Docket: 2006-1867(GST)I

BETWEEN:

SAND, SURF & SEA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 29, 2007 and
January 31, 2008, at Halifax, Nova Scotia.

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	David Moore
Counsel for the Respondent:	Lindsay D. Holland

JUDGMENT

The appeal under the *Excise Tax Act* ("*Act*") from the reassessment No. 01CB0101902 dated December 10, 2004 is allowed, in part, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the following basis:

1. The amount reassessed for the net tax for 1999 is to be reduced by the following amounts:

Adjustment re 1999 Sales:	$1,036.49
ITCs allowed by consent at the hearing:	$1,488.43
Total reduction in the net tax reassessed for 1999:	$2,524.92

2. The amount reassessed for the net tax for 2000 is to be reduced by the following amounts:

Amount re conversion to residential:	$6,985.65
ITCs allowed by consent at the hearing:	$790.17
Additional ITC:	$1.20
Total reduction in the net tax reassessed for 2000:	$7,777.02

3. The amount reassessed for the net tax for 2001 is to be reduced by the following amounts:

ITCs allowed by consent at the hearing:	$213.69
Total reduction in the net tax reassessed for 2001:	$213.69

4. The penalties assessed pursuant to section 285 of the *Act* are vacated.

Signed at Halifax, Nova Scotia, this 11th day of March 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC96
Date: 20080311
Docket: 2006-1867(GST)I

BETWEEN:

SAND, SURF & SEA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The Appellant was reassessed under the *Excise Tax Act* ("*Act*") to increase the amount of Harmonized Sales Tax ("HST") that was collectible by the Appellant and to decrease the amount of input tax credits ("ITCs") to which the Appellant was entitled. The reassessments relate to 1999, 2000 and 2001.

[2] The total amount of the adjustments to the HST collectible, following the audit and the consideration of the Notice of Objection, was $11,120.60. The ITCs were decreased by $20,913.27 for the three years under appeal. Gross negligence penalties were also assessed in relation to some of the disallowed ITC amounts. The Appellant filed an appeal in relation to all of the amounts included in the increase in the HST collectible, the decrease in the ITCs claimed and the assessment of the gross negligence penalties.

[3] In 1994 the Appellant acquired a beach front property at Queensland Beach in Nova Scotia. David Moore, who is the President, Director and the sole shareholder of the Appellant, testified during the hearing. He is also an RCMP officer. He described the acquisition of the property, the construction of the building, the plans for the business and the difficulties with the individual who lived across the street from the property of the Appellant in general terms as follows:

> The ownership of that particular property was purchased by Sand, Surf & Sea Ltd. to operate in principal as a restaurant and country inn.
>
> The premise behind the purchase and future renovations of this property in four separate phases was to acquire the property, which was in a derelict state of repair, make repairs to the property and turn it into a viable restaurant, take out servicing the beach during a four-month period during the summer. And country inn with rooms and eventually private quarters when I retired from my Government position.
>
> ...
>
> From almost the beginning point of the acquiring of this property we ran into bottlenecks if you will with regard to an individual known to the police across the street who was a known drug dealer. This individual set his sights on not only hating the police officer that owned the property but doing anything in his power to destroy the business, destroy the property and an ongoing barrage occurred from 1996 until 2003 which resulted in the burning down of the restaurant by the drug dealer.

[4] David Moore introduced an Exhibit listing numerous damage claims related to the property from 1996 to 2001. The items listed included various claims for property damage and stolen items. Included in the list are slashed tires, smashed out windows on the second storey and bullet holes. The total amount listed in relation to the damage to the property was approximately $30,000.

[5] The amounts related to the increase in HST collectible can be summarized as follows:

Conversion of a portion of the property to residential use in 2000 (15% x $46,571):	$6,985.65
HST on commercial rent received in 1999 (15 / 115 x $1,500):	$195.65
HST on commercial rent received in 2000 (15 / 115 x $1,500):	$195.65
HST on void purchases for 2000:	$809.04
HST on void purchases for 2001:	$932.20
Adjustment re 1999 sales:	$2,001.97
Total additional HST collectible:	$11,120.16

[6] At the commencement of the hearing, the amounts related to the adjustments to the ITCs could not be easily summarized.

[7] The first day of the hearing was June 29, 2007. During the first day David Moore acknowledged that errors had been made in the HST returns but the errors were not quantified. Also during the first day of the hearing three Exhibits

were introduced by the Respondent which showed a list of the ITCs claimed by the Appellant and the various items that were being denied. The Exhibit for 1999 is 27 pages with approximately 30 entries per page. The Exhibit for 2000 is 32 pages with approximately 30 items per page and the Exhibit for 2001 is 36 pages with approximately 30 items per page. It appears that most of the items involve less than $10 of HST claimed and in several cases the amount is less than $1.

[8] The situation at the commencement of the hearing was very similar to that faced by Justice Bowman in *897366 Ontario Limited v. The Queen*, [2000] T.C.J. No. 117. The situation was described by Justice Bowman as follows:

> **8** In GST appeals we have seen too frequently appellants, usually unrepresented, appear in court with boxes of invoices and take the position that the Department of National Revenue was uncooperative and failed to consider the evidence. The Department usually makes similar allegations about the taxpayer and intones ritually that the taxpayer "failed to keep adequate books and records". In the result, the court is called on, in effect, to perform an audit that should have been performed long before the matter came to court. That is not the function of the court. In cases of this sort, the proper procedure is that set out in *Merchant v. The Queen*, 98 D.T.C. 1734 at pages 1735-6:
>
> > [7] Where a large number of documents, such as invoices, have to be proved it is a waste of the court's time to put them in evidence seriatim. The approach set out in Wigmore on Evidence (3rd Ed.) Vol IV, at s. 1230 commends itself:
> >
> > > s. 1230(11):...Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements - as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank-ledger - it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well-established to be proper.
> >
> > [8] This passage was cited with approval by Wakeling, J.A. in *Sunnyside Nursing Home v. Builders Contract Management Ltd. et al.*, (1990), 75 Sask. R. 1 at p. 24 (Sask. C.A.) and by MacPherson, J. in *R. v. Fichter, Kaufmann et al.*, 37 Sask. R. 128 (Sask. Q.B.) at p. 129. I am in respectful agreement.

[9] The hearing was adjourned after the first day to allow counsel for the Respondent to meet with the agent for the Appellant to try to resolve as many of the items as possible to avoid what otherwise would have been a very lengthy hearing to deal with each individual item that was being denied.

[10] Following the resumption of the hearing, counsel for the Respondent and the agent for the Appellant were able to resolve a number of the items and the following is a summary of the adjustments to be made to the ITCs and the amounts still in issue at the hearing:

Adjustments to the ITCs for 1999:

ITCs claimed in the HST return:	$12,844.67
ITCs allowed by audit or appeals:	$5,957.96
ITCs allowed by consent at the hearing:	$1,488.43
ITCs claimed – ITCs allowed:	$5,398.28
Amount conceded by the Appellant at the hearing:	$2,324.73
Amount in issue at the hearing:	$3,073.55

Adjustments to the ITCs for 2000:

ITCs claimed in the HST return:	$14,352.77
ITCs allowed by audit or appeals:	$6,596.44
ITCs allowed by consent at the hearing:	$790.17
ITCs claimed – ITCs allowed:	$6,966.16
Amount conceded by the Appellant at the hearing:	$4,982.99
Amount in issue at the hearing:	$1,983.17

Adjustments to the ITCs for 2001:

ITCs claimed in the HST return:	$17,161.17
ITCs allowed by audit or appeals:	$10,890.94
ITCs allowed by consent at the hearing:	$213.69
ITCs claimed – ITCs allowed:	$6,056.54
Amount conceded by the Appellant at the hearing:	$4,338.13
Amount in issue at the hearing:	$1,718.41

Conversion of a Portion of the Property to Residential

[11] The Appellant was assessed HST for 2000 in relation to a conversion of a portion of the property to residential use. The Respondent assumed that David Moore and his family started to use the upstairs portion as a residence in June of 2000. The upstairs part (which is the area in issue) consisted of a staff bathroom, a sleeping area, two unfinished rooms and a storage area. There was a double bed and a dresser in the sleeping area. The Appellant stored pamphlets in the dresser. David Moore would stay overnight on days when he was not on duty with the RCMP and would arrange for other off-duty police officers or other security personnel to stay at the property when he could not stay there. He stated that they were there to protect the property. The only personal effects that David Moore kept at the property were a change of clothes and shaving supplies.

[12] The portion of the property that was assessed as a residential unit was 22.5% of the total square footage of the property. The Appellant did not lead any evidence to contradict the calculation of this percentage. The amount used as the fair market value of the property for the purposes of subsection 191(1) of the *Act* (which was also the book value of the property) was $206,982 and therefore the amount that was used as the fair market value of the area that was determined to be a single unit residential complex was $46,071 or 22.5% of $206,982. The Appellant did not lead any evidence to contradict the amounts used to calculate the amount of the HST in relation to this matter. The Appellant's argument was that the property was not being used as a residence in 2000.

[13] Although it is not entirely clear from the evidence, I find that the second floor of the building was constructed by the Appellant and therefore the Appellant was the builder of the second floor for the purposes of the *Act*.

[14] Subsection 191 (1) of the *Act* provides as follows:

> 191. (1) For the purposes of this Part, where
>
> (a) the construction or substantial renovation of a residential complex that is a single unit residential complex or a residential condominium unit is substantially completed,
>
> (b) the builder of the complex
>
> (i) gives possession of the complex to a particular person under a lease, licence or similar arrangement (other than an arrangement, under or arising

> as a consequence of an agreement of purchase and sale of the complex, for the possession or occupancy of the complex until ownership of the complex is transferred to the purchaser under the agreement) entered into for the purpose of its occupancy by an individual as a place of residence,
>
> (ii) gives possession of the complex to a particular person under an agreement for
>
> (A) the supply by way of sale of the building or part thereof in which the residential unit forming part of the complex is located, and
>
> (B) the supply by way of lease of the land forming part of the complex or the supply of such a lease by way of assignment,
>
> other than an agreement for the supply of a mobile home and a site for the home in a residential trailer park, or
>
> (iii) where the builder is an individual, occupies the complex as a place of residence, and
>
> (c) the builder, the particular person or an individual who is a tenant or licensee of the particular person is the first individual to occupy the complex as a place of residence after substantial completion of the construction or renovation,
>
> 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 complex is so given to the particular person or the complex 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.

[15] In order for subsection 191(1) of the *Act* to apply it is necessary that "the builder of the complex … gives possession of the [single unit residential] complex to a particular person under a lease, licence or similar arrangement … entered into for the **purpose of its occupancy by an individual as a place of residence**". (emphasis added)

[16] A "single unit residential complex" is defined in the *Act* as:

> "single unit residential complex" means a residential complex that does not contain more than one residential unit, but does not include a residential condominium unit;

[17] A “residential complex” is defined, in part as:

> “residential complex” means
>
> > (a) that part of a building in which one or more residential units are located,
> >
> > …
> >
> > but does not include a building, or that part of a building, that is a hotel, a motel, an inn, a boarding house, a lodging house or other similar premises, or the land and appurtenances attributable to the building or part, where the building is not described in paragraph (c) and all or substantially all of the leases, licences or similar arrangements, under which residential units in the building or part are supplied, provide, or are expected to provide, for periods of continuous possession or use of less than sixty days;

[18] A “residential unit” is defined in the *Act* as:

> “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,
> >
> > (f) is vacant, but was last occupied or supplied as a place of residence or lodging for individuals, or
> >
> > (g) has never been used or occupied for any purpose, but is intended to be used as a place of residence or lodging for individuals;

[19] Therefore while the use of a part of a building as a place of residence or lodging will result in that part being a residential unit, the provisions of subsection 191(1) of the *Act* only apply if the purpose of the use is as a place of

residence. Giving possession of a single unit residential complex to an individual as a place of lodging but not as a place of residence will not result in the application of subsection 191(1) of the *Act*.

[20] In *Thomson v. M.N.R.*, [1946] S.C.R. 209, Rand J. stated as follows:

> But in the different situations of so-called "permanent residence", "temporary residence", "ordinary residence", "principal residence" and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited. **On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".**
>
> (emphasis added)

[21] In the Canadian Oxford Dictionary, second edition, lodging is defined as “temporary accommodation”.

[22] In this case David Moore and the other off-duty police officers would sleep in one of the rooms to protect the property overnight and to try to catch the perpetrator of the damage to the property in the act of damaging the property. They occupied the second floor of the property as a place of lodging. Only minimal personal effects were kept at the property which is consistent with its use as a place of lodging and not as a place of residence.

[23] The Appellant had a staff of 18 employees. Since all of the staff had access to all of the upstairs area, this is also consistent with the use of this area for lodging and not as a residence.

[24] Counsel for the Respondent referred to the decision of Justice Murphy, in *Sand, Surf and Sea Ltd. v. Nova Scotia (Minister of Transportation and Public Works)* (2005), 236 N.S.R. (2d) 201 and to the Factum of the Appellant filed in the Nova Scotia Court of Appeal when the Appellant appealed the decision of Justice Murphy. The case before Justice Murphy related to the attempt by the Appellant to obtain the necessary permits to rebuild the building after it was destroyed by fire in 2003.

[25] Justice Murphy in that case stated as follows:

> 4 The Property is zoned for mixed residential and commercial use. From May until October each year beginning in 1995 until 2003, SSSL operated a restaurant and bar in the building, which was known as Moore's Landing, and starting in 2000 the owner of SSSL and his family used the second floor as a summer residence.

[26] Justice Murphy also stated that:

> 2 The extensive affidavit evidence filed by both parties established the principal events leading to this application.

[27] Therefore the evidentiary basis for the statement in paragraph 4 of the decision of Justice Murphy quoted above would be in the Affidavits that were filed and presumably the Affidavit of David Moore would be the source for this information.

[28] In paragraph 7 of the Factum filed by the Appellant, in relation to the appeal from the decision of Justice Murphy, it was stated that:

> Between 1995 -- 2003, the Appellant operated Moore's Landing as a restaurant and bar every year from May through October. Since 2000, David Moore and his family had used the second floor of the building as a residence during the summer months.

[29] The authority for this statement of facts was the Moore Affidavit, paragraph 7, which presumably was the same Affidavit that was introduced in the hearing before Justice Murphy.

[30] The Respondent submitted the Affidavit of David Moore, filed in the Nova Scotia Supreme Court case referred to above, as an Exhibit. Since only one Affidavit was filed as an Exhibit by the Respondent, I am assuming that this was the only Affidavit of David Moore on the issue of whether the property was occupied as a residence. Paragraph 7 of this Affidavit stated as follows:

> **THAT** during the years 1995 through 2003, prior to the fire, the property was used as a restaurant and bar and was operating from the months of May through to October on a yearly basis.

[31] There is no mention in this Affidavit of the property being used as a residence by the family. Therefore the basis for the statement that the property was used as a residence in the Reasons for Judgment of Justice Murphy and in the Factum is not clear.

[32] David Moore was cross-examined in relation to the statements made to the Supreme Court of Nova Scotia and the Nova Scotia Court of Appeal and the following is the evidence presented during part of this exchange:

> Q. But Mr. Moore, in order for you to satisfy the conditions of the *Municipal Government Act* you put before the Nova Scotia Supreme Court and Nova Scotia Court of Appeal that you did use the premises as residential premises?
>
> A. I did, yes.
>
> Q. So that you could -- you did? Okay.
>
> A. You never asked me if I didn't.
>
> Q. Thank you.
>
> A. You asked me if my family did. My family also uses it here but it became unbearable for them. I continued to use it as a residence but I'm looking after the property and I'm a Director and ---
>
> Q. So your family did inhabit that residence with you?
>
> A. They were there for a short period of time but it became very unpleasant to live there so they ended up going back to the other house. We ended up building another house closer to the building so we can have an enjoyable life.
>
> Q. Yet ---
>
> A. These are not under dispute.
>
> Q. Yet in the audit you told:
>
> > "I never disputed the fact that an assessment on the conversion of the residence you used had to be made."
>
> You told the auditor, you put before that the house was used as residential premises. You told the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal. Correct?
>
> A. My intention for this property is to have the second story be residential quarters for myself and my family. It's never been anything but. The fact that I haven't been able to get quiet enjoyment of my property is another thing altogether.
>
> Am I splitting hairs, no. It's always been that intent before the Court and you're looking at periods of time. Well, the property was purchased in 1995. It burned down in 2003. Throughout that entire period of time I was looking to have that property be a residential quarters.

Q. Now Mr. Moore all the documents indicate that you did use it. It doesn't state you intended to use it.

A. I personally used it.

Q. And your family, that's what the documents say.

A. It started out that way but it didn't end up that way *[.]*

Q. When did it end?

A. I'd have to look at my paperwork to find out. When things became unbearable from a damage point of view, from threats. We had ---

[33] Previously David Moore had testified in relation to the time that he and his family spent at the property in 2000 as follows:

Q: Now, I just want to take you back to page 3 of that Reply and the fact that you lived in the residence -- I just want to flush out what was going on in 2000 with you and your family. And I apologize for making you re-live the event but I just want to clarify exactly how much time the family would be spending at the cottage. Were they there all day long with you?

A: During the day, yes.

Q: During the day. What time at night did they go home?

A: Well, all of the children were employees. And my wife was the manager. So my -- the wife was there during, let's say from 9:00 a.m. until ten or eleven. The kids operated -- the younger kids operated the Surf Shop and the oldest daughter who was 16 or 17 at the time, she was working the take-out so daytime operation, night-time they all pile into mom's car and go home.

Q: Did they ever use the upstairs portion of the bedroom to watch T.V., any sorts of daily activities?

A: Well, if they were taking a break from doing their stuff outside, that's the only place they could go to, so yes, they would use a down room -- we had a staff bathroom and a down room upstairs so the staff could take their break upstairs. So --

Q: Was there any portion of the area that the staff wasn't allowed to use?

A: No, it was wide open.

Q: And yourself, did you -- you spent most of your summer, other than when you were working, at the Surf Shop?

A: At the restaurant, yes.

Q: Sorry, the restaurant.

A.: Yeah.

Q: And I'll just refer to it as the restaurant, then as opposed to Surf Shop throughout. And did you have -- did you keep your belongings upstairs in the bedroom? Like personal belongings?

A.: I *[sic]* made have had a change of clothes or a shirt or -- I kept my uniform -- I normally work shift work in uniform and would drive there at night to be on security at night. And then during the day I'd be in shorts and T-shirt or uniform. We had a uniform we had to wear, if that's what you mean. Shaving kit, whatever, yes.

Q: Did your kids ever spend any nights there?

A: No, not once we started getting the threats and once the Restraining Orders and everything were put in place, not going to happen.

Q: And your wife?

A; She wouldn't have anything to do with it, believe me.

Q: Just to -- I know a lot of the documents you entered were 1996, 1997 and this -- we're dealing with 1999 through 2001 -- similar events?

A: Worse

[34] Since the evidence established that the problems with the neighbour started in 1996 and that the Restraining Order was followed with criminal charges against the neighbour in May of 1997, it is not clear when the children stopped staying at the property but it does appear clear that this was before 2000.

[35] Given the very clear testimony of David Moore during the hearing that he only stayed at the property overnight to protect the property and that his wife and children never stayed overnight at the property after the threats commenced (which was before 2000), I find that the property was not occupied by David Moore or his family as a residence in 2000. David Moore occupied the property in 2000 in the same manner as the other off-duty police officers i.e. simply a place of lodging. As a result

the appeal is allowed in relation to the assessment of additional HST collectible for 2000 that was assessed on the basis that subsection 191(1) of the *Act* applied in 2000.

HST on Commercial Rent Received in 1999 and 2000 / HST on Void Purchases for 2000 / HST on Void Purchases for 2001

[36] The Appellant conceded during the hearing that all of the adjustments for the additional HST collectible in relation to the commercial rent received in 1999 and 2000 and the adjustments to HST collectible related the void purchases for 2000 and 2001, were correct and therefore the appeal in relation to these adjustments is dismissed. The Appellant had received $1,500 in commercial rent in 1999 and 2000 and had not reported any HST collectible in relation to this rent. The Appellant's cash register was not treating void purchases correctly in 2000 and 2001 and the Appellant acknowledged this during the hearing.

Adjustment re 1999 sales

[37] The item identified as adjustment re 1999 sales arises as a result of a review of the cash register tapes by the auditor for the Canada Revenue Agency and a determination by her that the tapes for certain days were missing. The auditor then prepared a schedule assuming sales on the days for which there were no cash register tapes. Included in the list of missing days was September 31 and sales were imputed for that day. However since September 31 is not a valid day, no sales should have been imputed for that day. As well David Moore testified that on certain days the cash register tape may not be run on that day but the cash register tape for the following day would include two days of sales. A review of the list of the amounts for the cash register tapes confirms this. As well he indicated that the business would not operate in inclement weather.

[38] The following table summarizes the possible HST collectible amounts related to sales for 1999:

HST amount reported by the Appellant:	$11,058.14
HST as calculated from the cash register tapes:	$12,023.62
HST as calculated by the auditor, assuming sales on days for which there was no cash register tape:	$13,060.11

[39] Given the nature of the business, it seems obvious that the business would either not operate or would not have very many sales on days of inclement weather, and therefore as a result I do not find it plausible that sales could be imputed for each

and every day from the June 1 to September 30. However, since the actual cash register tapes of the Appellant indicate that HST of $12,023.62 was collectible in 1999 that is the amount that should have been used as the HST collectible on sales in 1999.

[40] Therefore the adjustment that should be made to the amount reassessed in relation to the 1999 sales is a reduction in the amount reassessed equal to $13,060.11 - $12,023.62 = $1,036.49.

Adjustments to ITCs for 1999

[41] The adjustments to the ITCs for 1999 that are in issue in this case relate to two invoices. One invoice is from Newton and Associates for legal fees and the HST payable in relation to this invoice was $2,405.25. The second invoice is from Fitzsimmons Investigations and the HST payable in relation to this invoice was $668.30. The legal fees and the investigation services related to the same set of facts. David Moore described the events as follows:

> On this particular day the individual across the street had sent an individual over to smash up the property of the corporation. There were chairs on the beach. And he had indicated to these individuals that I had no right to keep those chairs on my own property and do as I liked. Three days before there had been an ongoing issue with this. The manager attempted to deal with it. The staff attempted to deal with it. I said I would deal with it on my way out.
>
> ...
>
> This was in 1998, in August of 1998. What transpired from there was me having to first go down and warn these individuals that I wasn't particularly happy with smashing up our property and causing a disturbance for the clients that were sitting up on the deck by their cursing and swearing.
>
> And followed by not getting any response from the individuals, I ended up going upstairs and acquiring my badge, going back down and arresting them as a peace officer for causing a disturbance and damage to property. What ensued from that point forward was an absolute nightmare.
>
> My own police department failed to respond in three separate calls for help in assisting a police officer in lawful execution of his duty. In October of 1998 I was charged by the very same police department for assaulting the individual on the beach. Suspended with pay, taken before the Courts only to find that Justice -- pardon me for a minute -- Bill Digby ruled it was a lawful arrest and the subsequent -- I believe his words verbatim were:

> Had this evidence been presented on the trial of the three individuals that are sitting in the audience they all would have been convicted of causing the disturbance and causing damage. I was in lawful execution of my duty and the police were negligent in failing to respond.

[42] The ITCs in relation to the legal fees and investigation services are related to the charges laid against David Moore, arising from this incident. It is clear from the evidence that David Moore was trying to protect the property of the Appellant and that he was found to be in lawful execution of his duties when this incident occurred. If an arm's-length individual were to have taken the same actions as David Moore did on that day to protect the Appellant's property it would seem reasonable that the Appellant would reimburse such individual for any legal fees or investigative services that related to charges laid against that individual. David Moore was simply trying to protect the assets of the Appellant. David Moore would not have incurred these expenditures as the agent for the Appellant as he was the one who was charged with assault and therefore these services were acquired for his benefit. However it is reasonable that the Appellant should reimburse David Moore for these amounts.

[43] In this appeal, however, the issue is not whether the Appellant should reimburse David Moore for the cost of these services but whether the Appellant is entitled to claim an ITC in relation to the HST payable for these services.

[44] Subsection 175(1) of the *Act* provides as follows:

> 175.(1) Where an employee of an employer, a member of a partnership or a volunteer who gives services to a charity or public institution acquires or imports property or a service or brings it into a participating province for consumption or use in relation to activities of the employer, partnership, charity or public institution (each of which is referred to in this subsection as the "person"), the employee, member or volunteer paid the tax payable in respect of that acquisition, importation or bringing in **and the person pays an amount to the employee**, member or volunteer **as a reimbursement in respect of the property or service**, for the purposes of this Part,
>
> (a) the person is deemed to have received a supply of the property or service;
>
> (b) any consumption or use of the property or service by the employee, member or volunteer in relation to activities of the person is deemed to be consumption or use by the person and not by the employee, member or volunteer; and
>
> (c) the person is deemed to have paid, at the time the reimbursement is paid, tax in respect of the supply equal to the amount determined by the formula

A × B

where

A is the tax paid by the employee, member or volunteer in respect of the acquisition, importation or bringing into a particular province of the property or service by the employee, member or volunteer, and

B is the lesser of

(i) the percentage of the cost to the employee, member or volunteer of the property or service that is reimbursed, and

(ii) the extent (expressed as a percentage) to which the property or service was acquired, imported or brought into the province, as the case may be, by the employee, member or volunteer for consumption or use in relation to activities of the person. (emphasis added)

[45] Since David Moore was charged with assault, he was the person who incurred the legal fees and investigation services. As noted, these were in relation to the activities of the Appellant as he was protecting the Appellant's property. The problem for the Appellant is that the Appellant did not reimburse David Moore for these amounts. It is a requirement of subsection 175(1) of the *Act* that the Appellant, as the employer, must have paid an amount to David Moore as a reimbursement of the amount he incurred in order for the Appellant to have been deemed to have received this supply of these services. When David Moore was asked if the Appellant had reimbursed him for the amounts incurred in his name, his only response was to produce documentation showing the guarantee that he had provided for the debts of the Appellant. I am satisfied that the Appellant did not reimburse David Moore for these amounts and hence the Appellant cannot rely on subsection 175(1) of the *Act*. Therefore the Appellant is not entitled to an ITC in relation to these legal and investigation services.

Adjustments to ITCs for 2000

[46] The adjustments to the ITCs for 2000 can be summarized in three categories. There were some small amounts for items purchased at the grocery store, the Nova Scotia Liquor Commission, and department stores. There is a group of amounts identified as Delta Halifax and the third category is a group of receipts for materials that were purchased in relation to the garage constructed on David Moore's property in Bedford, Nova Scotia.

[47] With respect to the small amounts for items purchased at the grocery store, the Nova Scotia Liquor Commission, and department stores, David Moore speculated that these related to the Christmas party and gifts for the staff. However, the difficulty in this situation is that there was no indication of any notation on the receipts of the purpose for the purchase of the various items. The receipts were all for items that could either be used personally or by the Appellant. When dealing with items that could be either personal items or business items, it is very important that the Appellant identify on the receipt or in some other way the commercial purpose for the purchase of the item. Because there was no such indication on the receipts, David Moore now, more than seven years after the expenses were incurred, had to speculate on the commercial purpose for the purchase of the items in dispute. It should also be noted that the Appellant has conceded that in 2000, of the total amount of $14,352.77 of ITCs claimed in that year, $4,982.99 (or approximately 35% of the amount claimed) should not have been claimed. I find that the Appellant has not established that any adjustments should be made to the ITCs for this group of items from 1999.

[48] There were several items identified as Delta Halifax. These related to a party at the Delta Halifax sponsored by Serca, which is one of the main suppliers for the Appellant. The issue in relation to this claim is the documentation requirements of the *Act* and the *Regulations*. David Moore indicated that the amount payable would have been set out on the invitation to this event and that he would have the Visa slip for this amount but he did not produce either document. It is not clear whether the Visa statement or the invitation would have contained the relevant information in order for the Appellant to claim an ITC for the larger amounts. The documentation requirements are set out in subsection 169(4) of the *Act* and in the *Input Tax Credit Information (GST/HST) Regulations*. Subsection 169(4) of the *Act* provides as follows:

> 169(4) A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,
>
> > (a) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed; and
> >
> > (b) where the credit is in respect of property or a service supplied to the registrant in circumstances in which the registrant is required to report the tax payable in respect of the supply in a return filed with the Minister under this Part, the registrant has so reported the tax in a return filed under this Part.

and paragraph 3 of the *Input Tax Credit Information (GST/HST) Regulations* provides as follows:

> 3. For the purposes of paragraph 169(4)(a) of the Act, the following information is prescribed information:
>
> (a) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is less than $30,
>
> (i) the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business,
>
> (ii) where an invoice is issued in respect of the supply or the supplies, the date of the invoice,
>
> (iii) where an invoice is not issued in respect of the supply or the supplies, the date on which there is tax paid or payable in respect thereof, and
>
> (iv) the total amount paid or payable for all of the supplies;
>
> (b) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $30 or more and less than $150,
>
> (i) the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business, and the registration number assigned under subsection 241(1) of the Act to the supplier or the intermediary, as the case may be,
>
> (ii) the information set out in subparagraphs (a)(ii) to (iv),
>
> (iii) where the amount paid or payable for the supply or the supplies does not include the amount of tax paid or payable in respect thereof,
>
> (A) the amount of tax paid or payable in respect of each supply or in respect of all of the supplies, or
>
> (B) where provincial sales tax is payable in respect of each taxable supply that is not a zero-rated supply and is not payable in respect of any exempt supply or zero-rated supply,
>
> (I) the total of the tax paid or payable under Division II of Part IX of the Act and the provincial sales tax paid or payable in respect of each taxable supply, and a statement to the effect that

the total in respect of each taxable supply includes the tax paid or payable under that Division, or

(II) the total of the tax paid or payable under Division II of Part IX of the Act and the provincial sales tax paid or payable in respect of all taxable supplies, and a statement to the effect that the total includes the tax paid or payable under that Division,

(iv) where the amount paid or payable for the supply or the supplies includes the amount of tax paid or payable in respect thereof and one or more supplies are taxable supplies that are not zero-rated supplies,

(A) a statement to the effect that tax is included in the amount paid or payable for each taxable supply,

(B) the total (referred to in this paragraph as the "total tax rate") of the rates at which tax was paid or payable in respect of each of the taxable supplies that is not a zero-rated supply, and

(C) the amount paid or payable for each such supply or the total amount paid or payable for all such supplies to which the same total tax rate applies, and

(v) where the status of two or more supplies is different, an indication of the status of each taxable supply that is not a zero-rated supply; and

(c) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $150 or more,

(i) the information set out in paragraphs (a) and (b),

(ii) the recipient's name, the name under which the recipient does business or the name of the recipient's duly authorized agent or representative,

(iii) the terms of payment, and

(iv) a description of each supply sufficient to identify it.

[49] There were five separate HST amounts for the Delta Halifax. Only one amount ($2.41 of HST payable) would fall within the lowest level of required documentation. In order to claim the other amounts, the documentation requirements of either paragraph 3(b) or 3(c) of the *Input Tax Credit Information (GST/HST) Regulations* would have to be satisfied. The Appellant has not been able to establish that it had, before filing its HST return for 2000, the necessary documentation to satisfy the

requirements of either paragraph 3(b) or 3(c) of the *Input Tax Credit Information (GST/HST) Regulations.* In relation to the amounts identified as the amounts paid to the Delta Halifax, I am not satisfied that either the invitation or the Visa statement would have shown the GST/HST registration number of the supplier. Therefore the only amount that I will allow will be the claim for $2.41. Since the amount was paid for food or entertainment, only 50% of the amount paid will be allowed as an input tax credit.

[50] The remaining amounts for 2000 relate to a three-bay garage that was constructed on the lands owned by David Moore in Bedford, Nova Scotia. This garage is in addition to the two car garage that is attached to the house. The sole purpose for constructing the three-bay garage was to have a facility that could be used as a warehouse and storage facility for the Appellant. The invoices for the materials were issued in the name of David Moore. The Appellant claimed the ITC on the supplies used to construct this garage.

[51] In *Plan A Leasing Ltd. v. The Queen*, [1977] 1 F.C. 73, Gibson J. of the Federal Court, Trial Division noted that title to land and to a building erected on the land can be separated:

> 23 In law, the title of the lands and the title to the building on such lands can be conveyed separately when parties have made a special contract to do so. When parties do so by proper conveyances, they may, as was said in *Davy v. Lewis (supra)* at page 30, define and make a law for themselves in respect to such lands and building. In other words, the usual rule of law that the building is part of the freehold can be abrogated by a contract of parties. They can completely sever the right title and interest in the freehold in the building from the right title and interest in the freehold of the lands on which the building sits, even though the building continues to be annexed to such lands.
>
> 24 This exception to the rule of common law has obtained since Lord Coke's time. (See Challis, The Law of Real Property, 3rd edition, page 54). And as is said in Megarry and Wade, The Law of Real Property, 3rd edition, at page 70:
>
> > An owner can, if he wishes, divide his land horizontally or any in other way. He can dispose of minerals under the surface, or the top floor of a building, so as to make them separate properties.
>
> 25 In this Court in *Rudnikoff v. The Queen* (supra) at page 809, Jackett C.J. said:
>
> > However, in my view, while the general rule, both in the common law provinces and in the Province of Quebec is that a substantial building becomes a part of the land and belongs to the owner of the land, this situation may be changed, by contract or otherwise, so that ownership of the building is separate from ownership

> of the land and the building would not be a part of the subject matter of the lease. Such a result would, however, follow only as a result of clear language and, in my view, in this case, the terms of the emphyteutic lease are not such as to produce such a result.

[52] However, as noted by the Federal Court, in order to achieve this objective the parties must have a special contract to do so. There was no evidence of any contract between the Appellant and David Moore under which the Appellant would have title to the building. The testimony of David Moore in this regard was that he and not the Appellant owned the building. He stated as follows during cross-examination:

> Q. That's the allowed. So -- but at the time back in 2000 when you built the property what was your intention, to treat the property as a commercial premises or to treat the property as your own personal ownership? Who did you intend to own that garage?
>
> A. Well, the garage -- the physical building itself is owned by me but the interior of it is leased out or used by the corporation for holding all of its ware, the same as the office. The building ---
>
> Q. Was there any payments made to yourself, any rent paid by the company?
>
> A. No. And it wasn't in a position to do that.

[53] Subsection 169(1) of the *Act* provides in part as follows:

> 169. (1) Subject to this Part, **where a person acquires** or imports **property** or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:
>
> (emphasis added)

[54] In order for the Appellant to claim an ITC in relation to the acquisition of the materials, the Appellant must be the person who acquired the materials. Since the garage is owned by David Moore and the invoices for the materials were in his name, it is logical that he and not the Appellant acquired the materials used in the construction of the garage. The Appellant has not established that it, and not David Moore, acquired the materials to construct the garage and hence the Appellant

has failed to establish that it is entitled to any ITCs in relation to the acquisition of the materials used to construct the garage.

Adjustments to ITCs for 2001

[55] The amounts in dispute in relation to the ITCs for 2001 also can be categorized as either amounts for items purchased at grocery stores or department stores that could either be for personal or commercial use and amounts related to the acquisition of the materials acquired for the construction of the garage owned by David Moore. As noted above where the receipt is for an item that could either be for personal or commercial use the Appellant should have clearly indicated on the receipt or otherwise the commercial purpose for the item being purchased. Failing to do so has now left David Moore in a situation where he can only speculate that the amounts were spent on items that were used in a commercial activity of the Appellant. It should also be noted that the Appellant has conceded that in 2001, of the total amount of $17,161.17 of ITCs claimed in that year, $4,338.13 (or approximately 25% of the amount claimed) should not have been claimed. There is also an amount claimed for bark mulch purchased from Elmsdale Landscaping Limited. However the delivery address was the home address of David Moore. As a result, no adjustments will be made to ITCs for 2001 for the items purchased at grocery stores or department stores or the bark mulch purchased from Elmsdale Landscaping Limited.

[56] As well, for the reasons noted above, no adjustment will be made in relation to the reassessment related to the ITCs claimed on the materials used in the construction of the garage owned by David Moore.

Gross Negligence Penalties

[57] Gross negligence penalties were also assessed under section 285 of the *Act*. In *897366 Ontario Limited v. The Queen*, [2000] T.C.J. No. 117 Justice Bowman made the following comments in relation to the assessment of gross negligence penalties under the *Act*:

> 13….The onus is upon the Crown to establish these elements and this the Crown has failed completely to do. Subsection 163(3) of the *Income Tax Act* specifically places the burden of proof on the Crown in appeals from penalties imposed under subsection 163(2). There is no provision in the *Excise Tax Act* that corresponds to subsection 163(3) with respect to section 285 penalties, although the wording in section 285 is virtually identical to that in subsection 163(2). It would be a remarkable result if the onus of proof lay on the Crown in one case and on the taxpayers in another.

…

> 19…The imposition of penalties under section 285 requires a serious and deliberate consideration by the taxing authority of the taxpayer's conduct to determine whether it demonstrates a degree of wilfulness or gross negligence justifying the penalty. Section 285 is not there to permit assessors to punish taxpayers for being frustrating or annoying. It cannot be overemphasized that penalties may only be imposed under section 285 in the clearest of cases, and after an assiduous scrutiny of the evidence.

[58] I am not satisfied that the Respondent had satisfied the onus of establishing the facts on which penalties under section 285 of the *Act* could be assessed. Many of the amounts were small, individual items and I am satisfied that the Appellant did not intentionally or in circumstances amounting to gross negligence claim the additional ITCs. The Appellant made mistakes but I am satisfied that the mistakes that were made were inadvertent and cannot justify the assessment of gross negligence penalties.

[59] As a result, the appeal in relation to the assessment of the penalties under section 285 of the *Act* is allowed and the assessment if these penalties is vacated.

Summary

[60] The appeal is allowed, in part, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the following basis:

1. The amount reassessed for the net tax for 1999 is to be reduced by the following amounts:

Adjustment re 1999 Sales:	$1,036.49
ITCs allowed by consent at the hearing:	$1,488.43
Total reduction in the net tax reassessed for 1999:	$2,524.92

2. The amount reassessed for the net tax for 2000 is to be reduced by the following amounts:

Amount re conversion to residential:	$6,985.65
ITCs allowed by consent at the hearing:	$790.17
Additional ITC:	$1.20
Total reduction in the net tax reassessed for 2000:	$7,777.02

3. The amount reassessed for the net tax for 2001 is to be reduced by the following amounts:

ITCs allowed by consent at the hearing:	$213.69
Total reduction in the net tax reassessed for 2001:	$213.69

4. The penalties assessed pursuant to section 285 of the *Act* are vacated.

Signed at Halifax, Nova Scotia, this 11th day of March 2008.

"Wyman W. Webb"

Webb J.

CITATION:	2008TCC96
COURT FILE NO.:	2006-1867(GST)I
STYLE OF CAUSE:	SAND, SURF & SEA LTD. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
DATES OF HEARING:	June 29, 2007 and January 31, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	March 11, 2008

APPEARANCES:

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