Citation: 2011 TCC 353
Date: 20110802
Docket: 2009-3264(GST)I

BETWEEN:

CANPAR DEVELOPMENTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the bench on March 2, 2010, in Toronto, Ontario.)

Paris J.

[1] This is an appeal from an assessment of GST arising from a transfer by the Appellant of a house it was building to its two shareholders. The Appellant did not collect or remit GST on the transfer. The Appellant says that it only transferred legal title to the property to its shareholders and retained the beneficial interest, and therefore, that there was no supply that would give rise to an obligation to collect GST.

[2] The Minister assessed the Appellant on the basis that it transferred both the legal and beneficial interest in the property to its shareholders, thereby resulting in a supply of property on which GST was required to be collected pursuant to sections 165 and 221 of the *Excise Tax Act*.

[3] The assumptions of fact relied upon by the Minister in assessing are set out in paragraph 9 of the Reply to Notice of Appeal and will form part of these reasons:

a) the appellant is a small scale builder of new residential housing;

b) the appellant was, at all material times, registered for GST purposes;

c) the appellant's sales of new residential housing were taxable at a rate of 7 per cent;

d) Terry Canning ("Canning") and Subhash Parmar ("Parmar") each held 50 per cent of the common shares of the appellant at all material times;

e) Canning and Parmar controlled the appellant;

f) Canning and Parmar were not a arm's length with the appellant;

g) on or about September 9, 2005, the appellant transferred the Oakridge Property to Canning and Parmar for fair market value ("Transfer");

h) prior to September 9, 2005, the Oakridge Property was one of the properties held by the appellant in its inventory;

i) on or about September 9, 2005, Canning and Parmar obtained a mortgage in respect of the Oakridge Property of $401,250 from the Toronto-Dominion Bank;

j) the fair market value of the Oakridge Property at the time of Transfer was $495,000;

k) no bare trust was established in respect of the Oakridge Property;

l) Canning and Parmar did not hold the Oakridge Property in trust for the appellant after the Transfer;

m) Canning and Parmar made all of the decisions in respect of the Oakridge Property after the Transfer;

n) the appellant did not hold any legal or beneficial interest in the Oakridge Property after the Transfer;

o) the amount of GST collectible in respect of the transfer of the Oakridge Property was $34,650;

p) the appellant did not report any revenue or GST collectible in respect of the transfer of the Oakridge Property in its GST returns;

q) the appellant did not claim Input Tax Credits ("ITCs") in respect of the Oakridge Property after the date of the Transfer; and

r) the appellant failed to remit any GST collectible in respect of the transfer of the Oakridge Property to the Receiver General.

[4] Mr. Subhash Parmar, a director and 50 percent shareholder of the Appellant, gave evidence that the Appellant had borrowed money to finance the purchase of the lot on Oakridge Trail in Oshawa in 2004 and that it borrowed an additional amount to finance the construction of a house on the lot. In the summer of 2005, the lenders demanded repayment, and the Appellant was required to find replacement financing.

[5] Mr. Parmar approached the Bank of Nova Scotia and TD Canada Trust, but both refused to loan money to the Appellant and would only consider giving a mortgage on the property if it was put into the names of Mr. Parmar and Mr. Canning, the other shareholder. Mr. Parmar said that in order to obtain the financing from TD Canada Trust, the Appellant transferred the property to Mr. Canning and himself. Documents in evidence showed that the property was registered in their names as tenants in common on September 9th, 2005.

[6] Mr. Parmar said the transfer was only done to obtain financing and that the Appellant continued to be treated as the owner of the property. It paid all of the remaining construction costs as well as the utility bills. When the property was ultimately sold in January 2008, the net proceeds from the disposition were deposited into the Appellant's bank account.

[7] Evidence adduced by the Respondent showed, however, that at the time of the transfer, the Appellant recorded it as a sale to Mr. Parmar and Mr. Canning. In the Appellant's books, the property was removed from inventory and the shareholder loan accounts of Mr. Parmar and Mr. Canning were debited for an amount equal to the Appellant's cost of the property. Mr. Parmar said that this representation of the sale of the transfer was made in error by the Appellant's bookkeeper and was later reversed by the Appellant.

[8] The first matter that I am required to address is whether Mr. Parmar and Mr. Canning held the property in trust for the Appellant subsequent to the transfer of title which occurred on September 9th, 2005. Three criteria must be met in order to establish a valid trust. These are certainty of intention, certainty of subject matter and certainty of objects. It must be clear that the settlor of a trust intended that the property transferred to the trustee be held in trust as a binding obligation. The property that is the subject of the trust and the beneficiaries of the trust must be identifiable, and the interest the beneficiaries in the trust property must be defined.

[9] The Appellant has the onus to show that the requirements for the creation of a trust have been met. In this case, the requisite certainty of intention has not been

established. Firstly, the existence of the trust was not recorded on the transfer documents. Secondly, the evidence shows that TD Canada Trust required that the property be held by the two shareholders as a condition of obtaining the necessary financing. It is illogical, in my view, that TD would have accepted that the property still be beneficially owned by the Appellant after the transfer when it, Toronto Dominion, was advancing funds on the basis that the property was registered in the names of the shareholders. I can see no other reason why TD Canada Trust would have required the property to be put into the names of the shareholders except that it required them to have beneficial ownership of it.

[10] Thirdly, as pointed out by counsel for the Respondent, there was no evidence that either Mr. Parmar and Mr. Canning ever advised TD Canada Trust of the existence of a trust with respect to the property, and I infer from this that no such representation was made. This is inconsistent, in my view, with an intention to create a trust. The comments of Justice Bowman in *Erb v. The Queen*, 2000 D.T.C. 1401 in this regard, I think, are appropriate. Justice Bowman said at paragraph 26:

> It strikes me that where a person transfers property to someone else by a deed or conveyance that on its face is absolute and does so to achieve a purpose that is premised upon a transfer on beneficial ownership that would require very cogent evidence to establish that the transferor had no intention of doing what the documentation unequivocally shows that it did do and that intended to withhold from the grantee beneficial title to the property.

[11] It is my impression that Mr. Parmar and Mr. Canning were very anxious to obtain replacement financing for the property in the summer of 2005 and that the transfer of the property was done without any consideration of the tax consequences that would flow from it. I infer that neither Mr. Parmar nor Mr. Canning turned their mind to the creation of a trust at the time of the transfer.

[12] I am also not convinced the manner in which the transaction was first recorded by the Appellant in its books and records was an error. The records were not amended until after the commencement of the audit by the CRA which led to the subject assessment. Furthermore, I draw a negative inference from the Appellant's failure to call the bookkeeper, Ms. Cunningham, as a witness to corroborate Mr. Parmar's testimony on this point.

[13] I accept that after the transfer of the property to the shareholders, the Appellant continued to pay the expenses related to the property, but this alone does not outweigh the factors which point to the lack of an intention to create a trust.

[14] The Appellant's representative also suggested that the transfer of the property to Mr. Parmar and Mr. Canning fell within section 134 of the *Excise Tax Act* as the transfer of a security interest and therefore should be deemed not to be a supply. Section 134 reads:

> For the purpose of this part where, under an agreement entered into in respect of a debt or obligation, a person transfers property or an interest in property for the purpose of securing payment of the debt or performance of the obligation, the transfer shall be deemed not to be a supply, and where on payment of the debt or performance of the obligation or the forgiveness of the debt or obligation, the property or interest is retransferred, the retransfer of the property or interest shall be deemed not to be a supply.

[15] However, there is no evidence that the Appellant transferred the property to Mr. Parmar and Mr. Canning in order to secure the payment of a debt or the performance of an obligation to them. The debt or obligation referred to in section 134 is one that is owed by the transferor of the property to the transferee.

[16] According to David Sherman's Analysis:

> The objective of section 134 is clear. A pledge, mortgage or similar transfer made for the purpose of securing a debt is not really a transfer of the property. Unless and until the security is realized to pay for the debt, no transfer of the property has taken place.

[17] For these reasons, I find that the Appellant was liable to collect and remit GST on the transfer of the property to Mr. Parmar and Mr. Canning on September 9th, 2005.

[18] The second issue before me is whether gross negligence penalties were properly imposed under section 285 of the *Excise Tax Act*. That section reads as follows:

> Every person who knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to, or acquiesces in the making of a false statement or omission in a return, application, form, certificate, statement, invoice or answer (each of which in the section is referred to as a “return”) made in respect of a reporting period or transaction is liable to a penalty of --

The section goes on to set out the manner in which the penalty is calculated.

[19] In *Venne v. The Queen*, 84 D.T.C. 6247, Mr. Justice Strayer stated:

> Gross negligence must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting and indifference to whether the law is complied with or not.

[20] Furthermore, as noted by Justice Bowman in *Farm Business Consultants Inc. v. The Queen*, 95 D.T.C. 200, a court must be extremely cautious in sanctioning the imposition of a gross negligence penalty.

[21] In the circumstances of this case, I am not satisfied that the Appellant's conduct regarding the failure to collect and remit GST on the transfer of the property in issue amounted to gross negligence on its part. I accept that Mr. Parmar and Mr. Canning believed that GST would not become payable until the property was disposed of to an arm's length party. I also accept that they believed that the Appellant maintained some interest in the property given that it continued to pay the expenses related to it. Although that belief was incorrect in law, it appears to me that Mr. Parmar maintained that subjective belief and I infer Mr. Canning did as well. I believe they were negligent in not seeking legal advice regarding the tax consequences of the transfer, but this was not in itself tantamount to an intentional of disregard of its obligations under the *Excise Tax Act*.

[22] In my view, the tax consequences of a transfer between non-arm's length parties is often a complex matter and one that experienced business people may misunderstand. Again, this alone while amounting to negligence would not constitute gross negligence as that term has been defined in the case law.

[23] For these reasons, the appeal is allowed in part and the matter shall be referred back to the Minister of National Revenue for reassessment on the basis that the section 285 gross negligence penalty be deleted.

Signed at Vancouver, British Columbia, this 2nd day of August 2011.

"B.Paris"

Paris J.

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APPEARANCES:

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