Docket: 2012-3027(GST)G

BETWEEN:

HIGH-CREST ENTERPRISES LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 26, 2014, at Halifax, Nova Scotia.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the Appellant: Maurice P. Chiasson, Q.C.

Counsel for the Respondent: Jan Jensen

JUDGMENT

For the attached reasons for judgment, the appeal from the assessment made under the *Excise Tax Act* for the period from January 1 to March 31, 2010, notice of which is dated July 16, 2010, is dismissed with costs to the Respondent.

Signed at Ottawa, Ontario, this 20th day of October 2017.

"Gaston Jorré"

Jorré J.

Citation: 2017 TCC 210
Date: 20171020
Docket: 2012-3027(GST)G

BETWEEN:

HIGH-CREST ENTERPRISES LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] The Appellant, High-Crest Enterprises, owns and operates a nursing home in Springhill, Nova Scotia. The facility provides long-term care for its residents, including nursing care, food services, housekeeping and occupational therapy.

[2] Prior to the construction of the addition in issue in this appeal, the Appellant operated a 56-bed facility. Of those beds, 45 were operated for the Nova Scotia Department of Health and 10 for the Department of Veterans Affairs. There was also one respite bed.

[3] In 2007, the Nova Scotia Department of Health sought proposals regarding the provision of long-term nursing care. In response to this request, the Appellant made a proposal for providing 20 additional beds and this proposal was accepted by the Department of Health in early 2008.

[4] As a result, the Appellant constructed a 20-bed addition to its Springhill facility. Occupancy of the addition began in the first quarter of 2010.

[5] Pursuant to the *Excise Tax Act*, the Appellant is considered to have made a self-supply of the addition to the Springhill facility. As a result it is required to include in its Harmonized Sales Tax return (output) tax on the self-supply.

[6] The Appellant says that the Harmonized Sales Tax on the self-supply should be equal to the applicable rate of tax multiplied by the fair market value of the property.[1] The Appellant filed its return for the period from January 1, 2010 to March 31, 2010 on that basis. The Appellant obtained a valuation of the property. The quantum of the valuation is not in issue.

[7] At that time, the rate of the Harmonized Sales Tax was 13% of which 5% was for the federal government and 8% was for the government of Nova Scotia.

[8] In that period and in prior reporting periods, the Appellant claimed input tax credits with respect to the construction of the addition to the Springhill facility. Cumulatively, the input tax credits claimed are greater than the amount of the output tax reported by the Appellant on the self-supply.

[9] If the Appellant is correct, the practical result is that with respect to the construction of the 20-bed addition, cumulatively, in the period in issue and preceding periods, the Appellant receives a net tax refund to the extent that the input tax credits exceed the output tax on the self-supply of the addition.

[10] The Respondent says the Appellant cannot receive an overall net tax refund of the Harmonized Sales Tax with respect to the addition because, in the circumstances, section 191.1 of the *Excise Tax Act* applies. In certain circumstances, the section requires the output tax on the self-supply to be no less than the total amount of input tax paid in relation to the addition. Put differently, when it applies the section prevents an overall net tax refund on the self-supply by increasing the value of the addition for the purpose of computing the tax on the self-supply.

[11] There is no quantum issue. The parties agree on the numerical outcome if section 191.1 applies and if it does not apply. The difference between the two positions amounts to slightly less than $300,000.[2]

---

[1] Pursuant to subsection 191(4) of the *Act*.

[2] See paragraphs 2 and 3 of the notice of appeal and paragraphs 1 and 2 of the reply to the notice of appeal. The amount of tax on the self-supply was $350,000. The cumulative input tax credits on the construction total $646,304.

[12] Thus the issue in this appeal is whether subsection 191.1(1) of the *Excise Tax Act* applies and thereby increases the output tax on the self-supply.

[13] This issue turns on the contractual arrangements between the Appellant and the Department of Health and whether, as a result of those arrangements, the Appellant received, or could expect to receive, "government funding" as defined by subsection 191.1(1) of the *Excise Tax Act*.[3]

The Statutory Scheme

[14] Section 191.1 of the *Excise Tax Act* read as follows at the relevant time:

> Definitions
>
> 191.1(1) The definitions in this subsection apply in this section.
>
> *government funding*, in respect of a residential complex, means an amount of money (including a forgivable loan but not including any other loan or a refund or rebate of, or credit in respect of, taxes, duties or fees imposed under any statute) paid or payable by
>
> (*a*) a grantor, or
>
> (*b*) an organization that received the amount from a grantor or another organization that received the amount from a grantor,
>
> to a builder of the complex or of an addition thereto for the purpose of making residential units in the complex available to individuals referred to in paragraph (2)(*b*). (*subvention*)
>
> *grantor* means
>
> (*a*) a government or municipality, other than a corporation all or substantially all of whose activities are commercial activities or the supply of financial services or any combination thereof;
>
> (*b*) a band (within the meaning assigned by section 2 of the *Indian Act*);
>
> (*c*) a corporation that is controlled by a government, a municipality or a band referred to in paragraph (*b*) and one of the main purposes of which is to fund charitable or non-profit endeavours; and
>
> (*d*) a trust, board, commission or other body that is established by a government, municipality, band referred to in paragraph (*b*) or corporation described in paragraph (*c*) and one of the main purposes of which is to fund charitable or non-profit endeavours. (*subventionneur*)
>
> Subsidized residential complexes

[3] The contractual arrangements are contained in a great many pages of documents that must be read as a whole to get a clear view of the arrangements.

(2) For the purposes of subsections 191(1) to (4), where

(*a*) a builder of a residential complex or an addition thereto is deemed under any of subsections 191(1) to (4) to have, at any time, made and received a supply of the complex or addition,

(*b*) possession or use of at least 10% of the residential units in the complex is intended to be given for the purpose of their occupancy as a place of residence or lodging by

(i) seniors,

(ii) youths,

(iii) students,

(iv) individuals with a disability,

(v) individuals in distress or individuals in need of assistance,

(vi) individuals whose eligibility for occupancy of the units as a place of residence or lodging, or for reduced payments in respect of their occupancy as a place of residence or lodging, is dependent on a means or income test,

(vii) individuals for whose benefit no other persons (other than public sector bodies) pay consideration for supplies that include giving possession or use of the units for occupancy by the individuals as a place of residence or lodging and who either pay no consideration for the supplies or pay consideration that is significantly less than the consideration that could reasonably be expected to be paid for comparable supplies made by a person in the business of making such supplies for the purpose of earning a profit, or

(viii) any combination of individuals described in any of subparagraphs (i) to (vii), and

(*c*) except where the builder is a government or a municipality, the builder, at or before that time, has received or can reasonably expect to receive government funding in respect of the complex,

the amount of tax in respect of the supply calculated on the fair market value of the complex or addition, as the case may be, is deemed to be equal to the greater of

(*d*) the amount that would, but for this subsection, be the tax calculated on that fair market value, and

(*e*) the total of all amounts each of which is tax that was payable by the builder in respect of

(i) real property that forms part of the complex or addition, as the case may be, or

(ii) an improvement to that real property.

[15] There are a number of conditions in section 191.1 but most of them are either not in dispute or are very clearly met on the evidence. Section 191.1 applies where the three conditions in paragraphs 191.1(2)(*a*), (*b*) and (*c*) are met.

[16] There is no dispute that there was a self-supply of a residential complex as required by paragraph 191.1(2)(*a*). There is also no question that the intended use of at least 10% of the residential units in the complex fell within the requirements of paragraph 191.1(2)(*b*).

[17] Paragraph 191.1(2)(*c*) requires that the builder, the Appellant, receive or reasonably expect to receive government funding in respect of the complex at the time of the self-supply. Government funding is defined in subsection 191.1(1).

[18] There is no question that High-Crest is the builder of the addition to a residential complex and that High-Crest received payments from the government of Nova Scotia. The government is a "grantor" under paragraph (*a*) of the definition of "grantor" contained in subsection 191.1(1).

[19] The legal question in this matter thus turns on limited portions of section 191.1. For convenience, I reproduced those portions below after removing text that is inapplicable in these circumstances:

> Definitions
>
> 191.1(1) The definitions in this subsection apply in this section.
>
> *government funding*, in respect of a residential complex, means an amount of money . . . paid or payable by
>
> (*a*) a grantor, or
>
> . . .
>
> to a builder of the complex or of an addition thereto for the purpose of making residential units in the complex available to individuals referred to in paragraph (2)(*b*). . . .
>
> . . .
>
> Subsidized residential complexes
>
> (2) For the purposes of subsections 191(1) to (4), where
>
> . . .
>
> (*c*) . . . the builder, at or before that time, has received or can reasonably expect to receive government funding in respect of the complex,
>
> . . .

[20] Thus, the crucial question is:

- Whether the builder (High-Crest),
- at or before that time (the time of the self-supply referred to in paragraph 191.1(2)(*a*)),
- has received or can reasonably expect to receive government funding, "an amount of money . . . paid or payable by a grantor [Nova Scotia] . . . to a builder [High-Crest] of the complex or of an addition thereto for the purpose of making residential units in the complex available to individuals", in respect of the complex.

[21] We can simplify and reorder this to make the question clearer:

- At or before the time of the self-supply of the 20-bed addition,
- had High-Crest received, or could it reasonably expect to receive,
- an amount of money paid or payable by the government of Nova Scotia for the purpose of making residential units in the 20-bed addition available to individuals?

[22] The critical question to be decided can be stated as:[4]

> Whether, at the time of the self-supply, High-Crest could expect to receive an amount of money from the government of Nova Scotia "<u>for the purpose</u> of making residential units in the [20-bed addition] available to individuals" (emphasis added).

The Facts[5]

[23] The only witness was Mr. Shannon Stephenson. Mr. Stephenson is a lawyer and the Chief Executive Officer of High-Crest. There are no credibility issues. A substantial amount of documentation was filed as exhibits.

[24] In March 2007 the Department of Health issued the first part of a request for proposals to build new nursing home facilities.[6]

---

[4] To simplify the question, I have taken out "or before" in the first bullet and "received" in the second bullet in the paragraph above because, on the facts here, no amount was received before the self-supply and because, in this case, to the extent there is an expectation of receiving an amount of money it existed at the time of the self-supply and before.

[5] From a process point of view, this matter has been sent back to me by the Federal Court of Appeal as a result of its decision of April 28, 2017 (2017 FCA 88).

[25] The request sets out right in the first paragraph of the introduction that the proposal seeks level II nursing home beds such as those provided by the addition constructed by the Appellant.[7] Clauses 1.2.1 and 1.2.2 of the request for proposals set out the background and objectives. It explains that the province seeks to have new long-term care homes built with 804 new beds in various parts of the province. It also seeks to achieve certain goals not only in terms of the facilities but also in terms of cost and quality of the services and programs that the new homes will offer. These requirements for facilities and for program services are elaborated on at length in Appendices B and C of the request for proposals.[8]

[26] Clause 2.2.3.2 of the request sets out that:

> The facilities and services required under this contract include the design and development of the required buildings and infrastructure, the project management for the development/implementation phase, the operations and maintenance of the facilities, the development and delivery of resident care programs and resident services.

[27] It is clear from this that bidders are to design, develop and then operate the facility. The document together with its appendices also sets out numerous requirements imposed on the project.

[28] Clause 2.3.4 of the request sets out that a successful proposal will lead to:

> - A Development Agreement covering the period of design and construction of the required facilities, and
> - An annually renewable Service Agreement with a 25-year term covering the ongoing operations of the facility.
>
> The Service Agreement will be renewed subject to renewal of the facility's license and the provision of services that meet or exceed the requirements in this RFP and proposed by the successful service provider(s).
>
> The contracts will provide for payment for services which will commence at the date of occupancy. Any requirement for bridge financing during the development phase will be the responsibility of the Successful Proponent(s).

---

[6] See Exhibit A-1, Tab 2, and the documents incorporated by reference. It was subsequently supplemented and there were some modifications; see Tab 4.

[7] The request sought proposals for nursing home beds in some locations and residential care facility beds in other locations.

[8] See Exhibit A-1, Tab 2 (at pages 2, 3 and 8), Tab 1A and Tab 1B, respectively. These appendices are referenced right at the start of section 1.2.1 of the request for proposals.

[29] This sets out clearly that the successful bidder must obtain financing to cover the development of the facility because payments for services will only start at the time occupancy begins. It is also clear that the successful bidder will have to enter into separate development and service agreements, the terms of which will not be negotiable.[9]

[30] The Appellant made a proposal and, by letter dated January 7, 2008, the Department of Health advised the Appellant that it was successful and that the per diem rate per bed would be $264.47. By letter dated January 15, 2008, the Appellant confirmed that it would accept the per diem rate of $264.47 per bed;[10] this is equivalent to about $96,500 per year per bed.

[31] Subsequently, the Appellant signed the development agreement for the construction of the 20-bed addition.[11] The Appellant was unable to find a signed copy but Mr. Stephenson testified that the copy filed was substantially the same as the signed agreement. It would appear that it was signed in February 2009 given that the copy filed is a draft dated February 4, 2009.

[32] The agreement together with its schedules and appendices imposes numerous requirements on the Appellant. It also requires the Appellant to enter into the service agreement with the government of Nova Scotia and requires the service provider to acknowledge and agree that the service agreement and every subsequent service agreement shall contain an express continuing obligation on the Appellant to operate the 20-bed addition and provide services to the residents.[12]

[33] Article 4.2 provides that the Minister of Health will confirm the approved budget subject to an executed service agreement and the issuance of a licence to the Appellant. Once this happens, the Appellant will start receiving annual funding from the government of Nova Scotia.

[34] Somewhat earlier, by letter dated January 28, 2009, the Department of Health approved a capital budget for the development and construction of the addition in an amount of $5,533,250 including interest.[13] The letter also says:

> Please note:

---

[9] This is clear from clause 2.3.5.
[10] Exhibit A-3, Tabs 20 and 21.
[11] Exhibit A-2, Tab 5.
[12] Exhibit A-2, Tab 5, article 4.1 at page 12.
[13] Exhibit A-3, Tab 26.

- The Department will provide annual funding sufficient to amortize the mortgage for the capital cost over 25 years.[14]

[35] Subsequently in February 2009, the Appellant signed the service agreement. The agreement together with its schedules and appendices imposes a wide variety of requirements. Broadly speaking, the Appellant agreed to provide the residents of the new facility with a range of services including accommodation, meals, nursing services, housekeeping, physical and occupational therapy and recreational services.[15]

[36] The province does not make any payments to the Appellant pursuant to the development agreement. The only payments are made pursuant to the service agreement.

[37] The provincial funding to the Appellant is the sum of three constituent parts.

[38] First, there is the protected envelope which covers health care costs (nursing, dietitians, physiotherapy, social work, recreation, etc.) and raw food costs. Any unused funds in this budget are returned to the province.

[39] Second, there is the unprotected envelope that covers capital costs (notably, in this case, the addition) and accommodation costs such as administration, management, cooking, housekeeping and maintenance). To the extent that the Appellant provides all the required accommodation services for less than the budget, the Appellant may be able to earn a profit.[16]

[40] These two envelopes make up the budget for the 20 beds added by the addition and the total of the two envelopes divided by 20 beds and by 365 days equals the per diem per bed.[17] For the addition, this amounts to a total budget of about $2,074,000 per year.

---

[14] Apart from an amount added for HST, this approved amount is almost identical to the budget set out almost one and a half years earlier in a summary dated August 30, 2007; see Exhibit A-3, Tab 16.

[15] Exhibit A-1, Appendix C, at Tab 1B, gives a good idea of the program requirements.

[16] Potentially, since the funding will pay off the authorized cost of the addition and of the mortgage interest, the Appellant might gain the benefit of the residual value of the addition, if any, at the end of the 25 years.

[17] There is also an adjustment for an estimated occupancy rate. The adjustment is very minor since an occupancy rate of about 99% is used; see the first page of Exhibit R-1.

[41] Third, the Appellant receives a small annual capital renewal reserve payment of about $65,000 or $68,000 per year.[18] Unspent funds from the capital renewal reserve remain with the Appellant.[19]

[42] The Appellant may not charge more for the services than the per diem and, while there is the possibility of profit if the Appellant underspends the unprotected envelope, there is also the risk of loss if it goes over budget.

[43] The amount of $264.47 per diem that the province proposed and the Appellant accepted in January 2008 consisted of $113.03 in the unprotected envelope and $151.31 in the protected envelope. Of the unprotected amount of $113.03, an amount of $54.64 was for capital costs.[20]

[44] This amount of $54.64 per day per bed covered the amortization, including interest, over 25 years of the approved capital costs of $5,533,250, consisting of:[21]

Capital cost	$4,671,514
Land	$65,385
HST	$641,250
Interest during construction	$155,101
Total	$5,553,250

[45] The $54.64 per day per bed produces an annual amount of $395,938.

[46] Thus, if all goes according to plan and the agreement is renewed for 25 years, the Appellant will recover the full cost of the new facility including all the HST paid on the construction of the addition.

---

[18] Transcript, page 57.
[19] Exhibit A-2, Tab 6, Schedule F, page 329, at clause 6.2.9.
[20] Exhibit A-3, Tab 20, third page.
[21] The approved budget is at Tab 26 of Exhibit A-3. In Schedule 4 of Exhibit R-1 (page 3 of 7), the budget effective January 29, 2010 at the start of the operation of the new addition, we see that the annual funding of $395,938 to cover amortization is still for the same principal amount. The $395,938 per annum clearly covers the interest since, over 25 years, it produces total payment well in excess of the principal amount. Also, I note that $395,938 divided by 365 days divided by 20 beds produces about $54 per day per bed.

I note that the unprotected envelope per diem, at Tab 3 of Exhibit A-1 at the middle of the second to last line, has almost the same numbers. Given that it shows a daily per diem amount of $113.03 for the unprotected envelope, as shown at article 4.2(1) on page 10 of the service agreement signed in February 2009 (Tab 6 of Exhibit A-2), it appears that Tab 3 must have been prepared at about the same time.

Finally, I note that in Tab 3, page 1, we see that the $6.09 amount of the $54.24 capital funding per diem per bed is for amortization of the HST portion of the capital cost shown as $620,775, a number close to the $641,250 of input tax credits shown in the approved budget.

[47] Under the service agreement, the Minister of Health pays for the protected envelope. The unprotected envelope is paid for by the residents and by the Minister of Health in varying degrees.

[48] Residents are each potentially liable to pay the standard accommodation charge, $86.50 per day,[22] if they have sufficient income. If the resident has insufficient income, the Minister will pay part or all of the standard accommodation charge.[23]

[49] If 85% of a resident's income is greater than the annualized accommodation charge, about $31,500,[24] the resident pays the full accommodation charge. Thus, an individual whose income exceeds about $37,100 per year will pay the full accommodation charge.

[50] Where a resident's income is lower, the accommodation charge is lowered so that on an annual basis it does not exceed 85% of the resident's income. In addition, the accommodation charge is lowered further, if necessary, to ensure that the resident keeps at least $2,700 of his or her income. Indeed, the Minister may actually pay an amount to supplement the income of someone whose income is less than $2,700.[25]

[51] The Appellant is responsible for collecting the accommodation charge from each resident. The Minister of Health pays not only the difference between $86.50 per day and the actual accommodation charge paid by the resident but also the difference between the $113.03 per diem for the unprotected envelope and the $86.50.[26] As well, as we have already seen the entire protected envelope is paid for by the Minister of Health.

---

[22] At the time of signature of the service agreement.

[23] This is set out in the service agreement at article 4.2 (page 10 of Tab 6 in Exhibit A-2) as well as the resident charge policy contained at Schedule C of the service agreement (pages 127 to 140 of Tab 6 in Exhibit A-2).

[24] At the time of signature of the service agreement.

[25] See the resident charge policy at Tab 6 of Exhibit A-2 (Schedule C, page 135, clause 5.11.2).

[26] Also, I would note that while most residents' costs are paid for by the Nova Scotia Department of Health, there are some individuals whose costs are entirely paid for by others, such as the federal Department of Veterans Affairs; this covers not only the accommodation costs but also the health care costs (both the protected and unprotected envelope). See the definitions at article 1.1(1)(d), (u), (z) and (ee) and articles 4.1 and 4.2 of the service agreement together with articles 4.1 and 4.2 of the resident charge policy. These will be found at pages 2 to 4, 10, 128 and 129 of Tab 6 in Exhibit A-2.

[52] Mr. Stephenson testified that if the Appellant is unable to collect the accommodation charge from the resident, it is unable to collect that amount from the Department of Health.[27]

[53] The evidence does not disclose what specific portion of the accommodation cost or of the unprotected envelope is paid for by the residents of the addition and what portion by the Minister of Health.

[54] I am, however, satisfied that the Minister of Health's contribution to the accommodation charge is significant.[28]

Analysis[29]

[55] While there are a great many pages of documents forming the contractual arrangements underlying this appeal, for the purposes of the question to be decided the essential points of the arrangements are the following.

---

[27] Transcript, pages 48 and 49. I am not sure how this reconciles with clauses 5.4.4 and 7.0 of the unprotected envelope funding policy, Schedule E to the service agreement (see page 324 at Tab 6 of Exhibit A-2), and clauses 4.2.1 and 5.14.3 (second bullet) of the resident charge policy (see pages 129 and 137 at Tab 6 of Exhibit A-2). In any event, whether or not the Department of Health would make up the difference does not affect the question I have to decide.

[28] This is for two reasons. First, we know from Mr. Stephenson's testimony that there is a continuum of residents ranging from those paying the full accommodation charge to those who pay none of the accommodation charge. See pages 123 and 124 of the transcript.

Second, while we have no separate figures, we see an estimated annual contribution from residents of both the original facility and the addition of $1,233,379 out of a total annual budget for both parts of $5,453,686 (in the letter of April 8, 2010 from the Department of Health to the Appellant; see Tab 33 of Exhibit A-3 at the first and fourth pages). For 76 beds, the resident contribution amounts to approximately $44.50 per day per bed on average. However, we know that a limited number of beds are not funded by the government of Nova Scotia and are fully paid for by others, such as those occupied by clients of Veterans Affairs. As a result, we know that for most patients, who are the responsibility of the government of Nova Scotia, their contribution would be less than $44.50 per day. Whatever the portion of the province's funding paid for accommodation, it is clearly quite substantial.

Finally, I would note that the accommodation charge includes not only the capital costs to provide the building (the rooms for the patients) but also certain other services such as dietary services (meals), housekeeping and administration. Presumably this also includes heating. Given that the standard accommodation charge is not specifically allocated in a given order against any particular category of the costs that fall within the accommodation charge, patients who contribute less than the full accommodation charge are contributing *pro rata* to all of these costs and, to the extent the province is paying part of an individual's accommodation charge it is also paying *pro rata* for these various costs. Of course, where the resident pays no accommodation charge, the province is paying the full accommodation charge including all the costs related to providing a residence.

As a result, while we cannot quantify with any precision the amount of the provincial contribution which is covering the cost of residential accommodation for residents, it is clear that the portion of the payments from the province to the Appellant that cover residential accommodation is significant and far from trivial.

[29] While the Court of Appeal did not decide the substance of the case, Justice Webb, writing for the majority, made certain observations regarding the statutory provisions and also set out a question to be addressed (see paragraphs 41 to 51 of the decision, 2017 FCA 88); the question is stated in paragraphs 49 and 51. I consider that question as part of my analysis below, particularly at paragraphs 75 to 78 below. I also note that, in the fifth sentence of paragraph 121 of the dissenting judgment, Justice Stratas states that I am bound by the views expressed in paragraphs 41 to 51.

[56] While we have a request for proposals leading to a proposal by the Appellant, acceptance of the proposal by the government of Nova Scotia coupled with an offer by the province of a specific per diem per bed, and acceptance by the Appellant of the proposed per diem, all of which led to the signature of the development agreement and then the service agreement, the development agreement and the service agreement, including all the attached documents, form a single set of contractual arrangements. It is clear that from the very beginning there could be no service agreement without a development agreement and vice versa.

[57] As we have seen, the purpose of the government of Nova Scotia was to have new facilities constructed in order to provide new nursing home beds in Springfield and in other parts of the province and, as well, to arrange for the continuing provision of residential accommodation as well as various care and nursing services in those new facilities.

[58] These related objectives are reflected in the contractual arrangements which require not only that High-Crest construct and operate the new facility with 20 nursing home beds but also that it provide services including "accommodation, programs, dietary goods, social work services, physical, and occupational therapy, and personal and skilled nursing care".[30]

[59] While residents contribute to accommodation costs depending on their income, the funding by the province is such that the province is making a significant contribution to the cost of residential accommodation in the new facility.

[60] At the time of the self-supply, could High-Crest expect to receive an amount of money from the government of Nova Scotia "for the purpose of making residential units in the [addition] available to individuals"?

[61] There is no question that at the time of the self-supply High-Crest could expect to receive amounts of money[31] from the government of Nova Scotia. High-Crest would not have made such a large and risky investment in the construction of the addition, a construction with a fair market value upon completion that was

[30] See article 1.1(1)(z) and article 2.1(1) and (2) of the service agreement at Tab 6 of Exhibit A-2.

[31] The expectation was that the Appellant would receive a series of amounts. Subsection 33(2) of the *Interpretation Act* provides that the singular includes the plural.

substantially less than its cost,[32] if it did not expect the service contract to come into operation and be renewed for many years.[33]

[62] The question is one of interpretation: What does "to receive amounts for the purpose of making residential units available" mean?

[63] As often happens in disputed tax matters, we are in a situation where straightforward words in the abstract turn out to be less clear when applied in a particular factual context.

[64] The Appellant submits that section 191.1 cannot apply. First, the Appellant takes the position that the use of the words "for the purpose" suggests that an all or nothing approach applies with respect to the payments and, consequently, section 191.1 cannot apply unless the payments are solely for the purpose of making available residential units.

[65] Second, the Appellant suggests that the section was never meant to apply where the amounts are paid as consideration for supply; the section is meant to apply where the grantor is somehow providing a benefit to the builder. The Appellant further argues that there is no benefit conferred upon it.[34]

[66] With respect to the second argument, I simply do not see anything in the section which would suggest that there is a requirement that the relevant payments confer a benefit on the recipient. The language is simply that there must be a payment for the stated purpose, nothing more.

---

[32] Based on the ratio of the reported output tax to the input tax paid for the construction, the fair market value of the building was about 54% of its cost.

[33] The specialized nature of the facility was such that the entire service agreement was an inducement to its construction.

[34] The Appellant also submits that the mortgage loan from the Nova Scotia Housing Development Corporation was not government funding within the definition contained in the section. I did not understand the Respondent to be arguing the contrary but, in any event, given that the loan is fully repayable with interest, the Appellant is clearly correct on this point.

Finally, I note that at some point in the course of the Appellant's argument, because the Appellant put emphasis on the fact that no payments were made to the Appellant for the provision of the new addition itself and all the payments to the Appellant were made under the service agreement, I thought the Appellant might be arguing that section 191.1 could not apply unless the purpose of the payments were <u>for the construction</u> of the residential accommodation for individuals as opposed to making such units available to individuals. I concluded that the Appellant was not making such an argument. Given that the wording of the definition of government funding refers to making residential units available rather than the construction of such units, such an argument could not be successful.

[67] In support of its first argument, the Appellant refers to the jurisprudence related to the question of single or multiple supplies and the case of *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40. I am not sure I understand how that case is of assistance.

[68] In that case the Court needed to decide whether there was a single supply or a multiple supply. For the purpose of applying the GST, it has been established that if there is a single supply the dominant characteristic of that supply will determine whether it is a taxable supply, an exempt supply or a zero rated supply. Where there is a multiple supply then one will look to the character of each separate supply to determine how its sale is to be treated and it may be that the different supplies will be treated differently for GST purposes.

[69] The situation here is different; we are not faced with determining the character of a supply in order to know whether it is taxable, zero rated or exempt.

[70] Under the agreement the Appellant supplies to residents residential accommodation and other services. There is nothing in section 191.1 which suggests we have to analyze this case in terms of the kind of supply or kinds of supplies the Appellant was making to the government of Nova Scotia.

[71] It is useful to consider section 191.1. It does not require that the government funding for the required purpose cover any particular portion of the cost of achieving that purpose; the contribution to the purpose need not represent a large portion of those costs.

[72] On its face, by bumping up the amount of output tax so it is never less than the input tax paid on the construction, the objective of the section is to prevent any net tax refund in respect of the self-supplied construction where there is a government subsidy in the form of an amount, or amounts, of money paid for the specified purpose.

[73] Section 191.1 was added to the *Excise Tax Act* in 1997. The Department of Finance technical notes of July 1997 stated the following with respect to the section:

> New section 191.1 provides for special self-supply rules for government-funded residential buildings designed to be occupied by individuals having special needs or limited financial resources, in recognition of the fact that it is often difficult to ascertain the "fair market value" of such buildings. This new provision ensures that the builder must account for an amount of tax that is at least equal to the total

> of all tax that was payable by the builder in respect of real property forming part of the complex or addition or in respect of improvements thereto. Where the builder is registered for the tax, the builder will have been entitled to claim input tax credits for these amounts so the net effect of section 191.1 will be to at least recapture the amount of those credits.

[74] The modern rule of interpretation[35] is now well established in tax. As the Supreme Court of Canada stated in *Canada Trustco Mortgage Co. v. Canada*:[36]

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" . . . .

[75] Given this, when is an expected amount (or when are expected amounts) received for the purpose of making residential units available to individuals? There are at least three possibilities:

1. When the payments that High-Crest expected to receive are exclusively for the purpose of making residential units available to individuals.

2. When the payments that High-Crest expected to receive are primarily for the purpose of making residential units available to individuals.

3. When part of the payments are for the purpose of making residential units available to individuals.

---

[35] Section 12 of the *Interpretation Act*, which says:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

This provision dates back quite some time. It was in the 1967 re-enactment of the *Interpretation Act*, S.C. 1967-68, c. 7, although at that time it was section 11. The current section 10 was also there. Indeed both sections go back quite a bit further than that. They are, in substance, found in sections 15 and 10 of c.1 of the R.S.C. 1927. Indeed, as pointed out by Justice Locke in *The King v. Robinson*, [1951] S.C.R. 522, at page 530, what is now section 12 can be traced back to 1849, before Confederation, in the 28th item of section V of chapter 10 of the 1848-1849 Statutes of the Province of Canada, 1848, 1848-1849, vol. III, 129, 134 (1848-1849), which reads, in part:

> *Twenty-eighthly*. . . . every such Act and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature may deem to be for the public good or to prevent or punish the doing of anything which it may deem contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to their true intent, meaning and spirit.

That Act was enacted on April 25, 1849.

[36] 2005 SCC 54.

[76] There is no case law on point but the scheme of the section indicates a clear purpose. On its face the section seeks to deny a net tax refund on the self-supply by bumping up the output tax where there is government support for the provision of residential accommodation to the groups of individuals described in the section. It does so without regard to the extent of the support; in relation to the costs of the accommodation, the support can be modest or it can be the entire cost or anything in between.

[77] It would not make sense to read this as not applying to government support simply because, there were, as is the case here, combined payments providing government support both for the provision of residential accommodation together with government support for additional services such as nursing services. Government support for residential accommodation is not diminished by the payment of additional amounts in support of other purposes.[37]

[78] The requirements of section 191.1 are met so long as part of the amounts received are for the purpose of making residential units available.

[79] Accordingly, at the time of the self-supply the Appellant could reasonably expect amounts of money for the purpose of making residential units in the addition available to individuals referred to in the section.

Conclusion

[80] Thus, section 191.1 applies and it follows that the appeal is dismissed. Costs are awarded to the Respondent.

Signed at Ottawa, Ontario, this 20th day of October 2017.

"Gaston Jorré"

Jorré J.

[37] Further, the technical notes set out that this change was put into place to remedy a problem with valuing buildings receiving government funding for individuals having special needs or limited financial resources. That problem does not disappear because there is also government support for additional services.

CITATION:	2017 TCC 210
COURT FILE NO.:	2012-3027(GST)G
STYLE OF CAUSE:	HIGH-CREST ENTERPRISES LIMITED v. THE QUEEN
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	October 20, 2017

APPEARANCES:

Counsel for the Appellant:	Maurice P. Chiasson, Q.C.
Counsel for the Respondent:	Jan Jensen

COUNSEL OF RECORD:

For the Appellant:	Maurice P. Chiasson, Q.C.
Firm:	Stewart McKelvey Halifax, Nova Scotia
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario