portion of the Rebate via the Assessment, the Minister made the following assumptions of fact:

…

> (j) A. J. Eustace, acting for the Minister, determined the market value of the residence to be $400,000 as of March 3, 2004

[24] The Respondent did not assume that the fair market value of the residence was $400,000. The Respondent only assumed that A. J. Eustace had determined the market value to be that amount. The issue in this case is not what A. J. Eustace determined as the market value of the residence but what was the fair market value of the residence as of March 3, 2004.

[25] The Appellant did not demolish this assumption as Mr. Eustace's report confirms that this was the amount that he had determined. To demolish this assumption, the Appellant would have had to lead evidence that $400,000 was not the amount determined by Mr. Eustace as the market value of the property.

[26] Justice Létourneau in *The Queen v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, [2007] 4 C.T.C. 5, 2007 DTC 5379 (Eng.), 365 N.R. 105, 283 D.L.R. (4th) 434, stated that:

> 29 Fairness requires that the facts pleaded as assumptions be complete, precise, accurate and honestly and truthfully stated so that the taxpayer knows exactly the case and the burden that he or she has to meet: *Anchor Pointe Energy Ltd. v. R.*, supra, at paragraph 23, *Holm v. R.*, supra, *Loewen v. R.*, [2004] 4 F.C.R. 3 (F.C.A.), at paragraph 9., *Grant v. R.*, 2003 D.T.C. 5160 (Fed. C.A.), at page 5163, *First Fund Genesis Corp. v. R.* (1990), 90 D.T.C. 6337 (Fed. T.D.), at page 6340, *Shaughnessy v. R.*, 2002 D.T.C. 1272 (T.C.C. [General Procedure]), at paragraph 13, *Stephen v. R.*, [2001] T.C.J. No. 250 (T.C.C. [Informal Procedure]), at paragraph 6.

[27] Since the facts pleaded as assumptions must be precise, this assumption will be interpreted exactly as it is written. Therefore the assumption is simply that Mr. Eustace determined the market value of the property to be $400,000 not that the fair market value of the property was $400,000. Different appraisers may determine different amounts as the fair market value of a particular property. As noted by Chief Justice Bowman in *Qureshi v. The Queen*, 2006 TCC 485, [2006] G.S.T.C. 121:

> The valuation of property, as was noted in *Gold Coast Selection Trust Ld. v. Humphrey*, [1948] A.C. 459, is an art not a science.

[28] Since the Respondent did not plead as an assumption of fact that the fair market value of the property was $400,000, the onus of proving this would have been

with the Respondent. Justice Hugessen of the Federal Court of Appeal in *The Queen v. Bowens*, [1996] 2 C.T.C. 120, 96 DTC 6128 stated that:

> The reason the Crown bore the burden in this case of proving that Trilogy and the taxpayer were at arm's length is that that was a fact on which the validity of the reassessment depended, and since no assumption to that effect had been pleaded the Crown did not have the benefit of any reversal of onus.

[29] With respect to the fair market value being less than the cost, one issue is whether the costs should include GST. In *Qureshi, supra*, the Respondent was arguing that the fair market value of the property was $497,000 based on a cost of $497,000 (not including GST). However, since in my opinion, the use of cost information to determine the fair market value of the Appellant's property is not appropriate, I will not decide whether costs should include GST, if cost information is used to determine fair market value.

[30] I agree with the comments of Chief Justice Bowman in *Qureshi, supra*, in relation to the use of costs in determining the fair market value of a home:

> 6 It is true that cost has sometimes been used as a basis for determining fmv, both in the above cases and in cases under the *Cultural Property Export and Import Act*, such as *Aikman v. R.*, [2000] 2 C.T.C. 2211 aff'd'; [2002] 2 C.T.C. 147 or *Maréchal v. The Queen*, 2004 D.T.C. 3227, aff'd 2005 D.T.C. 5223. However, where the cost of a piece of property is indicative of fmv it is in cases where the cost is the price at which a property is bought in an arm's length sale. The cost of constructing or reproducing a property is not a reliable basis for determining fmv where, as here, there is a market to which one may look.
>
> 7 The valuation of property, as was noted in *Gold Coast Selection Trust Ld. v. Humphrey*, [1948] A.C. 459, is an art not a science. One must bring to bear many factors in determining what sort of a deal would be struck between arm's length parties. It is not a mechanical process of looking at the cost and ignoring all other factors, including common sense and the market.
>
> …
>
> 10 There is simply no justification for using cost or replacement cost as a measure of valuing when there is a market in which comparables are available. Cost or replacement cost do not indicate fmv where we are dealing with a home that is being constructed to a homeowner's specifications. If one buys a fully constructed house in the open market the price paid will generally be an indication of fmv.

[31] It seems to me that using cost information to determine the fair market value of

a home cannot be expected to produce as accurate a result as might be expected if cost information were to be used to estimate the fair market value of a business asset. Counsel for the Respondent had posed the question of why would the Appellant spend more to construct his house than his house would be worth? The simple answer could be that it was his home. Decisions on what materials to use, the size of the home, and how it is constructed may be based on personal and not business motives. In this case, the Appellant was building a property on part of his father's farm and there is no reason to believe that he does not plan to live there for many years. In this situation, the decisions related to the amount spent were really personal decisions not business decisions and, in my opinion, the cost approach is not the best approach to determine the fair market value of the Appellant's property.

[32] The Appellant had argued that the market value of his property had already been determined to be $310,000 as a result of his settlement with MPAC following his appeal of the assessed value of his property.

[33] Mr. Eustace described the assessment process for municipal tax purposes as follows:

> Q. (by counsel for the Respondent) Would you say that the fair market valuations that your office and you give are typically consistent with the assessments of the Municipal Property Assessment Corporation?
>
> A. In my opinion, no. The general opinion also is no. The reason is that, when they do their appraisals, they can't inspect every property. They use the mass appraisal technique or the regression technique where they get all the sales possible and then they divide it into parameters -- frontage, et cetera -- and they put it into a certain statistical formula and they come out with a value for the area. When there is an objection from one particular taxpayer, then they will pull that file out and try to go into more depth on that.

[34] The comments related to the general assessment process for municipal tax purposes would relate to the original assessed amount of $358,000. As noted by Mr. Eustace, if a property owner objects a more detailed review is completed.

[35] Section 19 of the *Assessment Act* (*Ontario*) provides that:

> 19.(1) The assessment of land shall be based on its current value.

[36] Section 1 of the *Assessment Act* (*Ontario*) includes the definitions of “land” and “current value” which are defined, in part, as follows:

> "land", "real property" and "real estate" include,
>
> …
>
> (d) all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land,
>
> "current value" means, in relation to land, the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer;

[37] The definition of “current value” is an abbreviated version of the definition of fair market value that has been accepted by the courts. In *Qureshi, supra* Chief Justice Bowman stated that:

> 15 The judicial definition of fmv that has traditionally been accepted by the courts in Canada is that of Cattanach J. in *Henderson Estate and Bank of New York v. M.N.R.*, 73 D.T.C. 5471 at page 5476:
>
> > The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand. These definitions are equally applicable to "fair market value" and "market value" and it is doubtful if the use of the word "fair" adds anything to the words "market value".

[38] While theoretically the assessed value of real property should be the fair market value of such property, it is unrealistic to expect MPAC to individually appraise each property for which it is required to determine the current value. As noted by Mr. Eustace, the general approach is to use statistical information and

formulas. As noted by Mr. Eustace and as supported by the sales information that was submitted at the hearing, the assessed value is generally different from the price at which a property will sell in the open market.

[39] However once a property owner, such as the Appellant, objects to an assessment, as noted by Mr. Eustace, the property file is then reviewed in more detail and the product of the objection process (whether by settlement with MPAC or as adjudicated at a hearing before the Assessment Review Board) should be a closer approximation to the fair market value of the property.

[40] I find that the Respondent has not established that the fair market value of the property was $400,000 and I find, on a balance of probabilities, that the fair market of the Appellant's property, as of March 3, 2004, was less than $350,000. Using the comparables from the MPAC report and the one comparable from Mr. Eustace's report, and adjusting the amount to reflect that the Appellant's house was only 85% to 90% finished as of March 3, 2004 produces a valuation of less than $350,000. Also, the Appellant appealed the assessed value of his property and the amount determined as the current value of his property by agreement with MPAC was $310,000.

[41] The Appeal is allowed, with costs, and this matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that for the purpose of determining the new housing rebate to which the Appellant is entitled under subsection 256(2) of the *Act*, the fair market value of the property in question was less than $350,000 as of March 3, 2004.

Signed at Halifax, Nova Scotia, this 15th day of May 2008.

"Wyman W. Webb"

Webb J.

CITATION:	2008TCC239
COURT FILE NO.:	2007-3967(GST)I
STYLE OF CAUSE:	MICHAEL SOMERS AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 17, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	May 15, 2008

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Brandon Siegal

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada