Docket: 2021-1139(GST)G

BETWEEN:

PATRIZIA NICOSIA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Docket: 2021-1140 (GST)G

AND BETWEEN:

JOSEPH NICOSIA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeals heard on common evidence on May 6 and 7, 2024
at Toronto, Ontario

Before: The Honourable Justice John C. Yuan

Appearances:

Counsel for the Appellant:	Jeremie Beitel Matthew Boyd Alice Wokoma
Counsel for the Respondent:	Andrew Lawrence

JUDGMENT

In accordance with the attached Reasons for Judgment;

1. The appeal of *Patrizia Nicosia*, Docket No. 2021-1139(GST)G, from an assessment dated December 30, 2019 issued pursuant to subsection 296(1) of the *Excise Tax Act*, for the reporting period April 1 to April 14, 2014, is allowed and the matter is referred back to the Minister of National Revenue on the basis that GST/HST was not payable on the supply of real property made on April 25, 2014;

2. The appeal of *Joseph Nicosia*, Docket No. 2021-1140(GST)G, from an assessment dated July 15, 2019 issued pursuant to subsection 296(1) of the *Excise Tax Act*, for the reporting period March 1 to December 31, 2014, is allowed and the matter is referred back to the Minister of National Revenue on the basis that GST/HST was not payable on the supply of the real property made on April 25, 2014; and

3. The Appellants are entitled to costs in accordance with Tariff B in Schedule II of the *Tax Court of Canada Rules* (*General Procedure*) but they will only be allowed one set of costs between the two of them.

Signed at Ottawa, Canada, this 26th day of August 2024.

"John C. Yuan"

Yuan J.

Citation: 2024 TCC 112
Date: 20240826
Docket: 2021-1139(GST)G

BETWEEN:

PATRIZIA NICOSIA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Docket: 2021-1140 (GST)G

AND BETWEEN:

JOSEPH NICOSIA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Yuan J.

[1] These are appeals of GST/HST assessments issued pursuant to subsection 296(1) of the *Excise Tax Act* (the "ETA") for siblings Patrizia Nicosia and Joseph Nicosia. The appeals were heard together on common evidence.

BACKGROUND

[2] The assessment of Joseph Nicosia was for the reporting period March 1, 2014 to December 31, 2014. The assessment of Patrizia Nicosia was for the reporting period April 1, 2014 to April 30, 2014.

[3] The assessments concern the siblings' sale of their co-owned residential property at 103 Ridley Boulevard, North York, Ontario (the "Property") on April 25, 2014 and, more particularly, the HST the Minister of National Revenue concluded that they were required to collect and remit from the purchaser on the sale.

[4] The siblings are appealing their respective assessments on the basis that the sale was exempt from GST/HST. In their Notice of Appeal, the siblings rely on three possible exemptions in Part I (Real Property) of Schedule V of the ETA:

(i) the general exemption for sales of residential property under section 2 of Part I where the seller is not a builder,

(ii) an exemption under section 3 of Part I that applies to a sale of a residential property by an individual who is a builder where the first use of the property after its construction or substantial renovations was primarily as a residence for the builder or his or her relative, and

(iii) if the siblings are determined to be builders, the exemption in paragraph 4(b) of Part I for the supply of a single-unit residential property by a builder that is available if the property was previously occupied by the builder and, by virtue of the occupancy, was subject to the application of the self-supply rules in the ETA at that time.

FACTS

[5] Patrizia and Joseph Nicosia are children of Diego and Susan Nicosia.

[6] In and around 2011, Patrizia and Joseph lived with their parents in their family home in Woodbridge, just outside of Toronto, Ontario. Diego and Susan Nicosia's other children, an older son and Patrizia's twin sister, had already moved out of the family home when they each were married.

[7] In 2011, Patrizia was in her early thirties and employed as a teacher, while Joseph was pursuing post-secondary education at Ryerson University (now Toronto

Metropolitan University). At that time, Patrizia and Joseph shared a desire to move out of the family home and, at the end of 2011, they purchased the Property as 50:50 co-owners for an aggregate purchase price of $1,625,000.

[8] The siblings made the purchase without any bank financing. Patrizia contributed $250,000 towards the purchase and their parents advanced the balance. The siblings bought the Property with the intention of tearing down the existing structure and building a new house that was consistent with other newer homes in the neighbourhood.

[9] Demolition and construction of the new house on the Property took place in 2012 and 2013. The siblings did not engage a general contractor to manage and oversee the project. However, the siblings' parents were familiar with residential home construction from their experience as the principals of Ashley Hill Homes Inc. and I accepted the siblings' evidence that their father, Diego Nicosia, provided guidance and support to the siblings with their decision-making and engagement of tradespeople and other professionals for the tear down and rebuild.

[10] Prior to purchasing the Property, Joseph Nicosia incorporated Delta Bay Contractors Inc. based on advice that more favourable pricing would be obtained from suppliers and tradespeople by using the corporation to engage them in connection with the construction of the new home. The siblings did not have the financial resources to pay for the construction work. Instead, all invoices received for construction work were forwarded to the parents for payment.

[11] The rebuild of the house on the Property was completed in the summer of 2013, with a certificate of occupancy issued on July 4, 2013. Around that time, the siblings together with their mother obtained a $1 million home-equity line of credit from the Royal Bank of Canada secured against the Property, which was almost immediately fully drawn down to repay the parents for part of their financial contributions to the Property to that point. The annual rate of interest on the line of credit was 3.5% and the siblings together paid the monthly interest on the debt using their own financial resources while it remained outstanding.

[12] The siblings first listed the Property for sale at the end of August 2013 but that listing was removed at the end of November 2013; the asking price was $3,889,000. The Property was then relisted for sale at $3,749,900 in March 2014 and this led to the April 25, 2014 sale of the Property for $3,700,000, inclusive of any applicable HST.

[13] The home was described in the March 2014 listing as a "custom new home" and, prior to the initial listing in August 2013, the siblings applied to have the home covered under a Tarion new home warranty; presumably, the Tarion warranty application was made by the siblings in their capacity as the builder of the house and the warranty coverage was for the benefit of a subsequent purchaser of the Property.

[14] The net proceeds from the sale from the Property were first applied to repay the $1 million line of credit with Royal Bank of Canada. The remaining balance was distributed among the siblings and their parents. Since Joseph was a licensed real estate agent at the time of the sale, the siblings did not engage a selling agent for the transaction and they agreed that as compensation for his role in selling the Property, Joseph would be distributed the $75,000 deposit that the purchaser submitted with her purchase offer. As he did not contribute any of his own money towards the purchase of the Property or the construction work, Joseph did not receive anything further from the sale proceeds. Patrizia was distributed an amount equal to her original $250,000 contribution to the 2011 purchase and then an additional amount which she regarded as her "profit", which she thought was around $300,000. The balance of the sale proceeds – which would be approximately $2,075,000, less any disbursements (*e.g.*, legal fees, property tax adjustments, etc.) that were made out of the $3,700,000 sale price at the time of the April 25, 2014 closing – was distributed to the siblings' parents, Diego and Susan Nicosia.

ASSESSMENTS UNDER APPEAL

[15] Subsection 165(1) of the ETA imposes GST/HST on the recipient of a taxable supply made in Canada and subsection 221(1) requires the tax payable by the recipient to be collected by the person making the supply.

[16] In the assessments under appeal, the Minister assessed Patrizia and Joseph Nicosia on the basis that, as 50:50 co-owners of the Property, they each had an obligation to collect and remit 50% of the HST that was payable by the purchaser of the Property on April 25, 2014. Each assessment also reflected a failure to file penalty pursuant to section 280.1 of the ETA.

[17] Joseph Nicosia was assessed on the basis that the $3,700,000 amount paid by the purchaser on April 25, 2014 for the Property did not include HST whereas Patrizia Nicosia was assessed on the basis that the $3,700,000 amount paid was inclusive of HST.

[18] At the opening of the hearing, the parties advised of their agreement that both siblings should have been assessed on the basis that the $3,700,000 amount paid by the purchaser represented a purchase price of $3,274,336.28 and HST of $425,663.72. The parties also advised of their agreement that the assessments should be reduced to allow the siblings to each receive the benefit of 50% of $102,033.87 total allowable input tax credits (ITCs) for GST/HST paid on expenses incurred towards the improvement of the Property between July 1, 2012 and September 30, 2013.

ISSUES

[19] There is no dispute that the siblings made a supply of the Property to the purchaser on April 25, 2014 for GST/HST purposes.

[20] A "taxable supply" is defined in subsection 123(1) of the ETA to be a supply made in the course of a "commercial activity" and paragraph (c) of the definition of "commercial activity" in subsection 123(1) of the ETA expressly includes "the making of a supply (other than an exempt supply) by the person of real property of the person ...."

[21] The pathway for the siblings to be successful in their respective appeals is to demonstrate that the supply of the Property on April 25, 2011 was an exempt supply.

Possible Categories of Exempt Supplies

[22] As noted at the outset, there are three alternative exemptions that the siblings have identified in their Notice of Appeal:

(i) the general residential property exemption in section 2 of Part I (Real Property) of Schedule V of the ETA for a supply that is the sale of residential property by a person who is not a builder ("**Section 2 Exemption**");

(ii) the exemption in section 3 of Part I (Real Property) of Schedule V of the ETA for the supply of a residential property by a builder who is an individual, where the first use of the property after its construction or substantial renovation was primarily as a residence for the builder or the builder's relative ("**Section 3 Exemption**"); and

(iii) the exemption in paragraph 4(b) of Part I (Real Property) of Schedule V of the ETA for the supply of a single-unit residential property by a builder where the property was previously occupied by the builder and at that time was subject to the application of the self-supply rules in the ETA by virtue of the occupancy("**Section 4 Exemption**").

[23] With respect to the Section 2 Exemption, the Minister of National Revenue takes the position that this exemption does not apply because the siblings were each a "builder" of the Property within the meaning of the definition in subsection 123(1) of the ETA.

[24] With respect to the Section 3 Exemption, the Minister's position is that this exemption does not apply because the Property was not previously occupied by the siblings as a residence.

[25] With respect to the Section 4 Exemption, although the Minister raised the subsection 191(1) self-supply rule and the subsection 191(5) exclusion in both the Reply and Respondent's Written Submissions, those materials did not address the application of the Section 4 Exemption to the supply of the Property on April 25, 2014 in the event that the Court determines that the siblings occupied the Property as a residence prior to the start of the assessed reporting periods. However, in the course of oral argument, counsel for the Minister appeared to concede that, if the siblings were each a builder, the Section 4 Exemption would apply to exempt the April 25, 2014 supply of the Property in those circumstances.

Significance of a Determination as to Whether the Siblings Previously Occupied the Property as a Residence Prior to the Start of the Assessed Reporting Periods

[26] The main factual dispute between the parties in connection with these appeals is whether the siblings resided at the Property at some point in time before the start of the assessed reporting periods.

[27] Residential occupancy at the Property by the siblings is relevant to each of the three exemptions.

[28] It is indirectly relevant to the Section 2 Exemption because an individual will be considered a builder under the definition in subsection 123(1) of the ETA if the subject property was acquired in the course of a business or an adventure or concern in the nature of trade. A person's occupancy of the property helps to support a conclusion that the property was acquired for personal use.

[29] It is directly relevant to the Section 3 Exemption because that exemption requires the builder to demonstrate use of the residential property as a residence by the builder or the builder's relative.

[30] It is also directly relevant to the Section 4 Exemption because if the siblings were each a builder in relation to the Property for GST/HST purposes, their occupancy of the Property after the construction or substantial renovation of the house on the Property would have triggered the application of a self-supply rule in subsection 191(1) of the ETA, unless subsection 191(5) applied to prevent the operation of that self-supply rule in the circumstances.

[31] The relevant portions of subsections 191(1) and (5) of the ETA provide, as follows [underlining added]:

> 191. (1) Self-supply of a single unit residential complex or residential condominium unit – For the purposes of this Part, where
>
> (a) the construction or substantial renovation of a residential complex that is a single unit residential complex….is substantially complete,
>
> (b) the builder of the complex …
>
> > (i) gives possession or use of the complex to a particular person under a lease, licence or similar arrangement…entered into for the purpose of its occupancy by an individual as a place of residence, …
>
> ….
>
> > (iii) where the builder is an individual, occupies the complex as a place of residence; and
>
> (c) the builder, the particular person, or an individual who has entered into a lease, license or similar arrangement … is <u>the first individual to occupy the complex as a place of residence after substantial completion</u>,
>
> the builder shall be deemed
>
> (d) to have made and received, at the later of the time of construction or substantial renovation is substantially completed and the time possession or use is so given to the particular person or the complex is so occupied by the builder, a taxable supply by way of sale of the complex, and

> (e) to have paid as a recipient and to have collected as supplier, at the later of those times, tax in respect of the supply calculated on the fair market value of the complex at the later of those times.
>
> ….
>
> **(5) Exception for personal use** – Subsections (1) to (4) do not apply to a builder of a residential complex … where
>
> (a) the builder is an individual;
>
> (b) at any time after the construction or renovation of the complex…is substantially completed, the complex is used primarily as a place of residence for the individual, an individual related to the individual or a former spouse or common-law partner of the individual;
>
> (c) the complex is not used primarily for any purpose between the time of construction or renovation is substantially completed and that time; and
>
> (d) the individual has not claimed an input tax credit in respect of the acquisition of or an improvement of the complex.

[32] The Section 4 Exemption ensures that, where the self-supply rules previously applied to cause a builder to pay HST/GST on the value of the builder's newly constructed or substantially renovated residential property, a subsequent sale of that property by the builder does not attract HST/GST a second time.

[33] In the context of these appeals, the self-supply rule in subsection 191(1) of the ETA and the Section 4 Exemption together create a situation where, if Patrizia and Joseph Nicosia were each a builder in relation to the Property and occupied the Property as a residence prior to the start of the assessed reporting periods, the supply of the Property attracting GST/HST would shift from the sale on April 25, 2014 to the self-supply occurring at the time of residential occupancy by the siblings, unless subsection 191(5) applies to oust the operation of the self-supply rule.

[34] The presence of the exemption to the self-supply rule in subsection 191(5) does create the possibility that a self-supply of the Property to the siblings might not result from their residential occupancy prior to the April 25, 2014 and, therefore, the Section 4 Exemption would not apply on the April 25, 2014 third party sale. However, the statutory conditions to qualify for the subsection 191(5) exemption from the self-supply rules are virtually identical to the statutory conditions for the siblings to qualify for the Section 3 Exemption. Accordingly, if the siblings are builders who resided at the Property prior to the April 25, 2014 sale and the

subsection 191(1) self-supply rule did not apply to them due to the subsection 191(5) exemption, the April 25, 2014 sale of the Property would nonetheless be an exempt supply by virtue of the Section 3 Exemption instead of the Section 4 Exemption.

[35] The Minister's assertion that the siblings are builders for GST/HST purposes in relation to the Property is foundational to the assessments that are under appeal. However, even if the Minister is correct that the siblings are builders for GST/HST purposes, if they resided at the Property before the start of the assessed reporting periods, their supply of the Property on April 25, 2014 would be an exempt supply. This would be the case either on the basis of the Section 4 exemption – due to the fact that the subsection 191(1) self-supply rule applied at the time the siblings' residency at the Property started – or the Section 3 Exemption – on the basis that the subsection 191(5) exemption applied to prevent a self-supply of the Property to the siblings, despite their residential occupancy of the Property as the eligibility criteria for subsection 191(5) exemption is ostensibly the same as the Section 3 Exemption.

[36] Consequently, if this Court determines that the siblings occupied the property as a residence prior to the applicable reporting period, the sale of the property on April 25, 2014 will be an exempt supply irrespective of whether they were builders in relation to the Property at the relevant time.

DETERMINATION ON SIBLINGS' OCCUPANCY OF THE PROPERTY

[37] I note at the outset of the discussion under this heading that the operative language for triggering a self-supply in subsection 191(1) of the ETA is that an individual who is the builder "occupy the [single unit residential] complex as a place of residence". There is nothing in the language to suggest that the nature of residential occupancy at the property has to be as the individual's principal place of residence.

[38] Therefore, if the siblings are found to be builders in relation to the Property, a self-supply of the Property after the completion of construction or substantial renovation would arise if the siblings are considered to have occupied the Property as a residence (subject to the exemption under subsection 191(5) of the ETA), notwithstanding that the siblings could also be considered to be resident elsewhere for part of the relevant timeframe.

[39] The Appellants assert that they occupied the Property as their residence late in 2012 or the start of 2013.

[40] The only direct evidence tendered by the Appellants in support of their position was their respective testimonies. They both testified that the purchase and construction of a new house on the Property allowed the siblings to fulfill a mutual desire to move out of the family home and that they had moved into the Property in or around the December 2012/January 2013 holiday break. The house was furnished with newly purchased furniture that was delivered in December 2012, some furniture that was given by their grandmother, and some bedroom furniture that was brought from their bedrooms from their parent's home. They also testified that they moved their clothes and other personal effects to the Property at that time and ceased using their parent's home as the place they spent their evenings and where they slept.

[41] I found their testimony on the timing and nature of their occupation of the Property to be consistent, reliable, and credible.

[42] The Appellants also entered some documentary evidence that aligned with their testimony: (i) an invoice detailing the two bedroom sets, a dining set and living room furniture that the Minister admitted was delivered to the Property on December 14, 2012, and (ii) periodic invoices that show use of electricity and gas services at the Property for late 2012 and early 2013, respectively.

[43] In argument, the Respondent invited me to draw adverse inferences against the Appellants for not introducing into evidence copies of their invoices for municipal water/sewage services at the Property or copies of receipts for moving-related expenses. However, I decline to make those inferences because I am satisfied that the Appellant's failure to produce those documents can be attributed to the fact that the siblings did not retain copies of those particular invoices or receipts.

[44] The Respondent also argued that the siblings' testimony on their residential occupancy should not be believed because it is unlikely that one could reside at the Property without having cable television, phone or internet service. But I accepted the siblings' testimony that those were not services that they considered essential in their circumstances.

[45] In the result, I have concluded on a balance of probabilities that the Appellants occupied the Property as a residence at, or shortly after, the end of the 2012 calendar year.

ARE THE SIBLINGS BUILDERS?

[46] For the reasons outlined earlier, a determination that the siblings occupied the Property as a residence at or around the end of the 2012 calendar year allows me to dispose of the siblings' appeals of the Minister's GST/HST assessments without having to decide whether the siblings are builders in relation to the Property for GST/HST purposes.

[47] Nonetheless, counsel for the Minister urged me to make a finding on the "builder" question, in light of the parties' considerable litigation efforts towards that issue to date as part of these appeals and the potential value of such a ruling to the parties in connection with potential future assessments of the siblings by the Minister for GST/HST payable on the self-supply to them of the Property arising at the time of their residential occupancy of the Property.

[48] While I agree that there would be value to the parties to have a Court make a determination on the builder issue in the context of these appeals, I am declining to make that determination and will leave the question to be possibly re-litigated *de novo* in the event that the Minister decides to assess the siblings for GST/HST payable on a self-supply of the Property.

[49] However, I wish to add that my decision to not make a finding was partially driven by my impression that there was an obvious gap in the evidence the Appellants put before me at the hearing with respect to role that parents Diego and Susan Nicosia played in the siblings' decision to purchase and renovate the Property, having regard to the parent's familiarity with the residential construction/renovation projects through Ashley Hill Homes Inc. and the fact that both the purchase of the Property and renovations were mostly financed by the parents until the $1 million line of credit was obtained from the Royal Bank of Canada.

[50] It was also peculiar that, despite being a 50:50 owner of the Property, Joseph did not receive a share of the profit from the sale and that the siblings both described the distribution of the sale proceeds in a way that implied the balance of any profit from the sale of the Property in excess of the $300,000 portion given to Patrizia would have been distributed to the parents as part of the monies that they received post-closing. Neither party identified the total profit from the sale of the Property. But, if the $102,033.87 ITCs that the Minister was prepared to allow the siblings to recognize in connection with the sale of the Property is used to estimate the cost of building the new home on the basis the $102,033.87 amount reflected 13% HST on construction and closing costs of $784,876 and that amount is added to the original $1,625,000 purchase price of the Property, a sale price of $3,700,000 would translate to an estimated profit of $1,290,124. After one excludes Patrizia Nicosia's $300,000

share of the profit, this translates to almost $1 million of profit that could have been part of the net proceeds that were distributed to the parents post-closing.

[51] Had I been required to make a finding on whether the siblings were builders in relation to the Property for GST/HST purposes to dispose of these appeals, I would have been prepared to draw an adverse inference against the Appellants from the fact that neither Diego nor Susan Nicosia were called as witnesses by the Appellant, in light of the gap in the evidence described above and that no explanation was offered by the Appellants as to why they did not have either Diego or Susan Nicosia give testimony concerning the purchase of the Property and the construction of the new house.

DISPOSITION

[52] The appeals of both Patrizia and Joseph Nicosia are allowed in their entirety. I will refer the matter back to the Minister to reassess on the basis that GST/HST was not payable on the supply of the Property by Patrizia and Joseph Nicosia to the purchaser on April 25, 2014.

[53] I have made no finding as to whether Patrizia or Joseph Nicosia was a builder for GST/HST purposes but I have determined that, even if the siblings were builders in relation to the Property for GST/HST purposes, the supply of the Property by them to the purchaser on April 25, 2014 would have been an exempt supply under Part I (Real Property) of Schedule V either pursuant to (i) section 3 of Part I, or (ii) paragraph 4(b) of Part I. If the siblings were not builders in relation to the Property for GST/HST purposes, the supply of the Property by them to the purchaser on April 25, 2014 would have been an exempt supply under the general residential property exemption under section 2 of Part I of Schedule V.

[54] The Appellants will be entitled to costs in accordance with Tariff B in Schedule II of the *Tax Court of Canada Rules* (General Procedure) but they will only be allowed one set of costs between the two of them.

Signed at Ottawa, Canada, this 26th day of August 2024.

"John C. Yuan"

Yuan J.

CITATION:	2024 TCC 112
COURT FILE NO.:	2021-1139(GST)G 2021-1140 (GST)G
STYLE OF CAUSE:	PATRIZIA NICOSIA v. HIS MAJESTY THE KING JOSEPH NICOSIA v. HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 6 and 7, 2024
REASONS FOR JUDGMENT BY:	The Honourable Justice John C. Yuan
DATE OF JUDGMENT:	August 26, 2024

APPEARANCES:

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