

Case Name:

Condominium Plan No. 9422336 v. Canada

Between

The Owners: Condominium Plan No. 9422336, appellant, and
Her Majesty the Queen, respondent

[2004] T.C.J. No. 304

2004 TCC 406

Court File No. 2003-2489(GST)I

**Tax Court of Canada
Edmonton, Alberta
McArthur T.C.J.**

Heard: January 19, 2004.

Judgment: June 10, 2004.

(19 paras.)

Counsel:

Agent for the appellant: Gordon McIntosh.

Counsel for the respondent: Dawn Taylor.

JUDGMENT:-- The appeal from the assessment of goods and services tax (GST) made under the Excise Tax Act, notice of which is dated June 7, 2002, and bears number 10122554 is allowed and the assessment is vacated.

REASONS FOR JUDGMENT

¶ 1 **McARTHUR T.C.J.**:-- This is an appeal from an assessment of goods and services tax (GST) by the Minister of National Revenue (the Minister) under the Excise Tax Act (the Act) for \$19,860 tax, \$3,193 penalty and \$2,478 interest for the period May 1, 1998 to April 1, 2000. The Appellant was represented by a unit owner, Mr. Gordon McIntosh, who was also a director of the condominium board.

¶ 2 The Appellant is a corporation constituted according to the Condominium Property Act (CPA) [See Note 1 below] of Alberta. It managed a commercial condominium in the Strathcona Business Park in Edmonton. It collected condominium fees from the 132 unit-owners including \$136,058 for the one-year period ending April 30, 1999 and \$147,666 for the period ending April 30, 2000, for a total of \$283,724. Residential condominiums are specifically exempt from GST under the Act, but commercial condominiums are not.

¶ 3 At the outset of trial, the Respondent requested that an adjournment be granted to permit the Respondent to review the Appellant's documentation with respect to an application for input tax credits (ITCs) pursuant to subsection 169(4) of the Act. The Appellant's agent was not interested in that approach and at his request the hearing proceeded. Further, the Respondent asked for an adjournment to permit the Appellant to notify the Attorney General of each province with respect to a possible constitutional challenge in that it appeared the Appellant is stating that the CPA, Alberta legislation (section 65), takes precedence over the Excise Tax Act. Again, I decided not to grant such adjournment before hearing the Appellant's argument.

¶ 4 The Appellant made taxable supplies of administrative and management services to the owners of the units in the condominium complex for consideration equal to at least the amount of the condominium fees it received of \$136,058 for the reporting period ending April 30, 1999 and \$147,666 for the reporting period ending April 30, 2000. The Appellant was required to collect and report 7% of both amounts being \$9,524 for the period ending April 30, 1999 and \$10,336 for the period ending April 30, 2000 pursuant to subsection 165(1) and insufficient information was provided for ITCs in accordance with subsection 169(4).

¶ 5 The Appellant's primary position is that it is strictly an agent for the owners, its principals, and acted as such at all times and was never engaged in a "commercial activity". It adds that it provides administrative services as directed by the owners in helping with the CPA and its own by-laws. In this vein, the Appellant's principal (the owners) can by resolution, dissolve the Appellant (section 60 of the CPA) and can acquire or dispose of any of the Appellant's interest in real property. Upon terminating the Appellant condominium corporation, the owners can transfer ownership of the real property previously retained by the Appellant.

¶ 6 Mr. McIntosh presented secondary arguments including: (a) pursuant to section 65 of the CPA, the Appellant is not liable for GST; and (b) the Appellant did not provide "taxable supplies" as defined in the Act and does not meet the definition of "commercial activity" (section 123).

Analysis

¶ 7 The Appellant's agency argument is, by far, its strongest position and I will deal with it first. If the Appellant can establish that its relationship with the owners was one at law of principal and agent then the payment of condominium fees does not attract GST because the owners remained the beneficial owners of the condominium fees simply directing their agent (the Appellant) to pay for the maintenance of their units and their common elements.

¶ 8 Mr. James Thomas Clarke was the only witness and he represented himself together with all the other owners. Through him several documents were entered including the Appellant's by-laws, correspondence with Canada Customs and Revenue Agency (CCRA), the Appellant's financial statements for the years in question, and title documents. I allowed these documents over counsel for the Respondent's objections. As an owner and director of the Appellant, he had personal knowledge of all entries. Mr. Clarke testified that the Appellant managed the real property, keeping its own separate bank account, repairing and maintaining the real property and paying the maintenance bills. He admitted the Appellant could borrow funds, employ personnel, hire a management firm and generally take all the actions necessary to manage and maintain the common elements. For practical purposes, what the owners maintained exclusively was the interior of their unit from the paint inward.

¶ 9 Pursuant to subsection 6(2) of the CPA title to the common property is held by the owners. Subsections 6(1) and (2) provide:

- 6(1) The Registrar, in issuing a certificate of title for a unit, shall certify on it the owner's share in the common property.
- 6(2) The common property comprised in a registered condominium plan is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units.

(emphasis added)

Subsections 25(1), (2) and (3) provide:

- 25(1) On the registration of a condominium plan, there is constituted a corporation under the name "Condominium Corporation No. ____" and the number to be specified is the number given to the plan registration.
- 25(2) A corporation consists of all those persons
 - (a) who are owners of units in the parcel to which the condominium plan applies, or
 - (b) who are entitled to the parcel when the condominium arrangement is terminated pursuant to section 60 or 61.
- 25(3) Without limiting the powers of the corporation under this or any other Act, a corporation may
 - (a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and
 - (b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

(emphasis added)

Subsection 28 provides:

- 28(1) A corporation shall have a board of directors that is to be constituted as provided by the bylaws of the corporation.
- 28(2) Every member of a board shall exercise the powers and discharge the duties of the office of member of the board honestly and in good faith.
- 28(3) Where a member of the board has a material interest in any agreement, arrangement or transaction to which the corporation is or is to become a party, that person
 - (a) shall declare to the board that person's interest in the agreement, arrangement or transaction,
 - (b) shall not vote in respect of any matter respecting that agreement, arrangement or transaction, and
 - (c) shall not be counted when determining whether a quorum exists when a vote or other action is taken in respect of the agreement, arrangement or transaction.

- 28(4) Subsection (3) does not apply to an agreement, arrangement or transaction in which the member of the board has a material interest if that material interest exists only by virtue of that member of the board owning a unit.
- 28(5) A corporation shall, within 30 days from the conclusion of the corporation's annual general meeting, file at the land titles office a notice in the prescribed form stating the names and addresses of the members of the board.
- 28(6) Notwithstanding subsection (5), a corporation may at any time following a change in
- (a) the membership of the board,
 - (b) the name of a member of the board, or
 - (c) the address of a member of the board,
- file at the land titles office a notice in the prescribed form stating the change.
- 28(7) The powers and duties of a corporation shall, subject to any restriction imposed or direction given in a resolution passed at a general meeting, be exercised and performed by the board of the corporation.
- 28(8) A person who
- (a) is a bona fide third party dealing at arm's length with the corporation, and
 - (b) does not have notice of a restriction or direction referred to in subsection (7),
- is not liable for or otherwise affected or bound by any breach of or failure to follow that restriction or direction by the corporation.
- 28(9) All acts done in good faith by a board are, notwithstanding that it is afterwards discovered that there was some defect in the election or appointment or continuance in office of any member of the board, as valid as if the member had been properly elected or appointed or had properly continued in office.
- 28(10) At least 2/3 of the membership of the board of directors of the corporation shall be unit owners or mortgagees unless the bylaws provide otherwise.

Subsections 32(1) and (2) provide:

- 32(1) The bylaws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property.
- 32(2) The owners of the units and anyone in possession of a unit are bound by the bylaws.

Subsections 37 and 65 provides:

- 37(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property and the common property.
- 37(2) Without restricting the generality of subsection (1), the duties of a corporation include the following:
- (a) to keep in a state of good and serviceable repair and properly maintain the

- real and personal property of the corporation and the common property;
- (b) to comply with notices or orders by any municipal authority or public authority requiring repairs to or work to be done in respect of the parcel.

37(3) A corporation may by a special resolution acquire or dispose of an interest in real property.

65 The corporation is not liable in relation to a unit and the share in the common property assigned to the unit for any rate, charge or tax levied by the Crown, a local authority as defined in the Municipal Government Act or any other authority that has the power to assess and levy rates, charges or taxes on land or in respect of the ownership of land.

¶ 10 The Appellant had the onus of establishing, on a balance of probabilities, that it was an agent for the individual owners. CCRA, in the GST/HST Policy Statement, [See Note 2 below] sets out a range of tests to assist in determining whether an agency relationship exists. I find these helpful and in keeping with established case law. The essential qualities of an agency relationship include the following: (i) consent of both the principal and the agent; (ii) authority of the agent to affect the principal's legal position; and (iii) the principal's control of the agent's actions. I will apply some of these tests to the present situation starting with the first three "essential qualities".

Note 2: P-182R issued on June 23, 1995 and revised July 2003, effective January 1, 1991.

¶ 11 Consent of both the principal and the agent. The condominium corporation consists of all the unit owners (subsection 25(2) of CPA). They appoint or elect a Board of Directors that is answerable to all the owners. The directors operate the condominium corporation as the owners' representatives or agents. They report directly to the owners. They are not in business for themselves. I find nothing in the documentation that provides for compensation for their efforts other than being reimbursed for their out-of-pocket expenses. Paragraph 28(1)(7) of the CPA provides that the directors are subject to restrictions or directions imposed by the owners at an annual general meeting. I infer that the owners and the Appellant (which operates through the directors) consented to a principal and agent relationship. The first essential quality is answered in favour of the Appellant's position.

¶ 12 Authority of the agent to affect the principal's legal position. The by-laws of the Appellant provide for the control, management of all the property and the owners are bound by these by-laws (subsections 32(1) and (2) of the CPA). The Appellant has consent and authority to legally bind the owners. Section 25 of the CPA states that the owners are jointly liable. This indicates that the owners are responsible for the acts of the Appellant and that the owners are exposed to potential risks. In addition, the Appellant can enter into contracts with third parties on behalf of the owners. Counsel for the Respondent points out that the corporation can sue or be sued (subsection 25(3)) but the condominium corporation is made up of the owners. The corporation cannot be separated from the owners. It is not an independent legal entity. Paragraph 25(3)(b) states that the corporation can be sued with respect to the parcel of land and the owners are jointly liable. This second essential quality of an agency relationship exists.

¶ 13 The principal's control of the agent's actions. The powers of the Appellant are vested in the board and subject to restrictions and directions imposed at general meetings of the owners. Further,

several sections of the Bylaws and the CPA place requirements on the Appellant. For example, By-law 3.02(b) requires the owners' consent to borrow monies; subsection 37(3) requires a special resolution of the owners in order for the Appellant to acquire an interest or dispose of an interest in real property; section 63 of the CPA provides that the owners, by special resolution, can transfer the ownership of the Appellant's bare land units; and section 78 of the CPA states that contractors retained by the Appellant can register a lien against units in the complex.

¶ 14 The condominium corporation is not an independent entity. It exists because of the owners and on behalf of the owners. It does not carry on business on its own. It is a creature of the owner who, for convenience and efficiency, elect a board of directors at the pleasure and under the control of the owners. The owners, by majority vote, have complete control over the corporation. The corporation assumes no risks, it can effect the liability of the owners in respect of strangers to the relationship by the making of contracts or the disposition of property. The following is the classic definition of agency found in *The Law of Agency*: [See Note 3 below]

Note 3: G.H.L. Fridman, (7th ed.) (Toronto: Butterworths, 1996).

Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

The relationship between the Appellant and the unit owners easily fits within this definition. The corporation (agent) exists for the owners (principal) and the owners' legal position in the respect of strangers is affected by the Appellant entering into contracts.

¶ 15 The Federal Court of Appeal in *Glengarry Bingo Assn. v. R.* [See Note 4 below] held that risk is a significant factor in determining whether an agency relationship exists. The Court further sets out three essential qualities of agency:

Note 4: [1999] F.C.J. No. 316 at paragraph 32.

P-182 identified three essential qualities of agency. These are the consent of both the Principal and Agent, the authority of the Agent to Affect the Principal's Legal Position and the Principal's Control of the Agent's Action. Since I find that GBA did not have the capacity to affect the legal position of its Members, I find it unnecessary to address the other factors which Revenue Canada has indicated are required for a finding of agency.

In contrast to this, I have no difficulty concluding that the present Appellant corporation had the capacity to affect the legal position of the unit owners. Another indication of an agency relationship is that a portion of the condominium fees is held by the Appellant in a reserve or trust fund for the owners. Clearly, the corporation was the unit owners' agent. The corporation is not a separate entity from the owners. Pursuant to the CPA, the owners are obligated to operate through a corporation which exists solely because of them and for them. The Appellant being an agent of the owners, no GST is payable

unless the Act provides differently.

¶ 16 A brief review of the relevant sections follows. Subsection 221(1) of the Act provides that every person who makes a taxable supply shall collect GST. The definition of "taxable supply" in subsection 123(1) includes "... a supply that is made in the course of a commercial activity".

¶ 17 Subsection 123(1) of the Act defines "commercial activity" to include "a business carried on ... other than a business carried on without a reasonable expectation of profit ...". The corporation carried on a non-profit business and does not meet the definition of commercial activity because it had no expectation of profit. Counsel for the Respondent argues that the Minister gets over this hurdle by the definition of "business" in subsection 123(1), which is very broad and states:

"business" includes ... undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

¶ 18 The brief reference by both parties to ITCs is not sufficient to make a finding. Finally, it is not necessary to consider the Appellant's section 65 submission but I have no difficulty in agreeing with the Respondent's position and it was unnecessary to notify the Attorneys General of the provinces.

¶ 19 The appeal is allowed.

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