Docket: 2011-1645(GST)I

BETWEEN:

ROSS HUNTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 24, 2011, at London, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Tamara Watters

JUDGMENT

The appeal under the *Excise Tax Act* from the notice of reassessment dated June 1, 2010 is allowed, with costs which are fixed at $500, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim the input tax credits in the amount of $3,468.38 that had been denied.

Signed at Halifax, Nova Scotia, this 3rd day of November, 2011.

"Wyman W. Webb"

Webb J.

Citation: 2011TCC502
Date: 20111103
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BETWEEN:

ROSS HUNTER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether the Appellant should be denied the input tax credits that he claimed for GST that he paid in relation to the construction of a new building and a driveway in 2009 that were used in his landscaping business as a result of the provisions of subsection 208(4) of the *Excise Tax Act*.

[2] The Appellant commenced his landscaping business in 2000. He carried on the business from his home and from a barn and a garage that were situated on his property. His property was approximately 7 acres when he acquired it[1] and he

[1] Counsel for the Respondent asked the Appellant a question about who had purchased the property and in particular whether it had been bought by the Appellant alone or the Appellant and his spouse. However, in the Notice of Appeal, the Appellant only refers to himself as the purchaser of the property and the person who subdivided the property and sold the lots. In paragraph 2 of the Reply it is stated as follows:

> 2. He admits only the following facts stated in the notice of appeal:
>
> (a) The appellant purchased a parcel of land and a home;
>
> (b) A structure was built on land owned by the Appellant;

subdivided it and sold two lots prior to the time in question. Each lot that he sold was approximately 1/2 acre in size and therefore the property at the time when the new building was constructed was approximately 6 acres in size.

[3] His landscaping business grew to the point where he needed an additional facility to house the equipment that he was using in his landscaping business and in his snow plowing business during the winter. As a result he constructed a new building in late 2009 which was approximately 48 feet x 80 feet. As well he also constructed a new access from the road that was further from the house so that the vehicles that were traveling to the new structure would not have to travel close to the house. In constructing the new building and the new driveway the Appellant incurred GST in the amount of $3,468.38. The Minister does not dispute the amount of GST that was paid by the Appellant nor does the Minister dispute that the structure was used exclusively in the landscaping business of the Appellant. It seems clear to me that the landscaping business would be a commercial activity for the purposes of the *Excise Tax Act*.

[4] Since the new building was used exclusively in a commercial activity of the Appellant intuitively one would expect that the Appellant would be entitled to input tax credits in relation to the construction of this building. The Technical Notes to section 169 of the *Excise Tax Act* (which were released around the time that the GST provisions were added to the *Excise Tax Act*) provided as follows:

> A fundamental principle underlying the GST is that no tax should be incorporated into the cost of inputs used by a registrant in the course of a commercial activity to produce a taxable supply (including a zero-rated supply).
>
> To ensure that inputs to commercial activities effectively bear no GST, registrants are able to claim a full refundable credit, or "input tax credit", for the GST paid or payable on such inputs. This section provides that, to the extent a taxable input is used in a commercial activity, the tax paid or payable gives rise to an input tax credit.

[5] However in this case the Appellant was denied the input tax credits on the basis of subsection 208(4) of the *Excise Tax Act*. This provision provides as follows:

> (4) 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

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Since the Respondent admitted that the Appellant owned the property and since there was no motion to amend the Reply to withdraw this admission, the property, for the purposes of this appeal, is considered to be owned only by the Appellant.

> 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.

[6] The property referred to in this subsection is the entire property not just the building that was constructed. The new building is a fixture and became part of the real property. In situations where individuals were unable to establish that the entire property was not primarily for their personal use and enjoyment the input tax credits related to the construction of buildings that were used in commercial activities were denied[2].

[7] However, if:

(a) a sole proprietor who is a registrant were to construct a building that is to be used exclusively in his commercial activity on his land;

(b) the sole proprietor is denied the input tax credits only because of subsection 208(4) of the *Excise Tax Act*; and

(c) the sole proprietor were to sell the entire property to another individual who is a registrant and who will be using the entire property in the same manner as the sole proprietor (including the use of the separate building in a commercial activity);

as a result of the provisions of subsection 136(2) of the *Excise Tax Act* (which would separate the property into two parts) the purchaser would be entitled to input tax credits for the GST (or HST) paid in relation to the acquisition of the commercial building. Therefore the two individuals would not be treated the same way as the purchaser of the property (with the commercial building) is entitled to input tax credits for GST (or HST) paid in relation to the building used exclusively in the commercial activity of the purchaser but the person who constructs that building on his or her own land for the same use is denied the input tax credits. Perhaps this would suggest that the *Excise Tax Act* should be clarified to allow input tax credits to a sole proprietor, who is a registrant and who constructs on his or her own land a building that is not a residential complex and that will be used in a commercial activity, to the same extent that he or she would be entitled to input tax credits if the building would have been constructed on a separate parcel of land.

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[2] *Polley* v. *The Queen*, 2008 TCC 192, [2008] G.S.T.C. 99; *Lavoie* v. *The Queen*, 2009 TCC 501, [2009] G.S.T.C. 142; *Larivière* v. *The Queen*, 2009 TCC 424, [2009] G.S.T.C. 152.

[8] In this case, however, it seems clear to me that the Appellant has established that at the relevant time the property was not primarily for the personal use and enjoyment of the Appellant or a related individual. The relevant time for the purposes of subsection 208(4) of the *Excise Tax Act* is the time when the tax becomes payable or is paid without having become payable. This would have been in late 2009, presumably shortly after the building was constructed and when the work was completed on the driveway.

[9] Justice Angers in *Lavoie*, above, was considering the provisions of subsection 208(4) of the *Excise Tax Act* when he noted that:

> 10….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.* v. *Minister of National Revenue*, 87 DTC 394 (T.C.C.))

[10] The relevant condition as stated in subsection 208(4) of the *Excise Tax Act* is whether:

> …the property is primarily for the personal use and enjoyment of the individual or a related individual.

[11] The provision does not provide that in order to claim the input tax credits the property must be primarily used by the Appellant in his commercial activity. It is only necessary to determine if the property is primarily for the personal use and enjoyment of the Appellant (or a related individual). Either the property is primarily for the personal use and enjoyment of the Appellant (or a related individual) or it is not. These are the only two possibilities that are relevant for the purposes of subsection 208(4) of the *Excise Tax Act*.

[12] In this particular case, of the Appellant's 6 acre property, approximately one-half of the property is a hayfield. The Appellant allowed neighbouring farmers to cut the hay on this field for themselves. For two years he allowed one farmer and for another year he allowed another farmer to cut the hay. It seems clear to me that this portion of the property was not primarily for the personal use and enjoyment of the Appellant or a related individual as it was for the primary use of the neighbouring farmers who were cutting the hay for their own purposes. The Appellant referred to three years for which the hay was cut. It seems to me that it is more likely than not that those three years would be 2009, 2010 and 2011.

[13] The Appellant did not state whether the neighbours were related to him nor was he asked whether they were related to him. Justice Rothstein, writing on behalf of the Supreme Court of Canada, in *F.H.* v. *McDougall*, [2008] 3 S.C.R. 41 stated that:

> 47 Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B*, at para. 72:
>
> > Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.
>
> 48 Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:
>
> > Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.
>
> It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

[14] Although it was not clearly stated that the neighbouring farmers were not related to the Appellant, it seems to me that it is more likely than not that the neighbouring farmers are not related to the Appellant. The Appellant simply referred to the farmers as his neighbours which in the context of the case leads me to the conclusion that the more probable answer is that the neighbouring farmers who cut the hay were not related to the Appellant.

[15] In addition to the new building that was used in the landscaping business, there was an area around the building that was gravelled and used to store equipment and also other parts of the property that were used in carrying on the business (including the new driveway). When the part of the property that is (and was) a hayfield is added to the parts of the property that were used in the landscaping business, clearly less than one half of the property was used by the Appellant or his family for their own personal use and enjoyment and therefore it seems clear to me that the property was not primarily for their own personal use and enjoyment. It seems to me that this

was the situation in 2009 when the building was built. Therefore when the tax became payable or was paid in 2009 (which would have been after the construction of the new building and the driveway), the property was not primarily for the personal use and enjoyment of the Appellant or a related individual.

[16] As a result the appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim the input tax credits in the amount of $3,468.38 that had been denied. The Appellant is entitled to costs which are fixed in the amount of $500.

Signed at Halifax, Nova Scotia, this 3rd day of November 2011.

"Wyman W. Webb"

Webb J.

CITATION:	2011TCC502
COURT FILE NO.:	2011-1645(GST)I
STYLE OF CAUSE:	ROSS HUNTER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	October 24, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	November 3, 2011

APPEARANCES:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Tamara Watters

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada