Docket: 2022-1816(GST)I

BETWEEN:

9310-1731 QUÉBEC INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Heard on July 20, 2023, at Montréal, Quebec

Before: The Honourable Justice Jean Marc Gagnon

Appearances:

Agent for the Appellant:	Daniel Abandonato
Counsel for the Respondent:	Cansu Dilan Isik

JUDGMENT

The appeal from the reassessment made on May 14, 2021, under Part IX of the *Excise Tax Act* for the Appellant's October 1, 2016, to December 31, 2016, January 1, 2018, to March 31, 2018, and October 1, 2018, to December 31, 2018, reporting periods is allowed, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

a. for the purposes of the application of the provisions of the *Excise Tax Act*, including section 173 of the *Excise Tax Act*, against the Appellant, the fair market value of each of lots 5,524,048 and 5,524,049, disposed of to Isabelle Charbonneau-Abandonato and Michael Charbonneau-Abandonato, respectively, is $90,000; and

b. no other change to the reassessment is agreed to by the Court.

Without costs.

Signed at Québec, Quebec, this 23rd day of October 2023.

"J.M. Gagnon"

Gagnon J.

Translation certified true
on this 30th day of November 2023.
Melissa Paquette, Jurilinguist

Citation: 2023 TCC 150
Date: 20231023
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REASONS FOR JUDGMENT

Gagnon J.

I. Background

[1] The Appellant is represented by Daniel Abandonato. Mr. Abandonato is the controlling shareholder of the Appellant and is also the president and director of the Appellant. The Appellant is appealing from a reassessment made under the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (**Act**), by Agence du revenu du Québec (**Agent**), acting as the agent of the Minister of National Revenue, the notice of which that was addressed to the Appellant is dated May 14, 2021, for the Appellant's October 1, 2016, to December 31, 2016, January 1, 2018, to March 31, 2018, and October 1, 2018, to December 31, 2018, reporting periods (**Assessment**) (collectively, the **Periods**).

[2] The Appellant operates a business in the residential real estate industry. It develops housing projects, acquires vacant spaces, subdivides the lots, services the lots (streets, sewers, water supply systems), and puts the subdivided vacant lots up for sale.

[3] The Minister of National Revenue, acting through the Agent, added to the calculation of the net tax reported by the Appellant for the Periods the amount of

$5,162.07 as taxes deemed to have been collected on taxable benefits conferred on two of the Appellant's shareholders (**Amount in Issue**).

[4] The taxable benefits are allegedly attributable to Mr. Abandonato's children: Isabelle Charbonneau-Abandonato (**Isabelle**) and Michaël Charbonneau-Abandonato (**Michaël**) (collectively, the **Children**). During the relevant period, the Children were shareholders of the Appellant.

[5] More specifically, the Appellant purportedly disposed of a vacant lot to each of the Children for consideration below the fair market value. The Assessment reflects, among other things, the Amount in Issue, which is the Appellant's net goods and services tax (**GST**) payable in this case and which is supposedly attributable to the difference between the price paid by each of the Children and the fair market value determined by the Agent; this amount was allegedly not remitted by the Appellant.

II. Fact Situation

[6] On the basis of the evidence at the hearing, the Court retains the following sequence of facts:

a. Mr. Abandonato and the Children are shareholders of the Appellant. Mr. Abandonato is the controlling shareholder, director and president of the Appellant.

b. On October 24, 2014, the Appellant, by notarial deed, acquired, in particular, vacant lots 5524048 and 5524049, located on rue des Pommetiers in Saint-Hubert, Quebec. That acquisition was part of the initiative of a real estate development project undertaken by the Appellant that included a total of 32 vacant lots (**Saint-Hubert Development**).

c. On October 28, 2016, the Appellant, by notarial deed, transferred lot 5,524,048 at civic address 4431, rue des Pommetiers, Saint-Hubert, Quebec (**Lot 4431**) to Isabelle (undivided 99% share) and to Sylvie Charbonneau (undivided 1% share) for a total of $35,000 plus GST.

d. On January 25, 2018, the Appellant, by notarial deed, transferred lot 5,524,049 at civic address 4425, rue des Pommetiers, Saint-Hubert, Quebec (**Lot 4425**) to Michaël for a total of $35,000 plus GST.

e. Lot 4431 and Lot 4425 are the two largest parcels in the Saint-Hubert Development.

f. The notarial deeds referred to above in relation to the Saint-Hubert Development were prepared and received before Martin Fontaine, notary, as were all of the other notarial deeds introduced in evidence at the hearing.

g. The seller's representations in both notarial deeds of sale for Lot 4431 and Lot 4425 contain the following clause (**Cost-Inclusive Clause**):

> [TRANSLATION]
>
> The Seller represents and warrants:
>
> …
>
> 4. That the sale price of the immovable property includes the cost of setting up the following municipal services: (i) storm and sanitary sewers; (ii) the water supply system; (iii) the road subgrade; and (iv) the concrete curbs, asphalt surface and street lighting for the immovable property sold. All other potential municipal services financed by municipal loans may result in levies that will be payable by the buyer.
>
> …

It should be noted that were it not for the duplication in the paragraph numbering in the seller's representations in the notarial deed of sale for Lot 4431, the Cost-Inclusive Clause in that deed would be in paragraph 4 rather than paragraph 3 of the seller's representations.

h. In May 2019, the income tax unit of the Agent's audit division began the audit for the Appellant's 2016, 2017 and 2018 taxation years. The sales tax audit began in November 2019 for the period from October 1, 2016, to December 31, 2018.

i. On October 3, 2019, an agreement between the Appellant and Michaël concerning services was entered into before notary Martin Fontaine. In this agreement, the parties agreed that notwithstanding clause 4 as agreed to regarding services, it was agreed between the parties that Michaël would repay to the seller 1/32 of the total cost of servicing the lots when that work was completed, that is, when the second asphalt layer had been laid. It should be noted that the agreement

introduced in evidence on this point was not signed by notary Martin Fontaine. In addition, no similar agreement was filed as evidence in the case of the sale of Lot 4431 to Isabelle.

h. Mr. Abandonato acted on behalf of the Appellant in all of the documents referred to above to which the Appellant was a party.

[7] The assumptions of fact retained by the Respondent in making the Assessment include the following:

1. the Appellant had to file its GST net tax returns quarterly during the Periods in issue;

2. on October 28, 2016, the Appellant disposed of a parcel of land described as Lot 5,524,048 to one of its discretionary shareholders, namely, Isabelle Charbonneau-Abandonato, for $35,000 plus GST in the amount of $1,750;

3. the Appellant did not report the tax in the correct period, that is, it reported the tax in the period ending on March 31, 2018, instead of in the period ending on December 31, 2016;

4. on January 25, 2018, the Appellant disposed of a parcel of land described as Lot 5,524,049 to one of its discretionary shareholders, namely, Michaël Charbonneau-Abandonato, for $35,000 plus GST in the amount of $1,750;

5. the Appellant claims that the respective fair market value of the parcels of land described as Lots 5,524,048 and 5,524,049 (hereinafter the “lots”) is $35,000, which the Respondent denies;

6. the method used by the Appellant to determine the fair market value of the lots is not fair and reasonable, in particular in that the $35,000 value was determined on the basis that the services had not been set up at the time of the transactions, which the Respondent denies;

7. at the time of the supplies to the related persons, the services had been set up on each of the lots;

8. the Appellant did not have a fair market value valuation done by a chartered valuator in order to determine the $35,000 values;

9. the fair market value of the lots was determined by the Minister in the course of the audit;

10. the fair market value was determined using the comparables approach: the comparables were the lots sold by the Appellant to a related company, 9167-6833 Québec Inc., during the same periods as the Periods in issue;

11. the fair market values were established as follows:

    i. Lot 1 (Lot 5,524,048): $94,290 before taxes; and

    ii. Lot 2 (Lot 5,524,049): $92,443 before taxes;

12. for shareholder Isabelle Charbonneau-Abandonato, the Minister calculated a taxable benefit of $68,168.68 (($94,290 − $35,000) plus GST/QST);

13. for shareholder Michaël Charbonneau-Abandonato, the Minister calculated a taxable benefit of $66,045.09 (($92,443 − $35,000) plus GST/QST).

III. Issue

[8] The issue is whether, for the purposes of calculating the Appellant's net tax under section 173 of the Act, the fair market value of Lot 4431 and Lot 4425, as determined by the Respondent for the purposes of the Appellant's GST returns for the Periods, is justified.

[9] The $71.40 penalty for failure to file is not in issue.

IV. Position of the Parties

[10] The Appellant is of the opinion that the fair market value established by the Respondent for the purposes of the sale of Lot 4431 to Isabelle and of Lot 4425 to Michaël was overstated. In particular, that fair market value does not take into account the cost of servicing the lots, which Isabelle and Michaël have to assume. The Appellant considers that the Cost-Inclusive Clause, which provided that the cost of servicing the lots was included in the sale price of the lots, was not accurate and that those costs had to be assumed by the buyers. Given this, the $35,000 price was the fair market value.

[11] In the alternative, in the event that the costs of servicing the lots were to remain at the expense of the Appellant, the valuation report regarding the total value of the Saint-Hubert Development lots that was requested by the Appellant in order

to obtain initial financing for the project confirms a total price of $80,000 for each of the lots. That value corresponds to the market value since it includes the services.

[12] The Appellant did not raise any issue with respect to the charging provisions that were relied on by the Respondent in support of the Assessment. As clarified with the parties at the hearing, the only issue raised by the appeal is the determination of the fair market value used by the Agent in determining, under section 173 of the Act, the value of the benefit deemed to be the total consideration payable by Isabelle and Michaël, based on which the GST owed by the Appellant was calculated.

[13] The Respondent submits that the fair market values established as being $94,290 for Lot 4431 and $92,443 for Lot 4425 were properly determined. Isabelle and Michaël, as shareholders of the Appellant, received a benefit from the company in an amount equivalent to the difference between the fair market value determined by the Minister and the $35,000 acquisition price. In accordance with the provisions of section 173 of the Act, the Appellant is deemed to have collected the tax on the taxable benefits conferred on its shareholders. As a result, the Assessment was correctly established since it is based on the portion of the fair market values exceeding $35,000.

V. Analysis

Section 173 of the Act

[14] Section 173 of the Act is the key provision in this case. It requires, in particular, that the value of the taxable benefit on the basis of which the GST payable by the Appellant is determined in this case be established. The relevant parts for the purposes of the appeal are as follows:

> Taxable Benefits
>
> Employee and shareholder benefits
>
> 173 (1) Where a registrant makes a supply (other than an exempt or zero-rated supply) of property or a service to an individual or a person related to the individual and
>
> (a) an amount (in this subsection referred to as the "benefit amount") in respect of the supply is required under paragraph 6(1)(a), (e), (k) or (l) or subsection 15(1) of the *Income Tax Act* to be included in computing the individual's income for a taxation year of the individual, or
>
> (b) …

the following rules apply:

(c) …

(d) in any case, ... for the purpose of determining the net tax of the registrant,

(v) the total of the benefit amount and all reimbursements is deemed to be the total consideration payable in respect of the provision during the year of the property or service to the individual or person related to the individual,

(vi) the tax calculated on the total consideration is deemed to be equal to

(A) …

(B) in any other case, the amount determined by the formula

$$(A/B) \times C$$

where

A is

(I) where

1. …

2. …,

(II) in any other case, 4%,

B is the total of 100% and the percentage determined for A, and

C is the total consideration.

(vii) that tax is deemed to have become collectible, and to have been collected, by the registrant

(A) except where clause (B) applies, on the last day of February of the year following the taxation year, and

(B) where the benefit amount is or would, if no reimbursements were paid, be required under subsection 15(1) of that Act to be included in computing the individual's income and relates to the provision of the property or service in a taxation year of the registrant, on the last day of that taxation year.

In relation to the evidence introduced at the hearing

[15] The only testimony in support of the Appellant's position is the testimony of its representative, Mr. Abandonato. Mr. Abandonato testified at length, primarily to explain the business carried on by the Appellant, the acquisition and the Saint-Hubert Development project, the circumstances of the sale of Lot 4431 and Lot 4425 to Isabelle and Michaël, respectively, and the changes that occurred following the consequences that resulted from the tax audit begun by the Agent. I will return to Mr. Abandonato's testimony later.

[16] The Children did not testify and no other witness was heard. Although the Children are parties to the deeds of sale at the heart of the appeal and their rights and obligations under those deeds are determinative when it comes to the fate of key aspects of the Appellant's burden of proof, the evidence was not supported by their testimony so as to corroborate, explain, supplement or establish material facts that might have clarified the weight to give to the evidence submitted by the Appellant in order to meet its burden of proof. In my opinion, their absence leads me to believe that their account might reasonably not have corresponded to the Appellant's position. No explanation was given to justify their absence. The choice, whether well thought out or not, was the Appellant's, and the Appellant must live with the consequences that that choice might have regarding certain aspects of the evidence presented by the Appellant.

[17] On the subject of the Cost-Inclusive Clause, Mr. Abandonato testified that the transaction with his two children occurred before the municipal services—water supply systems, storm and sanitary sewers, asphalt, curbs, and so on—were set up. He added that the manner in which the transaction was carried out with the Children was that they paid the price of the value of the lot plus an additional amount for the services once the servicing had been completed. He stated that he was entering in evidence the cost of the 32 Saint-Hubert Development lots, which included the servicing incurred. Those costs were appraised at $1,540,178 and were substantiated by cheques issued by the Appellant covering a period starting in 2015 and ending in 2021. Approximately 60% of those costs were supposedly paid before 2020. A $591,000 payment was allegedly made in March 2021 to 9148-3511 Québec Inc. as reimbursement for advances and interest, bringing the total of the expenses paid to 98% at the end of 2021. However, no details were provided concerning 9148-3511, when the advances were apparently agreed to, and what expenses the advances covered.

[18] He specified that if the total cost of the lots is divided by 32 (that being the total number of Saint-Hubert Development lots), the result is an average servicing cost of $48,000 per lot, which means that the total for Lot 4431 and Lot 4425 to the Children is $83,000 ($35,000 + $48,000).

[19] Still on the subject of the Cost-Inclusive Clause, he testified that the cost of the servicing was not included, despite what was set out in the deeds of sale and what was a clerical error on the part of notary Martin Fontaine. In support of his position, Mr. Abandonato referred to a letter from notary Martin Fontaine addressed to whom it may concern and dated March 23, 2022; this letter confirms that despite the Cost-Inclusive Clause, the cost of servicing Lot 4431 and Lot 4425 was not included

and was payable when the second layer of asphalt was laid, at the rate of 1/32 of the cost for each of the lots. The letter is signed only by the notary and contains no reference to any other source of information or approval concerning the parties affected by that confirmation.

[20] Mr. Abandonato provided no further information concerning the Cost-Inclusive Clause.

[21] I note that Michaël did not testify to corroborate the Appellant. Although the witness tried to explain the reason, no similar document was produced in evidence for the situation involving Isabelle. In addition, Isabelle did not testify.

[22] The Court is therefore faced with a situation in which there are notarial deeds of sale involving two parties, with one party in each case not being present at the hearing, and in the case of Michaël, there is a deed under private writing presumed to have been signed on October 3, 2019, that might refer to an important change to the deed of sale entered into by the same parties on January 25, 2018.

[23] First, the Court does not find that the Appellant proceeded by improbation in order to contradict the statements of fact in the notarial deed of sale, which is an authentic act. That is what is generally required by the *Civil Code of Québec* to contradict and impugn the statements of fact in the deed. Such improbation requires, among other things, that the public officer who issued the act be impleaded. In addition, the Court understands from the wording of the deed under private writing, although it might be ambiguous, that the parties changed the situation governing their contractual relationship only as of the date on which the deed under private writing was signed, namely, on October 3, 2019. Mr. Abandonato did not stress this point and Michaël did not testify. In these circumstances, the Court finds that the document under private writing has little probative value.

[24] As well, the text of the clause that was allegedly agreed to by Michaël and the Appellant confirms that in October 2023, although the Saint-Hubert Development was progressing very well, and was maybe even complete, at least as regards the sale of the lots and the cost of servicing them, a valuation on which the Appellant relies, Michaël and the Appellant have still not confirmed that, after more than five years, they are able to determine the cost of the services that is payable by Michaël to cover a sale price for Lot 4425 equal to the fair market value. The pretext of the laying of a second layer of asphalt, which seems to be delayed with no explanation as to why, and the fact that the Appellant has managed to complete all the other sales of lots without a situation of the sort causing an issue, cause the Court to doubt the probative

value of the document. Because this is precisely what is at issue in this appeal: whether the purchase price of Lot 4425 payable by Michaël in January 2018 corresponds to the fair market value of the lot acquired. I do not consider that the probative value that the Court is prepared to assign to that document under private writing, and even its wording, can be sufficient for it to be given the scope that the Appellant is seeking. The Court finds that the deed under private writing signed by Michaël and the Appellant does not have sufficient probative value to supersede the authentic act as signed in January 2018 by the same parties.

[25] In the case of Isabelle, no such document was presented and no testimony was heard from Isabelle. The Court finds that the notarial deed of sale entered into in October 2016 by Isabelle and the Appellant remains intact.

[26] The Court considers that it is not satisfied, on a balance of probabilities, that there is additional evidence whose probative value has further supported the Appellant's position.

[27] Mr. Abandonato then insisted on the sale of the lots and the prices obtained. He stated that the lot sales began in 2016; there were three or four sales at the beginning of the project, of lots for semi-detached dwellings, again at a price of $80,000, including services. I note, however, that the Respondent's evidence made it possible to establish that documents of the Appellant relating to 30 of the 32 Saint-Hubert Development lots indicate that no lot in the Saint-Hubert Development was sold for a price lower than $90,000, with the exception of Lot 4431 and Lot 4425 to the Children. Those same documents also suggest that at the time that Lot 4431 and Lot 4425 were sold to the Children, no fewer than 85% of the Saint-Hubert Development lots had not yet been transferred to a buyer by the Appellant. No document was entered in evidence that confirmed a sale price of $80,000 for a lot in the Saint-Hubert Development.

[28] He added that he had had a real estate appraisal done in order to finance the Saint-Hubert Development. The appraisal was introduced in evidence and is dated October 7, 2014, with a valuation dated September 18, 2014. I would note that the valuation is the direct sum of the potential market value of each of the lots in the Saint-Hubert Development, including the cost of the streets, sewers and water supply systems in place, and the build-ready lots. The method used was the comparables approach, and the report specifies that it used 10 sales of serviced vacant lots to be used for single-family semi-detached and row houses. The report describes the typical buyer as a builder, not as a property owner who is buying the immovable property for the purpose of occupying it. The report uses a figure of $80,000/unit as

representative of the average market value of a lot for a single-family semi-detached dwelling that is serviced and build-ready as of September 2014, which was two years and more than three years, respectively, before the sales to Isabelle and Michaël.

[29] Since the fair market value must be determined, I believe that value, on the basis of the positions taken by the parties and the evidence on this issue at the hearing, to be between $80,000, the value proposed by the Appellant, and the value determined by the Respondent, which was $94,290 and $92,443 in the cases of Isabelle and Michaël, respectively. One other amount, at least, falling within that range was also proposed by the Appellant ($83,000). All things considered, I am of the opinion that the figures, $80,000 on the one hand and $94,290 and $92,443 on the other, presented certain issues. In particular, the Appellant's appraisal report is at least two years old, and there were certain issues with the values used by the Respondent during the cross-examination of Ms. Meunier when the suitability of the comparables used by the Agent was questioned because the use made of the lots had not been considered by the Agent.

[30] Having regard to the evidence introduced by both parties and this Court's assessment of that evidence, I am of the opinion that the $90,000 amount at which the first other lots were sold by the Appellant itself is a fair value. Those lots were sold in 2017 and 2018 and involved, at least in part, third parties. I am prepared to find that $90,000 was the fair market value of Lot 4431 and Lot 4425 at the time that they were sold by the Appellant to Isabelle and Michaël.

VI. Conclusion

[31] In light of the foregoing, the appeal from the reassessment made on May 14, 2021, under Part IX of the *Excise Tax Act* for the Appellant's October 1, 2016, to December 31, 2016, January 1, 2018, to March 31, 2018, and October 1, 2018, to December 31, 2018, reporting periods is allowed, without costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

a. for the purposes of the application of the provisions of the *Excise Tax Act*, including section 173 of the *Excise Tax Act*, against the Appellant, the fair market value of each of lots 5,524,048 and 5,524,049, disposed of to Isabelle Charbonneau-Abandonato and Michael Charbonneau-Abandonato, respectively, is $90,000; and

b. no other change to the reassessment, notice of which is dated May 14, 2021, is agreed to by the Court.

Signed at Québec, Quebec, this 23rd day of October 2023.

"J.M. Gagnon"

Gagnon J.

Translation certified true
on this 30th day of November 2023.
Melissa Paquette, Jurilinguist

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PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	July 20, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice Jean Marc Gagnon
DATE OF JUDGMENT:	October 23, 2023

APPEARANCES:

Agent for the Appellant:	Daniel Abandonato
Counsel for the Respondent:	Cansu Dilan Isik

COUNSEL OF RECORD:

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