Docket: 2017-309(GST)G

BETWEEN:

PRIMA PROPERTIES (92) LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 6, 2018, at Vancouver, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Kimberley Cook
Counsel for the Respondent:	Selena Sit

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the reporting period from August 1, 2009 to July 31, 2010 is allowed, with costs to the Appellant on a party and party basis, in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 10th day of January 2019.

"B.Paris"

Paris J.

Citation: 2019TCC4
Date: 20190110
Docket: 2017-309(GST)G

BETWEEN:

PRIMA PROPERTIES (92) LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] This is an appeal from a reassessment made June 10, 2016 under Part IX of the *Excise Tax Act* (the "*Act*"). The Minister of National Revenue (the "Minister") reassessed the Appellant for GST in the amount of $892,350.00 in respect of a deemed sale of a hotel property owned by the Appellant in downtown Vancouver.

[2] The parties agree that the reassessment in issue was made beyond the four year time limit set out in subsection 298(1) of the *Act*. Therefore, pursuant to subsection 298(4) of the *Act*, the Respondent must, show that the Appellant made a misrepresentation attributable to neglect, carelessness or willful default in its return for the reporting period in issue.

[3] The issues in this appeal are whether the Respondent has met the onus to prove both a misrepresentation by the Appellant and that the misrepresentation was due to the Appellant's neglect, carelessness or willful default.

[4] The Appellant was also reassessed for subsequent reporting periods to disallow certain input tax credits it claimed in relation to the hotel property. While the disallowance of the ITCs was raised in the Notice of Appeal, counsel for the Appellant advised the Court that the reassessments of the subsequent periods were no longer being challenged.

[5] The evidence presented at the hearing consisted of a Partial Statement of Agreed Facts, a common Book of Documents and the testimony of the Appellant's witness, Mr. Ali A. Tehrani, president of the Appellant's parent company.

Facts

[6] The Appellant is engaged in the business of real estate rentals and development. In 2007, it acquired the Bosman Hotel on Howe Street in Vancouver. It immediately leased the Property to the former owner, Sunset Motor Inn Ltd. ("Sunset") until April 30, 2010 and Sunset continued to operate the Property as a hotel. The lease between the Appellant and Sunset stipulated that the permissible uses of the Property were as "a hotel, restaurant, paid parking and business ancillary to the hotel."

[7] On October 20, 2009 the Appellant entered into a lease of the Property, with PHS Community Services Society ("PHS") to run from May 1, 2010 to March 31, 2013 (the "PHS Lease"). PHS is a non-profit organization that operates housing projects and support programs targeting the homeless.

[8] Mr. Tehrani said that the Appellant was approached by PHS to lease the Property in order to provide housing for the homeless. It was his understanding that PHS would offer transitory accommodation for homeless people until permanent housing could be found. The Appellant agreed to lease the Property to PHS because it felt it was the right thing to do.

[9] The PHS Lease provided that the permitted use of the Property was as a "funded and managed housing program". The PHS Lease also provided that PHS would "conduct its business and activities on the Premises in accordance with the operational plan for the Premises approved by the City." The operational plan stated that the Property would be run as a "supportive long-term housing project for 100 homeless adults living with mental illness". Mr. Tehrani confirmed that the Appellant received a copy of the operational plan from PHS.

[10] Mr. Tehrani testified that he told the Appellant's accountant, Bob Marzbani when the PHS Lease was entered into and gave him a copy of the Lease and all related documents. Mr. Tehrani said that Mr. Marzbani did not ask him any questions about the PHS Lease and that he, Mr. Tehrani, did not follow up on the matter. He said that he believed that Mr. Marzbani would contact him if he had any questions concerning the PHS Lease.

[11] The Appellant had used Mr. Marzbani and his firm, Synergy Accounting Services ("Synergy") since 2006 and had obtained references for Mr. Marzbani indicating that he was highly qualified. Throughout the time that the Appellant used the services of Mr. Marzbani, Mr. Tehrani said that he found him to be very professional and knowledgeable and that he was proactive in asking questions. He described Mr. Marzbani's approach to tax compliance as "very conservative" and stated that a prior audit of the Appellant by the Canada Revenue Agency had not turned up any issues.

[12] Mr. Tehrani testified that he considered both the Sunset Lease and the PHS Lease as the same type of commercial lease, with similar terms and conditions. The Appellant leased the Property in its entirety to each tenant, who then used it to carry on their operations. He said he did not see any difference between the use made by Sunset and PHS in that both used it to provide temporary accommodation.

[13] In cross-examination Mr. Tehrani agreed with counsel that he did not point out the change in the permitted uses of the Property between the Sunset Lease and the PHS Lease or ask about any specific tax consequences of the change. Mr. Tehrani said that he was relying on Mr. Marzbani to inform him of any tax issue that might arise from the PHS Lease. He also testified that the Appellant did not seek tax advice in relation to the PHS Lease from anyone else.

[14] Mr. Tehrani did not review the GST return prepared by Mr.Marzbani and filed by the Appellant for the reporting period in issue. The return was filed electronically on November 10, 2010. The Appellant charged and reported GST/HST on the rent payments made by PHS and claimed input tax credits in respect of the PHS Lease.

The Reassessment

[15] On June 10, 2016 the Minister reassessed the Appellant on the basis that when the Sunset Lease ended and the PHS Lease began, the Appellant commenced to hold the Property as a residential complex and that the deeming provisions of subsection 190(1) of the *Act* applied. As a result of the conversion of the Property to residential use, the Minister held that there was a deemed self-supply of the Property and a requirement to remit GST on the fair market value of the Property at the time of the change in use. The Minister stated that the reassessment was made pursuant to subsection 190(1) of the *Act*, although it is apparent that the self-supply would, in fact, have been deemed to have occurred by subsection 191(3) of

the *Act*. The Minister also disallowed ITCs claimed after the start of the PHS Lease.

Respondent's Position

Deemed self-supply

[16] In the Amended Reply filed on April 4, 2018, the Respondent abandoned Her reliance on subsections 190(1) and adopted the position that when the Appellant leased the Property to PHS it ceased using the Property in commercial activities and began using it as a "residential complex" and that subsection 206(4) of the *Act* deemed the Appellant to have made and received a supply of the Property by way of sale, and to have collected GST on the deemed sale.

[17] Subsection 206(4) reads as follows:

> 206(4) For the purposes of this Part, where a registrant last acquired real property for use as capital property in commercial activities of the registrant and the registrant begins, at a particular time, to use the property exclusively for other purposes, the registrant shall be deemed
>
> > (a) to have made, immediately before the particular time, a supply of the property by way of sale and, except where the supply is an exempt supply, to have collected, at the particular time, tax in respect of the supply equal to the basic tax content of the property at the particular time; and
> >
> > (b) to have received, at the particular time, a supply of the property by way of sale and, except where the supply is an exempt supply, to have paid, at the particular time, tax in respect of the supply equal to the amount determined under paragraph (a).

[18] The Respondent maintains that on May 1, 2010 - the date the PHS Lease began – PHS began to use the Property to make supplies of long-term accommodation. The Respondent says that, based on PHS's use of the Property, the supply of the Property by the Appellant to PHS was an exempt supply pursuant to Section 6.11 of Schedule V to the *Act*. Section 6.11 exempts a supply of property that is a residential complex to a person who uses or intends to use the property to make exempt supplies. The making of exempt supplies is excluded

from the definition of "commercial activity" set out in subsection 123(1) of the *Act*.

[19] Section 6.11 reads as follows:

> 6.11 A supply made by way of lease, licence or similar arrangement of property that is a residential complex or that is land, a building or that part of a building, that forms or is reasonably expected to form part of a residential complex if the supply is made to a recipient (in this section referred to as the "lessee") for a lease interval (within the meaning assigned by subsection 136.1(1) of the Act) throughout which all or substantially all of the property is
>
> > (a) supplied, or is held for the purpose of being supplied, in one or more supplies, by the lessee or any sublessee for the purpose of the occupancy of the property or parts of the property by individuals as a place of residence or lodging and all or substantially all of the supplies of the property or parts of the property are exempt supplies described by section 6, or
> >
> > (b) used, or held for the purpose of being used, by the lessee or any sublessee in the course of making exempt supplies and, as part of one or more exempt supplies, possession or use of all or substantially all of the residential units situated in the property is given under a lease, licence or similar arrangement for the purpose of their occupancy by an individual as a place of residence.

[20] Counsel argued that, the supply the Appellant made under the PHS Lease was exempt under section 6.11 because the supplies of accommodation that PHS made to the homeless individuals were exempt pursuant to section 6(a) of Part I of Schedule V to the *Act* (the "Rental Exemption"). That provision reads as follows:

> 6. A supply
>
> > (a) of a residential complex or a residential unit in a residential complex by way of lease, licence or similar arrangement for the purpose of its occupancy as a place of residence or lodging by an individual, where the period throughout which continuous occupancy of the complex or unit is given to the same individual under the arrangement is at least one month;

[21] The Respondent says that the leases or licenses (or other similar arrangements) under which PHS gave possession of the accommodation to the homeless individuals can be assumed to have been for periods of at least one

month on the basis of the Operations Management Plan provided by PHS to the Appellant, and the reference in that document to the operation of the Property as a "supportive long-term housing project". The PHS Lease stipulated that PHS was to conduct its business and activities on the Property in accordance with that operational plan. Counsel also submitted that there was no evidence that the PHS used the Property to make short-term rentals.

Statute Bar

[22] The Respondent alleges that the Appellant's failure to report the deemed sale of the Property in its return for the period ending July 31, 2010 was a misrepresentation that occurred as a result of the Appellant's failure to take reasonable care. The Respondent says that Mr. Tehrani ought to have specifically pointed out to Mr. Marzbani that PHS was going to put the Property to a different use than Sunset had under the Sunset Lease and says that Mr. Tehrani should have questioned Mr. Marzbani about possible GST consequences arising from the different use. Mr. Tehrani's failure to do so, says the Respondent, was conduct that fell short of the conduct of a wise and prudent person in similar circumstances. The Respondent argues that even where a taxpayer relies on an accountant or other professional adviser, his or her own prudence or diligence must be established.

[23] The Respondent's counsel asserts that Mr. Tehrani's failure to do anything other than provide the PHS Lease and related documents to Mr. Marzbani was conduct that fell short of that of a wise and prudent person in comparable circumstances, and characterized Mr. Tehrani's conduct as "lackadaisical".

[24] It was argued that Mr. Tehrani ought to have specifically asked Mr. Marzbani whether the difference in permitted use of the Property between the Sunset Lease and the PHS Lease would have any tax consequences. Counsel said that while this may have been an innocent mistake on Mr. Tehrani's part, even honest mistakes can lead to a finding of negligence or carelessness under subsection 298(4) of the *Act*.

[25] Finally counsel asserted that if the Court allowed this appeal, it would be encouraging "taxpayers to hire a professional and then keep silent in the hope that something will slip by their advisor's attention."

Analysis

Misrepresentation

[26] The first question to be determined is whether the Appellant made a misrepresentation in its return for the period ending July 31, 2010. The misrepresentation alleged by the Respondent is that the Appellant failed to report the GST it was deemed to have collected on a change of use of the Property from use in commercial activity to use in the making of an exempt supply under the PHS Lease. As I have already noted, the Respondent says that the supply of the Property by the Appellant under the PHS lease was exempt pursuant to section 6.11 of Schedule V of the *Act*.

[27] As I have already noted, section 6.11 is a "look through" provision and its application depends on the nature of the supplies of the Property made or intended to be made by PHS. If those supplies were exempt supplies, the supply of the Property by the Appellant to PHS would also be exempt.

[28] In order for the supply of the Property to fall within section 6.11, a number of conditions must be met, including that the Property is a "residential complex" or is "reasonably expected to form part of a residential complex" and "all or substantially all of the property" is supplied or held for supply by the lessee as exempt supplies of residential accommodation or lodging. The supply of residential accommodation or lodging will be exempt under Section 6(a) of Part 1 of Schedule V only where continuous occupancy of the complex or unit is given for at least one month.

[29] In my view, the Respondent has not shown, on the balance of probabilities, that all of the conditions in section 6.11 of Schedule V and section 6(a) of Part 1 of Schedule V have been met. In particular, no evidence was led regarding the nature of the arrangements governing the occupancy of the units in the Property by the clients of PHS.

[30] The Respondent says that the supplies made by PHS were exempt under section 6(a) of Schedule V because it was PCH's intention to rent the units in the Property to the occupants on a long-term basis. However, while the operational plan prepared by PHS refers to the operation of a "supportive long-term housing project" and the terms of the plan were incorporated into the PHS Lease, Mr. Tehrani said that his understanding was that PHS would use the Property for transitory housing until more permanent accommodation could be found for the occupants.

[31] The Respondent did not call anyone from PHS to clarify the nature of PHS's operations and it is not clear how or for what periods of occupancy the units in the Property were provided or intended to be provided by PHS to its clients.

[32] In the absence of such evidence, I am unable to conclude that the Respondent has shown that the supplies or intended supplies of the Property by PHS were exempt and that subsection 206(4) operated to deem the Appellant to have made a supply of the Property by way of sale during its reporting period ending July 31, 2010 and to have collected GST on the deemed sale. It follows that the Respondent has not shown that the Appellant made a misrepresentation on the return filed for that reporting period.

Statute-barred reassessment

[33] Even if I had concluded that the Appellant was required to report a deemed sale or self-supply of the Property and therefore had made a misrepresentation in its return for the relevant reporting period, I would still have found that the evidence did not support the conclusion that Appellant was negligent or careless in making the misrepresentation.

[34] The Respondent asserts that Mr. Tehrani ought to have suspected or believed that the change between the Sunset and PHS Leases of the permitted use of the Property would have GST consequences and ought to have communicated his suspicion or belief to the Appellant's accountant and sought advice on the matter.

[35] In my view, for the reasons that follow, it cannot be said that Mr. Tehrani, acting for the Appellant, was careless or negligent in not bringing to the attention of the Appellant's accountant the fact that PHS would be using the Property for a different purpose than Sunset had.

[36] First, it is significant that the Appellant itself did not change the use that it was making of the Property. In the case of both the Sunset and PHS Leases, it was entering into a commercial lease of the entire property, and in each case it had no further involvement in the operation of the Property. It seems reasonable to me that Mr. Tehrani saw no material difference between the two leases.

[37] Second, the potential significance, for GST purposes, of the fact that PHS's intended use of the Property differed from that of Sunset would only have been apparent to a person with extensive knowledge of Part IX of the *Act*, and

familiarity with the change of use provisions in subsection 206(4) of the *Act*. Here, Mr. Tehrani had neither, and I do not believe it reasonable to expect a lay business person to be knowledgeable about such matters. The deeming provision in subsection 206(4), as well as the relevant section of Schedule V are complex provisions containing highly technical language and are a challenge for lawyers and accountants to understand, let alone someone without professional tax education and experience.

[38] Counsel for the Respondent was unable to explain how Mr. Tehrani should have been aware in some general way that a change in how the Property was used by its tenants would impact on its GST obligations without him having knowledge of the issue or provisions beforehand. Mr. Tehrani said he saw no difference in the Leases from the Appellant's point of view, and I accept that it was a reasonable conclusion for him to draw, since the Appellant was leasing the Property to PHS just as it had done with Sunset. Mr. Tehrani could not have been expected to draw the difference to his accountant's attention because he had no reason to believe it was significant.

[39] The facts of this case are not analogous cases in which the Court has found that the a taxpayer knew or ought to have known that amounts or items omitted from their tax returns should have been included, or at least should have led them to question their accountants about the matter.

[40] For example, in *Robertson v. The Queen*, 2015 TCC 246 (affirmed at 2016 FCA 303), the taxpayer was unable to recall if he had ever disclosed to his accountant that he had exercised certain stock options that gave rise to benefits that should have been included in his income tax returns. The Court found that the taxpayer was aware of the provisions of the *Income Tax Act* that dealt with stock option benefits and should have sought to confirm with his accountant that his understanding of how those provisions applied in his case was correct.

[41] As well, this case is distinguishable on its facts from the decision of this Court in *832866 Ontario Inc. v. The Queen*, 2014 TCC 93 where it was noted that the taxpayer's representative had failed to disclose to its accountant that a change of use of a model home it had constructed had occurred.

[42] Also, in *College Park Motors v. The Queen*, 2009 TCC 409, it was found that the taxpayer's representative ought to have enquired of its accountant about the application of Part 1.3 tax to the taxpayer because of specific questions that

appeared on the tax return form. Bowie J. found that, had the representative reviewed the returns "as carefully as a wise and prudent person would", he would have asked the accountant about the Part 1.3 tax matter and in turn would have prompted the accountant to act.

[43] In the case at bar, however, the Respondent has not shown that the change in permitted use of the Property under the PHS Lease would have led a reasonable person to make enquiries about a self-supply or change of use issue.

[44] The Respondent also maintains that the Appellant did not meet the following four conditions, referred to by Bocock J. in *Robertson,* at paragraph 38, which were said to reveal the conduct of a wise and prudent person where reliance on an accountant is asserted, namely:

> … (1) the taxpayer submits all materials to the professional advisor; (2) a discussion is had between the advisor and the taxpayer touching upon the inclusion or exclusion from income of the item; (3) that discussion gives rise to a review of the facts related to the inclusion or exclusion; and (4) a clear, factual confirmation made by the professional advisor leads to the misrepresentation.

[45] Counsel submits that all four elements must be present in order for the Court to conclude that a taxpayer exercised the requisite diligence. I disagree. These factors do not constitute a rigid test for determining whether a taxpayer acted diligently to avoid making the misrepresentation, but instead provide a general approach to the assessment of a taxpayer's conduct leading up to the making of the misrepresentation. As such, it is not necessary to find that all four elements are present in order to find that a taxpayer has satisfied the "wise and prudent person" test. The determination is a contextual one to be made after considering all of the factors that are relevant in the particular case.

[46] The relevant factors here are that Mr. Tehrani met with Mr. Marzbani and advised him that a new lease had been entered into and gave him all the documents pertaining to the PHS Lease. It is also relevant that Mr. Marzbani had previously been given the Sunset Lease, and that Mr. Marzbani and Synergy had acted for the Appellant since 2006 and that the Appellant had never had any grounds to question their professional abilities. However, to expect Mr. Tehrani to initiate a discussion with Mr. Marzbani concerning the possible application of a highly technical provision of the *Act* would be to hold him to an unrealistically high standard of care.

[47] Finally, there is no proof that Mr. Tehrani would have noticed anything amiss on the GST return filed for the period in issue had he sat down with Mr. Marzbani and reviewed it.

[48] The evidence in this case does not support the Respondent's contention that to allow this appeal would be "to hire a professional and then keep silent in hopes that something will slip by their advisor's attention, and if reassessed, to hide behind their advisor." To the contrary, the evidence shows that Mr. Tehrani disclosed all relevant information about the PHS Lease and provided all related documentation to Mr. Marzbani and subsequently relied on Mr. Marzbani to advise him of any issues that arose from the lease transaction.

[49] While it may be inferred that Mr. Marzbani, was careless or negligent in failing to appreciate the GST consequences of PHS' intended use of the Property, the Respondent did not argue that Mr. Marzbani's carelessness or negligence in and of itself was sufficient to allow the Minister to reopen the statute-barred return. Counsel advised the Court that the Respondent accepted that the decision of this Court in *Aridi v. The Queen*, 2013 TCC 74, where Hogan J. found that it was not sufficient to show negligence on the part of the taxpayer's professional advisor in making the misrepresentation, and that the taxpayer must also be shown to have acted in a negligent or careless manner.

Conclusion

[50] The appeal is allowed, with costs to the Appellant on a party and party basis.

Signed at Vancouver, British Columbia, this 10th day of January 2019.

"B.Paris"

Paris J.

CITATION:	2019TCC4
COURT FILE NO.:	2017-309(GST)G
STYLE OF CAUSE:	PRIMA PROPERTIES (92) LTD. AND HER MAJESTY THE QUEEN
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APPEARANCES:

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