Docket: 2008-581(GST)I

BETWEEN:

SYLVAIN R. LAVOIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 6, 2009, at Edmundston, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant: Denis St. Pierre

Counsel for the Respondent: Justine Malone

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act,* the notice of which is dated May 1, 2006, for the period from October 1 to December 31, 2005 is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of October 2009.

"François Angers"

Angers J.

Citation: 2009 TCC 501
Date: 20091005
Docket: 2008-581(GST)I

BETWEEN:

SYLVAIN R. LAVOIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This appeal was filed in the French language but at trial the appellant requested that the hearing be held in both languages and that the judgment be in the English language. The Crown did not oppose the request.

[2] By notice of assessment dated May 1, 2006, the Minister of National Revenue (the Minister) informed the appellant that for the period from October 1 to December 31, 2005, he was not entitled to claim an input tax credit with regard to the construction of a garage during that period. The assessment was later confirmed on November 13, 2007.

[3] In 2005, the appellant and his wife purchased a residential lot of 1.21 hectares on which they built a 3400 square foot house as their residence. Following the construction of their residence, the appellant, who is a machinist, also built on the same lot, near his residence, what was described as a garage so that he could operate his business there. The garage is 2400 square feet and is used exclusively for his business. The appellant claimed an input tax credit (ITC) of $18,282.53 with respect to the construction of the garage. The issue is whether the appellant is entitled to the said ITC.

[4] The appellant drew a map of his lot and highlighted the portion he considers is being used for commercial purposes. Other than the garage, there is the use of a portion of the lot to stock metal pieces and for the purpose of access to the garage. Another portion is used as a common driveway for the business and for the appellant's residence. There is a small wooded area facing the appellant's residence and a larger wooded area behind the garage, which wooded area is approximately 500 feet long by the width of the lot, which is 186 feet. That wooded area would therefore cover an area of 93,000 square feet or 2.14 acres or .87 hectare.

[5] The appellant has included a fairly large area next to the garage to park some of the machinery he works on. In terms of use of the lot in relation to its square footage, the appellant submitted a summary described as follows:

	Business	**Personal**
Building	2,400 square feet	3,000 square feet
Parking	6,140 square feet	1,535 square feet
Storage	2,000 square feet	—
Land	70,800 square feet	38,860 square feet
Total	81,340 square feet	43,395 square feet
Proportion	65%	35%

[6] The evidence given by the appellant regarding the actual portion of the lot used for business as opposed to personal purposes is somewhat unreliable as he is not the one who did the actual allocation of the square footage and was unable to explain what some of the square footage allocated really included. In fact, the evidence indicates that it was the appellant's representative's assistant who prepared the summary and she did not testify at trial. The issue became particularly relevant when the appellant was unable to explain what was actually included in the 70,800 square feet referred to as land and how it could be considered as being used for business purposes.

[7] The appellant's representative testified that the 6,140 square feet for parking in addition to the square footage for the building and the 2,000 square feet for storage was the area covered by the driveway, that the 38,860 square feet represented the wooded area in front of the house less the area of the house as shown on the plan, and

finally, that the 70,800 square feet was the remaining area of land at the back of the lot.

[8] The issue, as mentioned, is whether the appellant is entitled to input tax credits on the construction of his garage. The Minister relied on subsection 208(4) of the *Excise Tax Act* (the "*Act*") in disallowing the appellant's ITC. That subsection which reads as follows:

> **Improvement to capital real property by individual** -- Where an individual who is a registrant acquires, imports or brings into a participating province an improvement to real property that is capital property of the individual, the tax payable by the individual in respect of the improvement shall not be included in determining an input tax credit of the individual if, at the time that tax becomes payable or is paid without having become payable, the property is primarily for the personal use and enjoyment of the individual or a related individual.

[9] If all the conditions of subsection 208(4) are met, the tax paid with respect to the improvement does not give rise to an ITC. In this case, the only condition in dispute is whether the property is still used primarily for the personal use and enjoyment of the appellant despite the construction of the garage.

[10] There is no doubt that a fairly large portion of the property in issue is being used for the appellant's commercial activities, but to include under the business heading in the appellant's summary, reproduced in paragraph 5 of these reasons, the wooded area behind the garage as being used for commercial purposes, would be contrary to the evidence. If we exclude the 70,800 square feet which is not used for commercial purposes, that leaves 10,540 square feet of commercial use out of a total area of 124,735 square feet. On the basis of the square footage alone, it is clear that the property is not primarily used for commercial purposes. One must also remember that « primarily » might be defined as of first importance, principal or chief and can also mean more than 50% (See *Mid-West Feed Ltd. et al vs. M.N.R.*, 87 DTC 394).

[11] The appellant first acquired this property for his personal use, building his residence on it. A decision was later made to build the garage to be used in his business activities. The end result, in my opinion, and according to the evidence heard, is that the property continued to be used primarily for the appellant's personal purposes despite the fact that the garage and the land immediately surrounding it are used exclusively for his commercial activities. The appellant has therefore failed to establish on a balance of probabilities that the property in question was no longer used primarily for his personal use and enjoyment.

[12] The appellant argued that since the garage was built to be used exclusively for commercial purposes, subsection 208(2) of the *Act* should apply such that he is deemed to have received a supply by way of sale of the property and to have paid tax in respect of the supply equal to the basic tax content of the property. This deemed sale would generate a deemed acquisition of two separate properties by virtue of subsection 136(2) of the *Act* given that the garage does not form part of the residential complex. The supply of the residential complex is thus deemed to be a separate supply from the garage portion and neither supply is incidental to the other. The tax status of each property created under subsection 136(2) would need to be considered separately, the residential part being exempt, such that the appellant can claim the ITC on the garage portion.

[13] I have addressed this question in *Polley v. The Queen*, 208 GSTC 482 and concluded that there is no deemed supply since the application of the change-in-use provisions of subsection 208(2) of the *Act* is not triggered. Subsection 208(2) deals with a change in use where a registrant begins using real property as capital property in commercial activities and is no longer using it primarily for the registrant's personal use and enjoyment. The registrant is then deemed to have received a supply of the entire property by way of sale.

[14] As I have concluded that such was not the case in this instance, subsection 208(2) has no application. The property as a whole is still being used primarily as a place of residence of the appellant and it has therefore not ceased to be used primarily for personal purposes. There has been no change in use and so no deemed supply or actual supply of real property.

[15] The appeal is dismissed.

Signed at Ottawa, Canada, this 5th day of October 2009.

"François Angers"

Angers J.

CITATION:	2009 TCC 501
COURT FILE NO.:	2008-581(GST)I
STYLE OF CAUSE:	Sylvain R. Lavoie and Her Majesty The Queen
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	July 6, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	October 5, 2009

APPEARANCES:

Agent for the Appellant:	Denis St. Pierre
Counsel for the Respondent:	Justine Malone

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada