Docket: 2008-2628(GST)I

BETWEEN:

ROB WALDE HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 9, 2008 at Saskatoon, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

Agent for the Appellant:	Rod F. Perkins, C.A.
Counsel for the Respondent:	Brooke Sittler

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act* is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of February, 2009.

"G. A. Sheridan"

Sheridan, J.

Citation: 2009TCC74
Date: 20090206
Docket: 2008-2628(GST)I

BETWEEN:

ROB WALDE HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Rob Walde Holdings Ltd., is a corporation carrying on a farming operation near Kindersley, Saskatchewan through its shareholders, Robin and Brenda Walde. In 2005 Robin and Brenda, acting in their joint capacity as the directing mind of the Appellant, built a house (referred to herein as the "New Home") on the Appellant's land. Although the Appellant paid all of the bills (including Goods and Services Tax) related to construction, because the New Home was to serve a dual function as a base of operations for the Appellant's business and as a personal residence for Robin and Brenda and their children, the Appellant, and Robin and Brenda always intended to split the construction costs on a 50-50 basis. When construction was completed, the family moved into the New Home. As planned, the office was used almost exclusively for the Appellant's business; other areas like the kitchen and the garage, were used for both business and personal purposes with the remainder of the New Home devoted to the family's personal use. Also as intended, the builder's mortgage originally borne only by the Appellant was somehow restructured to shift some of the financing obligations to the shareholders personally.

[2] It was on this footing that having paid all of the GST[1] on the construction bills, the Appellant claimed only 50% as input tax credits. Meanwhile, Robin and Brenda (in their personal capacities) applied for a New Housing Rebate of $4,032.71; no rebate of any kind was claimed by the Appellant.

[3] By Notice of Assessment dated January 15, 2007, the Minister assessed the Appellant on the basis that the Appellant was deemed to have made a self-supply of the New Home under subsection 191(1) of the *Excise Tax Act*. The details of the assessment are set out in the assumptions in the Reply to the Notice of Appeal at subparagraphs 5(i) to (n):

> …
>
> (i) the Appellant gave possession of the House to Brenda and Robin in December 2005;
>
> (j) the fair market value of the House in December 2005 was at least $378,137.16;
>
> (k) the Appellant is deemed to have made a supply and received a supply of the House;
>
> (l) with respect to the deemed supply of the House
>
> (i) the Appellant was required to self assess and report tax of $26,469.60 ($378,137.16 x .07) and remit this tax as part of its net tax remittance for the Reporting Period;
> (ii) the Appellant failed to report the required tax on the House;
>
> (m) with respect to the goods and services acquired for use in the construction of the House
>
> (i) the Appellant paid tax of no more than $22,403.92;
> (ii) the Appellant claimed ITCs of $11,201.96;
> (iii) the Minister allowed additional ITCs of $11,201.96;
>
> (n) the Minister allowed the Appellant a GST/HST New Residential Rental Property Rebate[2] (the "Rebate") in the amount of $6,287.99 calculated as follows
>
> $\frac{\$450,000 - \$378,137.16}{\$\ 100,000} \times \$8,750 \text{ (maximum allowable)} = \$6,287.99$

[1] The Minister later reassessed an additional $4,924.82 plus interest and penalties.

[2] Subparagraph 256.2(3)(*a*)(ii) of the *Excise Tax Act*.

[4] The Respondent's position is that the Appellant, as a "builder" of a "single unit residential complex", constructed the New Home ultimately occupied by Robin and Brenda and accordingly, is deemed to have made a self-supply of the New Home under subsection 191(1) of the *Act*. The Respondent argues further that regardless of any agreement between the Appellant and Robin and Brenda regarding the business and personal use of the New Home, there is nothing in the relevant provisions of the *Act* to permit them to allocate between themselves what are exclusively the Appellant's legislative obligations and entitlements.

[5] Turning first to the legislation, the relevant portions of subsection 191(1) provide that:

> **191.(1) Self-supply of single unit residential complex or residential condominium unit [on occupancy or lease by builder]** -- For the purposes of this Part, where
>
> (a) the construction … of a residential complex that is a single unit residential complex … is substantially completed,
>
> (b) the builder of the complex
>
> (i) gives possession or use of the 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,
>
> …
>
> (c) the builder, the particular person, or an individual who has entered into a lease, licence or similar arrangement in respect of the complex with 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 or use 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 time. [Emphasis added.]

[6] As noted by the Appellant's agent, Rod Perkins, C.A., this provision, like the rest of the *Excise Tax Act*, is very complicated making it difficult for even the most compliant taxpayers to ferret out their rights and obligations under the legislation. Mr. Perkins urged the Court to consider the Appellant's case from a common sense perspective in light of what actually happened: the Appellant and Robin and Brenda (jointly as individuals) equally shared the cost of the construction and use of the New Home; thus, they should be able to prorate their rights and claims under the *Act*

accordingly. Simple prairie logic, however, is no match for what the Federal Court of Appeal has described as "a model of ambiguity created by a maze of definitions"[3].

[7] The labyrinth begins with paragraph (*a*) of subsection 191(1): it is common ground that the "construction" of the New Home was "substantially completed". It remains only to consider whether the New Home is a "residential complex" that is a "single unit residential complex". Both of these terms are defined in subsection 123(1) of the *Act*. Briefly put, a "single unit residential complex" is a "residential complex" that has only one "residential unit". But what is a "residential unit"? Back again to subsection 123(1), where one learns that a "residential unit" means, among other things, "a detached house" or "that part thereof that (*d*) is occupied by an individual as a place of residence…". From Brenda's description of the New Home, it is a detached house as that term is ordinarily understood. The evidence also shows that no portion of the New Home was off limits to the family: the office (though primarily for the Appellant's use) was also accessible to the family; similarly, the garage housed vehicles owned by the Appellant as well as items for the family's personal use. None of this is surprising or blameworthy. The upshot is, however, that there is no part of the New Home that is not, to some extent, occupied by Robin and Brenda as "a place of residence". Accordingly, paragraph (*d*) has no application and all of the New Home must be treated as one "residential unit".

[8] As such, the New Home falls within paragraph (*a*) of the definition of "residential complex": "that part of a building in which one or more residential units are located …" which, for the same reasons as above, includes the whole of the New Home[4]. Accordingly, the New Home is a "residential complex" that is a "single unit residential complex" under paragraph 191(*a*) of the deemed self-supply provision.

[9] The next step is to consider whether the Appellant's situation meets the criteria in paragraphs 191(*b*) and (*c*). Under (*b*), it is common ground that the Appellant "gave[5] possession or use" of the New Home "for the purpose of its occupancy by" Robin and Brenda "as a place of residence"; and under (*c*), that they were the first individuals "to occupy" the New Home for that purpose. That leaves only to determine whether the Appellant was the "builder" of the New Home.

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[3] *Her Majesty the Queen v. Sneyd*, [2000] G.S.T.C. 46 (F.C.A.) at paragraph 2.

[4] *Sneyd*, above at paragraph 11.

[5] In the legal sense of that term: Brenda stressed in her testimony that she and Robin had fairly paid for what they considered their share.

[10] To answer that question, one must turn again to subsection 123(1) and specifically, to the definition of "builder", the relevant portions of which are set out below:

> **"builder"** of a residential complex … means a person who
>
> (a) at a time when the person has an interest in the real property on which the complex is situated, carries on or engages another person to carry on for the person
>
> …
>
> (iii) … the construction … of the complex,
>
> ...
>
> but does not include
>
> (f) an individual described by paragraph (a) … who
>
> (i) carries on the construction …
>
> (ii) engages another person to carry on the construction … for the individual, or
>
> (iii) acquires the complex or interest in it,
>
> otherwise than in the course of a business or an adventure or concern in the nature of trade,
>
> …

[11] As can be seen from the above, paragraph (*f*) excludes from the definition of "builder" an "individual" as further described in subparagraphs (i) to (iii). As a corporation, the Appellant is not a "natural person" and therefore, not an "individual" as defined in subsection 123(1). Accordingly, subparagraph (*f*) does not operate to exclude the Appellant from the definition of "builder".

[12] The Appellant is, however, a "person"[6] which brings it within the preamble to the definition of "builder"; as the owner of the land on which the New Home was built in 2005, the Appellant has an "interest in the real property on which the [New Home] is situated" as contemplated by paragraph (1)(*a*). Finally, the Appellant, through its principals, carried on or engaged with others to carry on the construction of the New Home. This, argues the Respondent, establishes that the Appellant is the "builder" of the New Home and is thereby deemed by operation of subsection 191(1) to have made a self-supply of the whole of the New Home.

[13] The Appellant contends that its status as "builder" should be restricted on a *pro rata* basis to that portion of the New Home that was used for business purposes, estimated by the Appellant at 50%. However, I am persuaded by the submissions of counsel for the Respondent that, even if the Appellant's percentage of use is correct,

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[6] Subsection 123(1) of the *Act*.

the provisions considered above do not permit such an approach. As the Appellant has been unable to show that the Minister's assessment was not in accordance with the applicable provisions of the *Excise Tax Act*, the appeal must be dismissed.

Signed at Ottawa, Canada, this 6th day of February, 2009.

"G. A. Sheridan"

Sheridan, J.

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COURT FILE NO.:	2008-2628(GST)I
STYLE OF CAUSE:	ROB WALDE HOLDINGS LTD. AND HER MAJESTY THE QUEEN
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APPEARANCES:

Agent for the Appellant:	Rod F. Perkins
Counsel for the Respondent:	Brooke Sittler

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

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