CRA's HST Self-Supply Saga

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As our colleague Lee Weatherby remarked in his August 2016 Blog HST Self-Supply Rules: Is CRA on the Warpath? "*engaging with the Canada Revenue Agency at any level is a knee-trembling experience that is best avoided if at all possible, so spare a thought for apartment builders, who have no choice but to engage every time they finish a new project".* And Canada Revenue Agency (CRA) are getting more aggressive… or perhaps more suspicious about the Fair Market Value figures furnished by builders and their accountants. HST, or GST as it was then, became a fact of life in January 1991 but things were relatively quiet until 2016 when the pace of calls to our office started to escalate. It is fair to say that they are now in full flood. We covered the subject just over a year ago in our Spring 2022 Newsletter. Time perhaps for a re-visit?

Self-Supply

Whenever a *builder* constructs, adds to or substantially renovates a residential complex (single-unit, residential condominium unit or multiple-unit residential complex) which they subsequently lease, license or otherwise make available for use by an individual as their place of residence, the builder is deemed to have sold and repurchased the entire complex, or addition, at its Fair Market Value. The definition of a "builder" is broad. It essentially covers any individual or organisation that has a legal interest in the property on which the residential building is being constructed and will include the entity undertaking, or contracting out, the construction in the normal course of their business, adventure or nature of trade. It would not include a person building their own home so long as they did not claim Input Tax Credits (ITC) on the labour or materials. But it would include a financial institution that foreclosed prior to the building being occupied, or a mortgage holder that provided financing while the building is under construction.

CRA's objective, according to Paragraph 5 of their GST/HST Memorandum 19.2.3, is to provide a level playing field by removing "*the potential tax advantage a builder would have in constructing or substantially renovating a residential complex and then offering the residential complex for rent or appropriating it for the builder's personal use*". Double speak for saying that they want to levy GST/HST on the builder's profit… something that would have escaped attention if the builder had continued to hold onto the property as an investment rather than sell it on the open market.

The “sale” is triggered by the later of the following two events (1) when the first apartment in the complex is *occupied or rented* or (2) when the building complex is *substantially complete*. There is an assumption that the building would be substantially complete before the first apartment unit was occupied or rented. In fact, the tax liability does not arise from self-supply until the time of substantial completion. “Substantially complete” is somewhat subjective and is described in the Memorandum as “*generally 90% or more*”. All rather woolly, but the intention is that the building must be reasonably habitable, so this entails an occupancy permit but excludes minor repairs, landscaping and items that do not “*reasonably impair the use and enjoyment of the housing unit as a place of residence*”. In any event substantial completion is also deemed to have occurred when 90% of the units in the complex are occupied. The foregoing applies to multi-unit rental complexes (MURCs). However, with condominium apartments, self-supply is triggered on a unit-by-unit basis as each unit is occupied or rented.

Many office buildings in Central Business Districts are now redundant and are being purchased for conversion to apartments (see the “Stranded Assets?” article in our Summer 2023 Newsletter). CRA Memorandum 19.2.3 Paragraph 96 provides that this will result in a GST/HST liability on the entire, or part of the property, when the first unit is occupied for residential purposes or whenever conversion of the complex is substantially complete, whichever is the later. If only part of the office building is to be converted to apartments, the GST/HST liability will be based on the Fair Market Value of that portion of the building. In either case the FMV would include the original structure, including the fee simple interest in the land, not just the renovations. The owner is deemed to be the builder of the complex and is liable for GST/HST on the deemed sale to themselves under the self-supply rule, or on the sale to another party.

Fair Market Value

CRA’s definition of Fair Market Value (FMV), contained in their Policy Statement P-165R, “*represents the highest price, expressed in terms of money or money’s worth, obtainable in an open and unrestricted market between knowledgeable, informed and prudent parties acting at arm’s length, neither party being under any compulsion to transact*” is congruent with the generally accepted description of Market Value i.e. the anticipated sale price if the property was sold on the open market. CRA Memorandum 19.2.3 stipulates that FMV has to *exclude* GST/HST and provincial levies such as land transfer tax: Policy Statement P-165R requires that the appraisal report state whether GST/HST is included in the appraised value, to avoid confusion.

FMV refers to the freehold i.e. fee simple interest, and has to reflect any encumbrances that “*limit the possible uses of the property, impose an obligation on the owner and may cause a reduction in the FVM of the property*”. CRA Policy Statement P-165R adopts the position that the FMV includes the fee simple interest even though the land may be leasehold. The logic of this approach is not readily apparent to us. The limits of the property to be included in the self-supply are the portion of the legal entity that is “*subjacent or immediately contiguous to the building that is reasonably necessary for its use and enjoyment as a place of residence”.* In other words, only that portion of the legal description required to support the building itself should be included in the FMV calculation. This is defined as “*generally half a hectare*” in Memorandum 19.2.3 but would be property specific and may be larger or smaller depending on building size, site circulation, location, access, etc.

Valuation Methodology

There are three recognised methods of computing Market Value, colloquially known as “the three approaches to value” viz., Cost, Income, Direct Sales Comparison… and many variations of each. Failure to use any of them has to be justified in the Valuation Report. The *Cost Approach* essentially computes the cost of creating the asset and is based on the twin assumptions that (1) Market Values in the long run should equal the costs of production and (2) reproduction costs represent a ceiling for Market Values since investors should not be willing to pay more for an improvement than the cost of obtaining a substitute in the marketplace. Under this Approach, value is measured by adding to the land value (found by Direct Comparison) the cost, in current prices, of reproducing the structure and site improvements, and then subtracting any loss in value due to physical depreciation, functional and external obsolescence. The *Income Approach* recognises that the Market Value of an interest in real property is equal to the present value of future benefit flows. This Approach first estimates the expected future benefit flows from a property. These benefit flows are then converted into a market value through a variety of alternative mathematical techniques for capitalisation. The *Direct Comparison Approach* is based on marginal demand theory and derives the Market Value of a particular interest in real property through the analysis of the sale prices of similar properties. The underlying idea is that the marginal demand should be the same for two similar properties in a real estate market. Therefore, the fact that one sold for a certain price should indicate that the other property, if offered for sale, would sell for approximately the same amount (provided that market conditions have not changed). The Approach utilises

market information on the prices and characteristics of recently sold properties to determine the value of the subject property. CRA's Policy Statement P-165R states that none of the three Approaches to arriving at Fair Market Value (Cost, Income, Direct Sales Comparison) should be excluded "categorically". The Tax Court of Canada (TCC) have also followed this suggestion, carefully considering all three approaches even though they have tended to favour the Cost Approach in many cases. Take a look at some of these cases: they identify the issues that have surfaced between CRA and the taxpayer:

(1) *Sira Enterprises Ltd. v. The Queen (TCC File 98-2463-GST-G),* decided on November 11th 2000, was an early case which helped inform our thinking on GST/HST valuations. The dollar numbers were not large but the principles enunciated in the TCC decision were groundbreaking. The dispute dated back to 1996 and involved six apartment buildings ranging in size from 16 to 24 units, located in Moncton, New Brunswick. The properties were owned by Sira Enterprises Ltd. and the buildings had been erected for them by A.V. Construction Ltd. an associated company. Construction commenced in 1995. Input Tax Credits (ITC) had been applied for and paid quarterly during construction. Sira based its self-supply valuation on their actual construction costs and did not rely on any other appraisal method. CRA's appraiser used the Income and Direct Sales Comparison approaches and discarded the Cost Approach entirely because "*usually, for income property, I am more interested in the income stream and not the costs*". The TCC decision ruled that (1) the amount of the mortgage was of little relevance, (2) previous appraisals on the property were not relevant, in part because CRA had not asked Sira to produce them, (3) the Court was not interested in the market value of the properties for the purposes of sale because it might reflect factors which were not relevant to the GST FMV, (4) the actual construction cost adjusted to add the discount afforded Sira by their associated construction company A.V. Construction Ltd., was the most relevant indicator of Fair Market Value and that was the figure adopted by TCC.

(2) *Beaudet v. The Queen (TCC File 2014 TCC 52),* decided on February 14th 2014. The dispute dated back to 2010 and involved four apartment buildings erected on a single lot acquired in 2003, located on Rue de l'Aster, Quebec. The builder, Beaudet *Claude* et Saucier Alain based their self-supply valuation on their actual construction costs and did not rely on any other appraisal method though they did attempt the Income Approach before discarding it. These construction costs included the builder's profit on labour and worksite mobilisation costs (fixed costs such as trailers, temporary electrical service and equipment) plus the price of the land, but were adjusted downwards for the extra costs incurred because of site stability and sub-contractor issues. Beaudet's appraiser added the cost of the on-site supervisor to these costs and deducted, as functional obsolescence, poor sound proofing and a leaking roof. CRA's appraiser relied on the Income and Direct Sales Comparison approaches but also took a stab at the Cost Approach using a costing system rather than actual construction costs and added Developer's Profit. The TCC decision ruled that (1) the Cost Approach was the most relevant in this case, (2) the land should be valued on a per square foot rather than a per apartment unit basis, (3) the purchase price of the land had to be adjusted to the appraisal date, (4) actual construction costs should be used reduced for construction cost overruns, or particular problems with regard to soil contamination or bearing capacity discovered after purchase, or errors in design or construction, (5) actual construction costs should be increased to reflect the cost of financing and a portion of the indirect costs (advertising, certain contractor's administrative costs), (6) contractor's profit and overhead should be included in the construction cost but Developer's Profit should be excluded.

(3) *Carvest Properties Limited v. The Queen (TCC File 2017-345(GST)G,* decided on March 18th 2021. The dispute dated back to December 1st 2008 and involved a 137-unit apartment building (of which 89 units were at issue), whose units were registered as condominiums, located at 1985 Richmond Street, London, Ontario. Although this was a rental apartment building the units had been registered as condominiums to ensure that they were treated for municipal property tax purposes as residential property, rather than attracting the higher tax rate levied on rental apartment buildings (a practice that was later outlawed by the Provincial government in 2017). The builder, Carvest Properties Limited based their self-supply valuation on the actual cost of construction for the entire building plus 6% for notional builder's profit. This figure was then aggregated with the land value, determined by the Direct Comparison Approach. The resultant figure was then apportioned equally to each condominium unit regardless of its size, rent, value and the date each was leased (December 1st 2008 through April 1st 2010). This "cost plus 6%" formula had been agreed with CRA on two other Carvest owned rented condominium properties for self-supply FMV purposes (in lieu of earlier CRA appraisals based on the Direct Sales Comparison approach and Carvest appraisals using the Income Approach). Carvest also fielded an alternate FMV, computed by their independent appraiser, Mr. Uba, which valued the property using the Income Approach on the grounds that it was really a rental apartment asset. Mr. Uba then apportioned the value of the entire complex between each condominium unit based on its size. However, during the hearing Carvest had a change of heart and ditched Mr. Uba's appraisal arguing that he

had valued the wrong property rights, in the wrong property, using the wrong approach to valuation, and asked the Court to disregard his appraisal. CRA's appraiser, Mr. Duda, discarded the "cost plus 6%" formula instead valuing each condominium unit using the Direct Sales Comparison approach i.e. he compared each condominium unit with sales of comparable units in the marketplace adjusting for size, quality and price changes in the market. He then applied a "6% discount" to reflect the fact that the condominium units were theoretically being placed on the market over a constricted time period and that this over-supply would negatively impact their values. Mr. Duda reasoned that although the market was "active" the introduction of 137 units over a 16-month period was "sizeable". This "volume discount" was based on a study by a colleague which concluded that a 0-6% discount was reasonable.

In the case of a rental apartment building, self-supply is triggered by the occupation or rental of the first unit, provided that the building is substantially complete, and FMV must be computed as of that date. However, with condominium apartments, self-supply is triggered on a unit-by-unit basis as each unit is occupied or rented, so FMV has to be computed individually for each unit as it is rented.

The TCC ruled that (1) Carvest's "cost plus 6%" formula had no validity, (2) the FMV of each condominium unit should have been calculated at the respective date each was rented out and should have taken into account their difference in size, (3) the use of the Income Approach by Mr. Uba was incorrect because it appraised the *entire building* and not the FMV of each condominium unit as it was leased, (4) CRA's appraisal using the Direct Sales Comparison approach with relevant comparable sales data and applying a reasonable volume discount was correct. The TCC decision referenced a Federal Court of Appeal case (*27 Cardigan)* which specifically considered the "volume discount" issue and decided that a 10% discount was reasonable when 187 condominium units were being added to existing supply over a 2.5 year time period (the Cardigan market was much less active than in the Carvest case).

The decision was subsequently appealed (*Carvest Properties Limited v. Canada, 2022 FCA 124*) but the Federal Court of Appeal affirmed that apartment buildings registered as condominiums must be valued on a unit-by-unit basis. They did not disturb TCC's acceptance of the "volume discount".

Be Proactive!

Take the initiative, commission a valuation report. This may sound like self-serving advice but CRA's Memorandum 19.2.3 is fairly blatant about their need for a formal report, going so far as to say that they "may request its own appraisal" (Paragraph 44). Far better that you take the initiative and get ahead of the curve. Be careful though, it is unwise to insult CRA with a biased, poorly researched and inadequately supported report. That will put you right behind the eight ball! Do not underestimate CRA's Halifax based professional appraisal staff; many are former colleagues, graduates of our training program which includes seven years of mentored training, twenty-four training modules and the University of British Columbia's real estate degree These guys know their onions! You need a comprehensive valuation report, containing the fiscal, physical and legal attributes of your property, as well as its Fair Market Value at the appropriate appraisal date. The Fair Market Value figure must be anchored by a detailed logic path to adequate, comparable and properly analysed sales data. Meat and drink to our Valuation Division! Once the Report has been submitted we will answer any questions that CRA may have about it and hopefully resolve any issues by negotiation without resort to the Tax Court of Canada.

Federal and Provincial Tax Rebates

On September 14th 2023 the Federal Government announced they were introducing legislation to enhance the GST rebate on multi-unit residential construction. The legislation will increase the current rebate from 36% of the GST to 100%. The intent of the new program is to incentivise construction of new housing stock and applies to new, purpose-built rental housing such as apartment buildings, student housing, and seniors' residences which are built specifically for long term rental accommodation. Qualifying projects must have at least four private apartments (i.e. self-contained units with their own kitchen, bath and living areas) or at least 10 private rooms or suites (e.g. a 10-unit residence for students, seniors, or people with disabilities) and at least 90% of the units in the building must be designated for long term rental. The intent of the legislation is to stimulate new construction, not take existing supply off the market and as such, conversions (think office buildings being converted to apartments) will be eligible for the rebate, however substantial renovations (think renovictions) will not. The rebate only applies to projects which started on or after September 14th, 2023 (the date the program was announced) but before December 31st 2030 and must be "substantially complete" by December 31st 2035. The rebate does not apply to projects already under construction and so those currently underway will presumably be out of luck (unless something changes). One week after the federal announcement, the province of Nova Scotia followed suit and announced they would remove the provincial

portion of the HST as well. The federal program applies for the next seven years, and while the province of Nova Scotia has said they intend to mirror that timeline, they have committed thus far to just two years, with a review to take place at that time. The provinces of Ontario, British Columbia, Prince Edward Island and Newfoundland have also said they will follow suit on the housing rebate in some form or another and it is possible others too may make similar commitments. *This latest initiative provides some relief to developers of rental housing (unless of course you were unfortunate to start your project before September 14th 2023). The requirement to self-assess remains in force.*