

Date: 20080423

Docket: A-203-07

Citation: 2008 FCA 158

**CORAM: RICHARD C.J.
SEXTON J.A.
EVANS J.A.**

BETWEEN:

LIONS VILLAGE OF GREATER EDMONTON SOCIETY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Edmonton, Alberta, on April 23, 2008.

Judgment delivered from the Bench at Edmonton, Alberta, on April 23, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

EVANS, J.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Edmonton, Alberta, on April 23, 2008)

EVANS J.A.

[1] This is an appeal by Lions Village of Greater Edmonton Society (“Lions Village”) from a decision of the Tax Court of Canada (2006 TTC 670) pursuant to the informal procedure. In that decision, Justice Miller dismissed Lions Village’s appeal from a reassessment by the Minister of Revenue of the amount of Goods and Services Tax (“GST”) payable by it, pursuant to section 191 of the *Excise Tax Act*, R.S.C. 1985, c. E-15, on the self-supply of two not-for-profit seniors’ housing complexes in Edmonton, of which Lions Village was the builder.

[2] The GST payable on a self-supply under section 191 is a percentage of the Fair Market Value (“FMV”) of the property. The dispute concerns the FMV of one of the complexes, Castledowns. In order to recover the input tax credits claimed by Lions Village on the construction, the Minister determined FMV at just under \$8.3 million, the taxable construction costs of the complex. The Minister decided not call an expert witness to testify. The appellant’s expert appraisers did testify, having appraised the FMV of Castledowns at approximately \$4.1 million on the basis of an income approach. Both methodologies produced almost identical FMVs for the other complex, Railtown.

[3] On completion of the complexes, the occupier of a unit acquired a lease for life, and lent to Lions Village an amount based on the construction and operating costs of the complex attributable to that unit. The loan was repayable when the lease terminated, at which point Lions Village would enter into similar agreements with another occupier.

[4] The FMV of the complexes arrived at by both Lions Village and the Minister did not take account of the particular legal restrictions and regime governing the not-for-profit complexes. However, Lions Village’s appraisers testified that the life leases would probably lower the FMV.

[5] Justice Miller rejected Lions Village’s income-based approach to the appraisal. He held that it was inappropriate because it ignored the not-for-profit nature of the complexes and the life leases, and assumed, wrongly, that the complex could be marketed as condominiums or rentals. In so concluding, the Judge cannot be said to have based his decision on an erroneous finding of fact

made in a perverse or capricious manner or without regard to the material before him: *Federal Courts Act*, R.S.C. 1985, c. F-7, paragraph 27(1.3) (*d*). The Judge also rejected Lions Village's appraisers' cost-based approach, on the ground that the figure arrived at was significantly lower than the actual costs. Again, we are not persuaded that, in so finding, the Judge made a reversible error.

[6] Although construction costs have been used as a basis for arriving at the FMV of properties where, as here, there is no direct evidence (sales of comparables, for example), Justice Miller had reservations about the appropriateness of its use in this case, because it ignored the fact that the life lease and loan agreements greatly reduced the actual costs to Lions Village of the construction. However, having rejected Lions Village's appraisal and, in the absence of other reliable evidence, he accepted the Minister's FMV based on the costs of construction.

[7] Counsel argued before us that the Judge had made various errors of law with respect to the Minister's assumption of the cost-based FMV. However, in our opinion, the burden of proof is of little relevance in this case. The parties submitted different figures for FMV, arrived at by different methodologies. In the absence of other reliable evidence, the question for the Judge was which he preferred. Having rejected Lions Village's appraisal for the reasons that he gave, the Judge was entitled, in the absence of other reliable evidence, to accept the Minister's determination of FMV as being the costs of construction, despite the reservations that the Judge expressed about the appropriateness of this methodology on the facts of this case.

[8] For these reasons, the appeal will be dismissed with costs.

“John M. Evans”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-203-07

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE
CAMPBELL MILLER DATED DECEMBER 8, 2006, DOCKET NO. 2003-1778(GST)I**

STYLE OF CAUSE: Lions Village of Greater
Edmonton Society v.
Her Majesty The Queen

PLACE OF HEARING: Edmonton, AB

DATE OF HEARING: April 23, 2008

REASONS FOR JUDGMENT OF THE COURT BY: RICHARD C.J., SEXTON, EVANS,
J.J.A.

DELIVERED FROM THE BENCH BY: EVANS, J.A.

APPEARANCES:

Mr. Gordon Beck FOR THE APPELLANT

Mr. Bryan Wigger FOR THE RESPONDENT

SOLICITORS OF RECORD:

MacPherson Leslie & Tyerman LLP FOR THE APPELLANT
Edmonton, AB

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Ottawa, ON