

BETWEEN:

K.M. CONSTRUCTION ET RÉNOVATION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on May 29, 2015, at Montréal, Quebec.

Before: The Honourable Associate Chief Justice Lucie Lamarre

Appearances:

Agent for the appellant: Moheub Ismail

Counsel for the respondent: Bernard Duchesneau

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**JUDGMENT**

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated November 20, 2012, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of September 2015.

“Lucie Lamarre”

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Lamarre A.C.J.

Citation: 2015 TCC 206  
Date: 20150908  
Docket: 2013-3556(GST)I

BETWEEN:

K.M. CONSTRUCTION ET RÉNOVATION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

### **REASONS FOR JUDGMENT**

Lamarre A.C.J.

[1] The appellant is appealing from an assessment made by the Minister of Revenue of Quebec (**Minister**) under the *Excise Tax Act (ETA)* dated November 20, 2012, in which it is being asked to pay \$14,082.56 for the Goods and Services Tax (**GST**) plus interest. The assessment results from the sale of an immovable located at 2560 to 2580 Georges Avenue, in Montréal, to the appellant's majority shareholder, Moheub Ismail, and his spouse for the total amount of \$510,000, taxes included.

[2] There is no dispute that, since the appellant sold the property to persons with whom it does not deal at arm's length, the disposition was to be at the Fair Market Value (**FMV**) for GST purposes, under section 155 of the ETA.

[3] In making the assessment, the Minister considered that the property's Fair Market Value at the time of the sale, October 6, 2010, was at least equivalent to the municipal assessment by the City in the amount of \$575,000 (taxes included) as of July 1, 2009.

[4] This value therefore exceeds by \$65,000 the proceeds of disposition established by the appellant.

[5] Mr. Ismail provided the only testimony on behalf of the appellant. He challenges the Minister's assumption that the FMV is equivalent to the municipal assessment.

[6] He explained that he established the proceeds of disposition to be \$510,000, that is, the assessment arrived at by the bank upon obtaining financing for the construction of the immovable, on July 10, 2009.

[7] The bank had at the time granted financing by assessing the hypothecary security at \$510,000 (Exhibit A-1). The [TRANSLATION] "immovable hypothec financing agreement" provides, in its terms and conditions, that the bank makes a loan that must be secured by an immovable hypothec on the immovable, on forecast rent from the immovable and on insurance benefits covering said rent (Exhibit A-1, page 2, 1st condition). Upon reading the document, there is no indication that the value assigned to the immovable as such is \$510,000.

[8] The immovable was built in one year and sold by the appellant to Mr. Ismail and his spouse on October 6, 2010, for \$510,000 (Exhibit A-2, and Exhibit I-1, Tab 1).

[9] Daniel Mann, appraiser for the City of Montréal, testified on behalf of the respondent. He explained that the City had received an application for a permit to build the immovable, which was granted on August 28, 2009.

[10] A City inspector showed up on April 7, 2011, to conduct an inspection upon completion of the immovable's construction and complete a technical report.

[11] Mr. Mann then went on to conduct a municipal assessment of said property, based on the inspection report. He stated that he then conducted a comparable sales analysis of 11 properties built between 2003 and 2009. Those sales ranged between \$180 per square foot and \$242 per square foot. He assessed the immovable at issue at \$213 per square foot (as opposed to the appellant's assessment of \$188 per square foot). He stated that he took the lower value of \$213 taking into account the sale of immovables located in comparable locations.

[12] The property in question here has an area of 250 m<sup>2</sup> and is located across from refineries containing storage tanks for oil and gas.

[13] In particular, Mr. Mann considered the sale of two properties located a short distance from Notre-Dame Street East in Montréal, in an industrial port and rail area with frequent heavy vehicle traffic.

[14] The two immovables were sold in November 2008, had an area of 182 m<sup>2</sup> and sold for \$228 per square foot.

[15] The assessment certificate of the property at issue on the assessment role for 2011 to 2013 was filed on September 15, 2011, was effective from May 1, 2011, and indicated a total value of \$575,000 established as of July 1, 2009 (Exhibit I-2).

[16] According to said assessment certificate, this was the actual value, which was defined as the price most likely to be paid in the free and open market, under section 43 of *An Act Respecting Municipal Taxation*, CQLR, c F-2.1 (Exhibit I-2, 4th last page).

[17] For his part, Mr. Ismail did not dispute the municipal assessment and paid the property tax accordingly.

[18] Also, Mr. Ismail filed in evidence the municipal assessment of another property he owns in an attempt to show that the municipal assessment in 2015 overvalued the property by comparison with the assessment he himself had done for this other property (Exhibit A-8).

### Statutory provisions relied upon by the respondent

#### ETA

##### Non-arm's length supplies

**155.** (1) For the purposes of this Part, where a supply of property or a service is made between persons not dealing with each other at arm's length for no consideration or for consideration less than the fair market value of the property or service at the time the supply is made, and the recipient of the supply is not a registrant who is acquiring the property or service for consumption, use or supply exclusively in the course of commercial activities of the recipient,

(a) if no consideration is paid for the supply, the supply shall be deemed to be made for consideration, paid at that time, of a value equal to the fair market value of the property or service at that time; and

(b) if consideration is paid for the supply, the value of the consideration shall be deemed to be equal to the fair market value of the property or service at that time.

Assessment deemed valid

**299.** (4) An assessment shall, subject to being reassessed or vacated as a result of an objection or appeal under this Part, be deemed to be valid and binding, notwithstanding any error, defect or omission therein or in any proceeding under this Part relating thereto.

*An Act Respecting Municipal Taxation*

**42.** The roll must indicate the value of each unit of assessment, on the basis of its actual value.

The values entered on the roll of a local municipality must, on the whole, tend to represent the same proportion of the actual value of the units of assessment.

No motion or action to quash or set aside the roll or any entries on the roll may be brought on the ground of a contravention of the second paragraph.

**43.** The actual value of a unit of assessment is its exchange value in the free and open market, that is, the price most likely to be paid at a sale by agreement made in the following conditions:

(1) the vendor and the purchaser are willing, respectively, to sell and to purchase the unit of assessment, and they are not compelled to do so; and

(2) the vendor and the purchaser are reasonably informed of the condition of the unit of assessment, of the use that can most likely be made of it and of conditions in the property market.

Arguments of the parties

[19] The respondent is of the view that the assessment relied on by the bank to grant financing for the construction of the immovable cannot be used to establish the property's FMV once the immovable was built. This argument is based on the fact that it was not in the bank's interest to overvalue the property so as to limit funding.

[20] The respondent criticized the appellant for not having provided an assessment once the construction was complete. She also noted that the appellant did not dispute the municipal assessment. The respondent stated that, according to

Mr. Mann's testimony, the City balanced the value of the property in 2012, thus increasing the property's value by 9% between July 2009 and July 2012.

[21] According to counsel for the respondent, the value established by Mr. Mann as of July 1, 2009, and considered to be the FMV at the time of disposition on October 6, 2010, is advantageous for the appellant, as, according to the balancing factor, said value would have normally increased between July 1, 2009, and October 6, 2010. According to him, the value used is entirely reasonable, as it was at the lower end of comparable sales.

[22] Thus, the respondent submits that the appellant's evidence did not rebut the presumption that the assessment was valid under subsection 299(4) of the ETA. Counsel for the respondent relied on a Court of Québec case, *Pennino c. Québec (Sous-ministre du Revenu)*, 2008 QCCQ 7987, to argue that the best evidence to rebut the presumption of validity of a value entered on the roll is generally from assessment experts (the respondent also referred to *Communauté urbaine de Montréal c. 150528 Canada Inc.*, 1998 CanLII 12503 (QCCA) and *St-Georges c. Québec (Sous-ministre du Revenu)*, 2007 QCCA 1442).

[23] The appellant is of the view that the City's assessment is not objective as the City has an interest in it being higher for the purpose of collecting property taxes.

### Analysis

[24] The only issue is the Fair Market Value of the property as of October 6, 2010. The definition of FMV, as adopted by the courts, can be found in *Henderson Estate v. Canada*, [1973] F.C.J. No. 800 (QL), at paragraph 20, 73 DTC 5471, at page 5476). Judge Cattanach states as follows:

The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell.

...

[25] Although this definition was proposed in the application of the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, it has been reiterated on a number of occasions by the judges of this Court, even when the FMV of an immovable property was at issue (see, *inter alia*, *Qureshi v. The Queen*, 2006 TCC 485 (Chief Justice Bowman) at paragraph 15).

[26] This definition is also very similar to the definition of actual value in *An Act Respecting Municipal Taxation*.

[27] The case law is clear that both the amount of the loan obtained with a hypothec guarantee and the municipal assessment can serve as indicators in establishing the FMV (see *Dufour v. The Queen*, 2003 TCC 685; *Beaudry v. The Queen*, 2003 TCC 464).

[28] In some cases, it was observed that the amount loaned by the financial institutions was lower than the value of a commercial immovable (*Descormiers v. The Queen*, 1999 CanLII 246 (TCC)).

[29] In other cases, it was determined that the municipal value is generally different from the price at which property will be sold on the free market (*Somers v. The Queen*, 2008 TCC 239; *Chartrand v. The Queen*, 2010 TCC 92).

[30] In other situations, it was held that municipal assessments can be of doubtful probative value if the appraiser who made them is not called (*Stafford, Stafford & Jakeman v. Canada*, [1995] A.C.I. n° 89 (QL)).

[31] The fact of not contesting the municipal assessment was also considered as leading one to believe that the municipal assessment was not exaggerated (*Beaudry, supra*, paragraph 49).

[32] Furthermore, it has already been indicated that the fact that municipal assessments are not made annually and that they are not as a rule prepared by qualified appraisers make it so that these assessments are generally not acceptable as appropriate for the purpose of determining what the property would be worth on the open market (*Arseneau v. The Queen*, 2004 TCC 739).

[33] Thus, this Court has already held that the taxpayer could not rely solely on a municipal assessment to establish, on a *prima facie* basis, that the valuation assumed by the Minister in making the assessment was different from the FMV (*Truong v. The Queen*, 2011 TCC 380). In that case, the municipal assessment

established the property's value a year and a half prior to the date of the property's transfer. However, in *St-Denis v. The Queen*, 2013 TCC 179 (affirmed by the Federal Court Appeal, 2014 FCA 217), the Court accepted the FMV established by the Minister through the municipal assessment, as the taxpayer presented no evidence to the contrary. Chief Justice Rip (as he then was), wrote as follows at paragraphs 44 and 45:

44 It is well established that the municipal assessment, while relevant in determining the fair market value of a property, is not by itself representative of the fair market value of that property. This was the conclusion reached by Campbell J. in *Truong v. Canada*, 2011 DTC 1275, at para. 27 and Webb J. in *Somers v. Canada*, (QL), at para. 38. However, the assessment of property taxes may be accepted as one of a number of indicators of the fair market value of a property (*Truong, supra*, at para. 27).

45 The appellant did not present any evidence enabling him to discharge his burden of showing that the respondent's assessment of the fair market value of the Property is erroneous (see, for example, *Truong, supra*, at para. 27 and *Côté-Sicé v. Canada*, [1999] T.C.J. No. 1363 (QL), at para. 8). As a result, I must accept the Minister's position that the fair market value of the Property at the time of the transfer was \$161,400.

[34] The onus is therefore on the appellant to demolish the Minister's assumption as to the FMV of the property, and to this end, it must adduce evidence in that respect.

[35] In the case at bar, Mr. Ismail submitted as evidence the document from the financial institution that granted him a loan and setting the amount of the hypothecary guarantee at \$510,000.

[36] No expert, however, came to explain the basis for the financial institution's assessment.

[37] For her part, the respondent called the City appraiser, who explained how he arrived at the value. He considered several comparable sales and chose two that were similar to our property.

[38] In this particular case, the municipal assessment was conducted in 2011 and reflected the value on the role in 2009. That value was subsequently, in 2012, balanced on the basis of a 9% assumed increase between 2009 and 2012. The property was sold in 2010.

[39] One of the elements raised by the case law to discard the municipal assessment is that it is not concomitant with the moment at which an attempt was made to establish the FMV.

[40] In my opinion, and after careful reflection, I believe the appellant has not provided sufficient evidence to demolish the Minister's assumption that the FMV was established at the time of the municipal assessment, namely, July 1, 2009.

[41] No expert came to support the contention that the financial institution's assessment for the purpose of financing the construction of the immovable is equivalent to the property's FMV, once the immovable was built, at the time of disposition of said property.

[42] Mr. Ismail filed in evidence an assessment he had done by qualified appraisers on another property, showing that the FMV of that property was lower than the municipal assessment in 2015 (Exhibit A-8). Unfortunately for the appellant, I am of the view that this does not help his cause with respect to the property at issue. That assessment does not concern either the property or the year at issue. I am unable to establish, without the assistance of a witness who has some expertise in the field, that an assessment by qualified appraisers would have yielded a FMV lower than the municipal assessment of the property in question in 2009.

[43] In addition, after having reviewed the evidence, I consider that the respondent has demonstrated, through the City appraiser's testimony, that the value assigned was similar to the property's FMV at the time of the sale. Indeed, it is my view that said assessment was done at about that very same time, considering the sales that were quite similar to property in question. The fact that Mr. Ismail has attempted, unsuccessfully, to sell his property since 2013 cannot affect the value of the property in 2009. There are too many factors that can come into play over a period of four years.

[44] Furthermore, the value established in 2009 was balanced in 2012, establishing an increase value of 9% between 2009 and 2012. The value of \$575,000 used by the City in July 2009 and assigned by the respondent to the property at the date of the transfer in 2010 would therefore be advantageous for the appellant.

[45] In the circumstances, I think the appellant also failed to adduce sufficient evidence to demolish the Minister's assumption that the property's FMV was \$575,000 at the time of the disposition.

[46] The appeal is therefore dismissed.

Signed at Ottawa, Canada, this 8th day of September 2015.

“Lucie Lamarre”

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Lamarre A.C.J.

Translation certified true  
on this 21st day of October 2015  
Daniela Guglietta, Translator

CITATION: 2015 TCC 206  
COURT FILE NO.: 2013-3556(GST)I  
STYLE OF CAUSE: K.M. CONSTRUCTION AND  
RÉNOVATION INC. v. HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 29, 2015

REASONS FOR JUDGMENT BY: The Honourable Associate Chief Justice  
Lucie Lamarre

DATE OF JUDGMENT: September 8, 2015

APPEARANCES:

Agent for the appellant: Moheub Ismail

Counsel for the respondent: Bernard Duchesneau

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent:

William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Canada