

Docket: 2020-1718(GST)G

BETWEEN:

AIDA ABEDIPOUR,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on common evidence with the appeal of
Asghar Arezehgar – 2020-1719(GST)G
on November 21, 22 and 23, 2022, at Toronto, Ontario

Before: The Honourable Justice David E. Spiro

Appearances:

Counsel for the Appellant: Adam Serota

Counsel for the Respondent: Tigra Bailey and Tony Cheung

JUDGMENT

The appeal is allowed, and the assessment of net tax for the reporting period March 1, 2016 to March 31, 2016, and the assessment of penalty under section 280.1 of Part IX of the *Excise Tax Act* are vacated, with costs in accordance with the Tariff.

Signed at Ottawa, Canada, this 7th day of December 2022.

“David E. Spiro”

Spiro J.

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“David E. Spiro”

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Citation: 2022 TCC 155
Date: 20221207
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AND BETWEEN:

ASGHAR AREZEHGAR,

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and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Spiro J.

[1] Ms. Aida Abedipour is a registered nurse and a cancer survivor. Ms. Abedipour and her husband, Mr. Asghar Arezehgar, were building a home when she was diagnosed with breast cancer. They decided to complete the construction and move in so she could recuperate from her chemotherapy and regain her strength before having a mastectomy and reconstructive surgery. The Minister of National Revenue (the “Minister”) believed the Appellants built the home intending to sell it at the earliest opportunity.

[2] It was on that basis that the Minister assessed GST/HST of \$243,318.58 against both Appellants (\$121,659.29 each) after they sold the home in March

2016 for \$2,115,000. Each Appellant was assessed a penalty of \$4,866.36 for failing to file the requisite return. The Appellants appealed their assessments to this Court.

The Law

[3] In *Wall v Canada*, 2021 FCA 132, Justice Webb set out the relevant legal test:

[23] There is no dispute in this case that Mr. Wall hired various contractors to build the houses in issue. If Mr. Wall, in the course of carrying on a business or an adventure or concern in the nature of trade, engaged these contractors to construct the houses in issue, then Mr. Wall would be a builder as defined in section 123 of the ETA:

“builder” of a residential complex [...] means a person who

constructeur Est constructeur d’un immeuble d’habitation [...] la personne qui, selon le cas :

(a) at a time when the person has an interest in the real property on which the complex is situated, [...] engages another person to carry on for the person

a) réalise, [...] par un intermédiaire, à un moment où elle a un droit sur l’immeuble sur lequel l’immeuble d’habitation est situé :

[...]

[...]

(iii) [...] the construction [...] of the complex,

iii) [...] la construction [...] de l’immeuble d’habitation;

[...]

[...]

but does not include

N'est pas un
constructeur :

(f) an individual
described by
paragraph (a) [...] who
[...],

f) le particulier visé
aux alinéas a) [...] qui,
en dehors du cadre
d'une entreprise, d'un
projet à risques ou
d'une affaire de
caractère commercial:

(ii) engages another
person to carry on the
construction [...] for
the individual

(i) [...] fait construire
l'immeuble
d'habitation [...]

[...]

[...]

otherwise than in the
course of a business
or an adventure or
concern in the nature
of trade,

[...]

[24] Therefore, the critical issue in this appeal is whether Mr. Wall was engaged in a business or an adventure or concern in the nature of trade when he had the three houses constructed. Neither party disputed that the tests to be considered in determining whether a gain realized on a disposition of property is an income gain or a capital gain are as set out in *Happy Valley Farms Limited v. Minister of National Revenue*, [1986] 2 C.T.C. 259, 86 D.T.C. 6421 (F.C.T.D.):

- the nature of the property sold;
- the length of the period of ownership;
- the frequency or number of similar transactions;
- work expended on or in connection with the property;
- the circumstances that were responsible for the sale of the property;
- motive.

[25] The tests are all based on the facts of the particular case and directly or indirectly lead back to the intention of the taxpayer. ...

[4] If the Appellants were builders within the meaning of section 123 of the *Excise Tax Act*, they were required to remit GST/HST when they sold the home. The answer to that question depends on whether they built the home as an adventure in the nature of trade. Before reviewing that question, I will set out my findings of fact.

The Facts

[5] Both Appellants testified at trial. They were the main witnesses. Their daughter testified briefly. Two other witnesses offered evidence — a friend called by the Appellants and a neighbour called by the Respondent.

[6] The Appellants were honest and forthright throughout. Even after aggressive cross-examination, their credibility remained unscathed.¹

[7] Mr. Arezehgar lived in Tehran, Iran until 2009 when he decided to immigrate to Canada with his wife, Ms. Abedipour, and their two young children. Mr. Arezehgar was a designer and Ms. Abedipour was a registered nurse. Until her cancer treatments, Ms. Abedipour taught nursing part-time at Seneca College in Toronto.

[8] Back in Iran, Mr. Arezehgar owned a one-half interest in an apartment. He also owned the apartment in Tehran in which he and Ms. Abedipour first lived as well as a larger apartment in Tehran to which they moved later on. In addition, he continued to own his old office space in Tehran.

[9] When the family immigrated to Canada, they lived in an apartment. In 2011, they bought a home at 5 Brillinger Street in Richmond Hill, Ontario, just north of Toronto. They paid \$615,000 for the house. Richmond Hill had a large Persian-Canadian community, including Ms. Abedipour's friends. Mr. Arezehgar sold his one-half interest in the Tehran apartment to help make the down payment.

¹ The Respondent sought to impugn the Appellants' credibility using the neighbour's jaundiced evidence, Mr. Arezehgar's grocery shopping habits, and an ill-informed "analysis" of water utility bills. The attempt was unsuccessful.

[10] Mr. Arezehgar sold the smaller apartment he owned in Tehran for \$300,000 at the end of November, 2012. He also sold his old office space in Tehran in March, 2013 for \$190,000.

[11] The Appellants signed a contract to buy an older home at 686 Balliol Street in Toronto, Ontario in August, 2013. The home was close to Ryerson University where their daughter was studying architecture. It was also close to architectural firms that were potential employers of their daughter and hospitals that were potential employers of Ms. Abedipour. They planned to demolish the older home and build their dream home on the property. The purchase closed in October, 2013. They paid just over \$950,000 for Balliol and took out a five-year mortgage. Mr. Arezehgar began drawing up detailed plans for a custom-built five-bedroom home.

[12] The drawings done by Mr. Arezehgar reflected a home suitable for the particular needs and desires of his family. For example, there were four fireplaces throughout the home, but only one television which was on the third floor. There were separate “his and hers” closets in the master bedroom rather than one large walk-in closet. The kitchen was not an open plan, but was closed off from the rest of the first floor. Ms. Abedipour chose the finishes, including black granite countertops for the kitchen and bathrooms. Mr. Arezehgar created the bathroom tile design. Ms. Abedipour designed her own workspace on the first floor along with nearby display cabinets. They also designed a third-floor suite with a balcony offering a view of the surrounding area.

[13] The building plans included several minor variances from the local by-law. A hearing was held at the Committee of Adjustment in March 2014 to consider the proposed variances. A neighbour objected that the home was not sufficiently set back from the lot line, but the Appellants compromised and the amended plan was approved.²

² That was not the end of complaints from this particular neighbour who considered the home built by the Appellants to be a “monster” (email dated March 14, 2015 to the local councillor). Another of his complaints concerned the Appellants’ ground-floor deck. He believed that it invaded his privacy. He called a city inspector. It passed inspection. The Appellants built a fence to meet his concerns, but it was not enough to satisfy him. During the winter, he also complained to Mr. Arezehgar about ice build-up on the side of the house.

[14] Demolition of the old house and construction of the new home commenced after a building permit was issued in June 2014. The construction process took between nine and ten months. By March 2015, all that remained to be done was the landscaping. Mr. Arezhegar had acted as architect, designer, and general contractor.

[15] In September 2014, with the construction process in full swing, the Appellants required additional funds to complete the home. Mr. Arezhegar decided to sell his one remaining property in Iran — the large apartment. He realized proceeds of \$800,000 from the sale.

[16] In October 2014, a lump was discovered in Ms. Abedipour's right breast. Tests were performed in November confirming the initial diagnosis. Her worst fears were realized when she was diagnosed with breast cancer. The course of treatment would be chemotherapy followed by surgery and radiation therapy. She would be treated at the Sunnybrook Health Sciences Centre in Toronto.

[17] Suddenly, she feared that her husband would be left to raise their two children on his own. Their daughter was already in her early 20s but their son was only 12. She contemplated her own mortality. This was particularly difficult for Ms. Abedipour as she was then in her mid-40s. She feared that even a minor pain indicated that the cancer had spread. She started her six cycles of chemotherapy — one every three weeks. The first round of chemotherapy was administered at the end of November 2014.

[18] The chemotherapy caused Ms. Abedipour to experience side effects. She lost her hair and felt weak. She had blurred vision — her eyes were red and swollen. She experienced symptoms consistent with heart failure. Sores developed in her mouth. She had nausea. She lost weight and was becoming increasingly anxious. Part of her anxiety arose from her knowledge and experience as a registered nurse. It was an emotionally turbulent time for her and her family.

[19] As the chemotherapy drew to a close in mid-March 2015, and as her recovery and recuperation began before surgery, Ms. Abedipour believed that she would benefit, both physically and emotionally, from living at Balliol. Balliol was close to Sunnybrook where she received all of her cancer treatments. Mr. Arezhegar would care for her at Balliol while she regained her strength for the upcoming surgery.

[20] Ms. Abedipour's mother travelled from Iran to Canada to provide emotional support to Ms. Abedipour and the family in their time of need. She arrived in Canada mid-December 2014 — just after her daughter's chemotherapy began — and lived with her two grandchildren at Brillinger. She did most of the cooking and Mr. Arezhegar did most of the grocery shopping. He shopped mostly in Richmond Hill. That is where a large Persian-Canadian community was located, including the specialty-food stores that catered to the needs of the community.

[21] During this time, Mr. Arezhegar's brother would stay at Brillinger for several months at a time. As a landed immigrant, he travelled frequently between Canada and Iran. Between Ms. Abedipour's mother and Mr. Arezhegar's brother, an adult was always at Brillinger to look after the Appellants' 12-year-old son.

[22] Shortly after Ms. Abedipour completed her chemotherapy, the Appellants moved from Brillinger to Balliol on April 8, 2015. A week after moving in, they registered Balliol with Ontario's new home warranty program. They moved some of their furniture from Brillinger, but only enough for the two of them to use. Ms. Abedipour's main objective in moving into Balliol was to prepare herself physically and emotionally for the 12 hours of surgery that were now less than three weeks away.

[23] On April 28, 2015, Ms. Abedipour had a mastectomy and reconstructive surgery. Shortly after recovering from the surgery, she expressed a desire to sell Balliol and move back to Brillinger where she could be among her friends in the Persian-Canadian community of Richmond Hill. The home at Balliol was now associated with Ms. Abedipour's cancer journey. She wanted this new chapter of her life to unfold at Brillinger where she could be among her closest friends.

[24] Ms. Abedipour and her husband lived at Balliol for four months from early April, 2015 until early August, 2015. During that time, they would return to visit the rest of the family at Brillinger almost every weekend. As Ms. Abedipour wished, Balliol was listed for sale on June 12, 2015. Two days earlier, an occupancy permit was issued. Six months later, in January 2016, the Appellants found a buyer after reducing the asking price several times. The parties agreed on a closing date of March 31, 2016. As soon as the Appellants agreed to sell Balliol, they arranged to have their furniture moved back to Brillinger. Their furniture was moved back in early February 2016.

[25] The visa for Ms. Abedipour's mother was set to expire in June 2015. As the family wanted her to stay on, Mr. Arezhegar arranged for an extension so she

could stay in Canada until early August 2015. She then returned to Iran. In early August 2015, Ms. Abedipour and her husband moved back to Brillinger.

[26] The purchasers of Balliol performed extensive renovations to the home. Rather than keeping the separate “his and hers” closets in the master bedroom, the buyers converted them to one large walk-in closet. They also transformed the closed kitchen into an open one.

Applying the Law to the Facts

[27] Of the six *Happy Valley* factors, three are neutral (nature of the property, length of ownership, and work expended) and three strongly favour the Appellants (number of similar transactions, circumstances responsible for the sale, and motive).

(a) Nature of the Property

[28] In this case, the nature of the property is a neutral factor. It does not point one way or the other.

(b) Length of the Period of Ownership

[29] The Appellants owned Balliol from October 2013 to March 2016. This was not a “quick flip” transaction nor was it a lifetime of ownership. This is a neutral factor.

(c) Frequency or Number of Similar Transactions

[30] This factor strongly favours the Appellants. There was no evidence of similar transactions undertaken by either Appellant involving the demolition of an existing house and the design and construction of a new home, whether in Iran or Canada. Mr. Arezhegar’s property transactions in Iran are not at all similar to the transaction at issue.

(d) Work Expended on or in Connection with the Property

[31] After moving into Balliol, the Appellants obtained a new home warranty from the Province of Ontario. They also obtained an occupancy permit shortly before listing the home for sale. Presumably, both would be necessary before a sale of the home. This factor is neutral.

(e) Circumstances Responsible for the Sale

[32] This factor strongly favours the Appellants. The chain of events leading to the disposition began with Ms. Abedipour's cancer diagnosis, followed by chemotherapy and its side effects, followed by surgery, followed by Ms. Abedipour's desire to move back to Brillinger to be close to her social circle and support network. The Appellants offered a plausible explanation, which I find credible, precluding a finding that they built Balliol intending to sell it at the earliest opportunity.

(f) Motive

[33] Intention is inferred from direct evidence and surrounding circumstances. We have the direct evidence of each Appellant, but we also have objective evidence that strongly suggests that the Appellants did not intend to sell the home at the earliest opportunity.

[34] An idiosyncratic feature of the home was the presence of only one television which was located on the third floor. A typical purchaser of a five-bedroom home would expect more. In particular, a television would typically be expected in the family room, the basement, and the master bedroom. Rather than installing multiple televisions, the Appellants installed multiple fireplaces. This strongly suggests that they built the home only for themselves.

[35] In addition, the Appellants left nothing for a potential purchaser to customize. When building a custom home for resale, a builder will typically leave certain features of the home unfinished so a buyer may customize them to their own taste and budget. Examples include flooring, countertops, lighting, cabinet hardware, and crown moldings. The fact that the Appellants finished everything to their own personal taste strongly suggests that they built the home only for themselves. The fact that it took the Appellants six months to sell the property after several price reductions supports this conclusion as do the extensive renovations performed by the buyers.

Conclusion

[36] I conclude that the Appellants have demonstrated, on a balance of probabilities, that they did not acquire or build the Balliol property as an adventure in the nature of trade. They have demolished the Minister's assumption that at all material times they intended to sell Balliol for profit (paragraph 14(n) of each Reply).

[37] Each appeal is, therefore, allowed and the assessment of each Appellant for net tax for the reporting period March 1, 2016 to March 31, 2016, and penalty under section 280.1 of Part IX of the *Excise Tax Act* is vacated. Each Appellant is entitled to his or her own set of costs under the Tariff.

Signed at Ottawa, Canada, this 7th day of December 2022.

“David E. Spiro”

Spiro J.

CITATION: 2022 TCC 155

COURT FILE NO.: 2020-1718(GST)G and 2020-1719(GST)G

STYLE OF CAUSE: AIDA ABEDIPOUR AND HIS
MAJESTY THE KING

ASGHAR AREZEHGAR AND HIS
MAJESTY THE KING

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 21, 22 and 23, 2022

REASONS FOR JUDGMENT BY: The Honourable Justice David E. Spiro

DATE OF JUDGMENT: December 7, 2022

APPEARANCES:

Counsel for the Appellant: Adam Serota
Counsel for the Respondent: Tigra Bailey and Tony Cheung

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