

Docket: 2005-2211(GST)I

BETWEEN:

SOUTHERN HOSPITALITY CAPITAL CORP.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 31, 2006 at St. Catharines, Ontario

Before: The Honourable Justice G. Sheridan

Appearances:

Agent for the Appellant:

Andrew A. Ferri

Counsel for the Respondent:

Genevieve Lévéille

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which bears the number 085P0050950, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Prince Albert, Saskatchewan, this 11th day of August, 2006.

"G. Sheridan"

Sheridan J.

Citation: 2006TCC456
Date: 20060811
Docket: 2005-2211(GST)I

BETWEEN:

SOUTHERN HOSPITALITY CAPITAL CORP.,

Appellant,

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REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Southern Hospitality Capital Corp., is appealing the assessment made under the *Excise Tax Act* by the Minister of National Revenue for Goods and Services Tax, interest and penalties in respect of the seizure and sale of real property upon which the Appellant held a mortgage.

Facts

[2] Except as set out below, the Appellant does not dispute the facts assumed by the Minister in paragraph 5 of the Reply to the Notice of Appeal:

5. In so assessing and in confirming the Assessment, the Minister made the following assumptions of fact:

- (a) the Appellant's business activity is the provision of mortgages and loans;
- (b) at the time the transaction that is the subject of this appeal took place, the Appellant was not registered for purposes of Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the "Act");
- (c) the Appellant held a mortgage on vacant real property, namely: Parcel 6-1, Section 59M-186, being Lot No. 6 Plan 59M-186, City of Niagara Falls in the Regional Municipality of Niagara (the "Property") for 502759 Ontario Limited which was in default as at January 5, 2000;

- (d) the Appellant subsequently sold the property under Power of Sale;
- (e) on April 13, 2000 the Appellant, as vendor, entered into a Agreement of Purchase and Sale with Charriol Services Inc., as purchaser, for purchase of the property with for a purchase price of \$200,000.00;
- (f) the agreement stated that "If the transaction is subject to Goods and Services Tax (GST), then such tax shall be in addition to the Purchase Price";
- (g) Charriol Services Inc. is a non-resident that was not registered for purposes of Part IX of the *Act*;
- (h) the sale of the Property closed on May 12, 2000; and
- (i) the Appellant did [not] collect or not remit GST on the sale.

[3] The Appellant accepts the facts as stated in paragraph 5(c) but adds that the land described therein was held by the registered owner, 502759 Ontario Limited, in trust for its beneficial owner, a Mr. Sam Mingle. The Appellant's agent, Mr. Ferri testified to this fact and in support, tendered as evidence a document entitled "Trust Agreement"¹ dated December 28, 1990 and duly signed by Sam Mingle on behalf of 502759 Ontario Limited. He stressed as well that the land was designated by the municipality as an "individual" lot. The Respondent does not dispute these facts but takes the position that they are not relevant to the disposition of this appeal.

Analysis

[4] It is common ground that the Appellant was the creditor of 502759 Ontario Limited and that, following the default of 502759 Ontario Limited, the Appellant exercised its rights under the mortgage to seize and sell the land. In such circumstances, the relevant provision for determining the tax liability, if any, of the creditor is section 183² of the *Excise Tax Act*. Applied to the present facts, paragraph

¹ Exhibit A-1.

² **183(1) Seizure and repossession** - Where at any time after 1990 property of a person is, for the purpose of satisfying in whole or in part a debt or obligation owing by the person to another person (in this section referred to as the "creditor"), seized or repossessed by the creditor under a right or power exercisable by the creditor (other than a right or power that the creditor has under, or because of being a party to, a lease, licence or similar arrangement by which the person acquired the property),

183(1)(a) deems the seizure of the land by the Appellant to have been a "supply" of that property by the debtor 502759 Ontario Limited to the Appellant. Paragraph 183(1)(b) goes on to deem the consideration for such a supply to be "nil", thus generating no tax consequences as between the Appellant and 502759 Ontario Limited.

[5] However, the seizure and sale of the land also triggered subsections 183(2) and 183(10) of the *Act*. The combined effect of these provisions is that the Appellant was

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- (a) for the purposes of this Part, the person shall be deemed to have made, and the creditor shall be deemed to have received, at that time, a supply by way of sale of the property;
 - (b) for the purposes of this Part (other than sections 193 and 257), that supply shall be deemed to have been made for no consideration;
 - (c) where the supply referred to in paragraph (a) is a taxable supply of real property, for the purposes of sections 193 and 257, the tax payable in respect of the supply shall be deemed to be equal to tax calculated on the fair market value of the property at that time; and
 - (d) where the supply referred to in paragraph (a) is a supply of real property included in section 9 of Part I of Schedule V, in section 1 of Part V.1 of that Schedule or in section 25 of Part VI of that Schedule, for the purposes of sections 193 and 257, the supply is deemed to be a taxable supply and the tax payable in respect of the supply is deemed to be equal to tax calculated on the fair market value of the property at that time.

(2) Supply in commercial activity – Subject to subsection (3), where at any time a creditor who has seized or repossessed property, in circumstances in which subsection (1) applies, makes a particular supply (other than an exempt supply) of the property, except where any of subsection (4) to (6) applied at an earlier time in respect of the use of the property by the creditor, the creditor shall be deemed, for the purposes of this Part, to have made the particular supply in the course of a commercial activity of the creditor and anything done by the creditor in the course of, or in connection with, the making of the supply and not in connection with the seizure or repossession shall be deemed to have been done in the course of the commercial activity.

(3) Court seizures - Where a court, for the purposes of satisfying an amount owing under a judgment of the court, orders a sheriff, bailiff or other officer of the court to seize property of the judgment debtor and subsequently makes a supply of the property, the supply of the property by the court shall be deemed, for the purposes of this Part, to be a supply made otherwise than in the course of a commercial activity.

...

(10) Debt security, etc. [power of sale] - For the purposes of this Part, where

- (a) for the purposes of satisfying in whole or in part a debt or obligation owing by a person, a creditor exercises a right under an Act of Parliament or the legislature of a province or an agreement relating to a debt security to cause the supply of property,
- (b) subsection (3) does not apply to the supply, and
- (c) a receiver (within the meaning assigned by subsection 266(1)) does not have authority in respect of the property, the creditor shall be deemed to have seized the property immediately before that supply and that supply shall be deemed to have been made by the creditor and not by the person.

deemed³ to have made a supply of the land to Charriol, and that supply was deemed "to have been made in the course of the [Appellant's] commercial activity"⁴. This was sufficient to bring the transaction within section 221, the general provision under which a person making a supply is required to collect GST; under section 240, that person was also required to remit the GST collected to the Minister. The Appellant did not comply with either of these statutory obligations when exercising its power of sale to transfer the land to Charriol.

[6] The Appellant submitted that the Trust Agreement protected the corporation from the effects of section 183 and that the sale of the land was an "exempt" supply. These arguments seem to have been based, however, on Mr. Ferri's personal belief that the Trust Agreement saved the transaction from being caught by section 183, rather than because it fell within the defined list of "exempt" supplies under the *Act*. In my view, the facts of this case fall squarely within the criteria of section 183. There is no exemption in the legislation that would allow the Appellant to rely on the Trust Agreement to avoid the consequences of the deeming provisions.

[7] The Appellant also argued that there was some significance in the municipal description of the land as an "individual" lot; this fact, however, does not affect the application of section 183. Finally, the Appellant argued that it was not caught by section 183 because the company was not a registrant under the *Act*. The weakness of this argument is that section 240 required the Appellant to be registered; the company's failure to comply with the *Act* cannot be relied upon as a means to avoid its tax liability under section 183. The fact is that the Appellant sold the land to a non-registered purchaser without collecting GST; in these circumstances the Appellant was obliged by the *Act* to remit the GST owing on the purchase price of \$200,000.

[8] The end result is that the Appellant has failed to prove wrong the assumptions upon which the Minister based the assessment. Under subsection 183(10), the Appellant is deemed to have made a supply of the land to 502759 Ontario Limited and is therefore liable for the GST assessed as well as the interest and penalties; accordingly, the appeal must be dismissed.

Signed at Prince Albert, Saskatchewan, this 11th day of August, 2006.

³ Subsection 183(10).

⁴ Subsection 183(2).

"G. Sheridan"

Sheridan J.

CITATION: 2006TCC456
COURT FILE NOS.: 2005-2211(GST)I
STYLE OF CAUSE: SOUTHERN HOSPITALITY CAPITAL
CORP. AND HER MAJESTY THE QUEEN

PLACE OF HEARING: St. Catharines, Ontario

DATE OF HEARING: July 31, 2006

REASONS FOR JUDGMENT BY: The Honourable Justice G. Sheridan

DATE OF JUDGMENT: August 11, 2006

APPEARANCES:

Agent for the Appellant: Andrew A. Ferri

Counsel for the Respondent: Genevieve Lévéille

COUNSEL OF RECORD:

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