Edmonton Composite Assessment Review Board

Citation: Hoopp Realty Inc/Les Immeubles Hoopp Inc as represented by Altus Group v The City of Edmonton, 2014 ECARB 00742

Assessment Roll Number:	10225237
Municipal Address:	15704 142 Street NW
Assessment Year:	2014
Assessment Type:	Annual New
Assessment Amount:	$29,211,500

Between:

Hoopp Realty Inc/Les Immeubles Hoopp Inc as represented by Altus Group

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
Shannon Boyer, Presiding Officer
Judy Shewchuk, Board Member
Mary Sheldon, Board Member

Procedural Matters

[1] Upon questioning by the Presiding Officer the parties indicated they did not object to the Board's composition. In addition, the Board members stated they had no bias with respect to this file.

Background

[2] The subject property is described as a large warehouse on 24.986 acres and is located in the Rampart Industrial neighbourhood of Edmonton at 15704-142 Street NW. It is owned by Hoopp Realty Inc. The subject property is fully serviced and is zoned IM.

[3] The subject property is valued on the cost approach for 2014 at $29,211,500. That value is made up of $12,284,283 for land value and $16,927,269 for improvement value.

Preliminary Matters

[4] The Respondent recommended that the land value be revised from an initial assessment of $12,284,283 to $11,493,494 for a recommended total of $28,420,500. The Complainant accepted that the Respondent's revision for the land value was fair and equitable.

[5] The parties agreed that, where relevant, evidence, argument and submissions would be carried forward from roll number 1310531 to this roll number.

Issue

[6] Should the assessed value of the improvements, being $16,927,269 and calculated using the cost approach to value, include the Goods and Services Tax (GST)?

Position of the Complainant

[7] The Complainant presented documentary evidence including a brief, board decisions, case law, and a rebuttal brief.

[8] The Complainant stated that the cost approach is used to assess the improvement because there is not enough sales information regarding the improvement due to its atypical nature. The cost approach is based on the principle of replacement.

[9] The Complainant informed the Board that the subject was valued using the Marshall and Swift Valuation Guide (Marshall and Swift), a manual that provides cost data and calculations for determining the typical replacement cost of buildings and other improvements. It is frequently used in the development of assessments. The Marshall and Swift calculation includes GST.

[10] The Complainant stated that in previous years, the Respondent applied a base rate multiplier (BRM) of 0.9524 to the Marshall and Swift calculation, to back GST out of the calculation. The Complainant informed the Board that the Respondent changed its policy in the 2014 tax year and did not apply a 0.9524 BRM to the subject or any of the properties in the cost approach inventory. The Complainant argued that there has been no change in legislation, court decisions, or change to GST rules to trigger the change in the Respondent's policy.

[11] The Complainant named two Alberta municipalities that do not apply GST when using the cost approach (Wood Buffalo and Parkland County), and that developed their own cost manuals suited to their local needs.

[12] The majority of the Complainant's presentation focused on establishing that GST is a flow-through tax with particular attention paid to the GST sections of the federal tax form entitled The Statement of Business or Professional Activities Form (the Tax Form) and the Canada Revenue Agency (CRA) document entitled General Information for GST/HST Registrants (the Tax Guide) which was produced in the Respondent's disclosure brief.

[13] The Complainant cautioned the Board that the presenter was not an expert in the area of GST and has layperson knowledge of GST. The Complainant submitted that the GST is a percentage value added consumption tax which is only paid by the end user of goods and services. GST is a flow-through tax and is never actually paid by the owner or purchaser of buildings; therefore, GST should not be included in the calculation of replacement cost. The Complainant stated that the vast majority of owners of commercial property are GST registrants and are responsible for collecting and remitting GST. The Complainant submitted that a Registrant owner is entitled to unconditional credit for the GST that it pays for materials and services incurred in the cost of construction or in the purchase of a property. The GST collected to offset the GST liability is called ITC (input tax credit). The Registrant owner's GST liability is offset by ITCs, so a potential purchaser of an improvement or an owner seeking to replace an improvement, does not actually incur GST.

[14] At various times during the hearing, the Complainant referred to the parties in this market as: GST registrants, prudent, cognizant, informed, competent, sophisticated and GST-sophisticated.

[15] The Complainant stated that if an owner does not actually incur GST under the GST/ITC scheme, then market thinking would dictate that as a GST registrant/prudent/cognizant/ informed/competent and GST-sophisticated potential buyer, will not pay an asking price if it were known to include GST, choosing rather to build an improvement and avoid paying GST through the GST/ITC scheme.

[16] The Complainant presented a memo from Deloitte & Touche (Deloitte memo) addressed to Altus Group, the Complainant's agents, dated July 7, 2014 in support of its argument that the GST is a flow-through tax. The memo stated:

> Yes, a commercial developer (or any business) is eligible to claim ITCs related to expenses incurred on the construction of a new industrial or commercial facility, provided the facility will be used in a commercial activity. The ITCs are claimable as the GST is paid on expenses and can be claimed on the registrant's GST return.

[17] The Complainant also presented an email from Kanika Parkash Vohra, Director of Financial Reporting for All Seniors Care Living Facility (ASC) to Altus advising that for each individual facility that ASC develops, 100% of the ITCs are claimed during the construction period. She stated that if the City is using the cost approach, it should exclude the GST because if ASC were ever to rebuild, it would be considered a developer and would be eligible to claim ITCs during the construction phase. The Complainant submitted that this supports its position that GST should be excluded.

[18] The Complainant submitted that GST does not add value to an improvement; therefore, it should not be included in the market value of the improvement. Further, market thinking is that GST is not a typical cost, so it should not be included as a typical cost in the Marshall and Swift calculation.

[19] The Complainant argued that GST is essentially a harmonized tax without the provincial sales tax. Harmonized tax rates are applied separately and are not compounded to avoid cascading tax. By failing to apply a BRM to back the GST out of the cost of replacement, the Respondent is taxing a tax, which is unacceptable.

[20] The Complainant argued that it does not have to show that GST does not form part of market value. Relying on *Pan Canadian Energy Services v. Alberta (Municipal Affairs)*, 2008 ABQB 393, the Complainant submitted that the onus is always on a person who asserts a proposition of fact that is not self-evident and where the subject matter of the allegation lies particularly within the knowledge of one of the parties, that the party must prove it whether it be of an affirmative or negative character. This is in contrast to the ordinary principle that the Complainant must present compelling evidence that the assessment is incorrect in some way in order to shift the onus to the City to show that the assessment is correct. In this case, the Complainant argued that the Respondent has specialized knowledge of the market and GST/ITCs, thereby shifting the burden to the Respondent to prove that there is GST in market value. Further, a failure of the Board to require an assessor to carry the onus of proof relative to the areas of particular knowledge of the assessor would result in an unfair hearing. The Complainant also cited *Rendez-Vous Inn Ltd. v. St. Paul (Town of)*, 1999 ABQB 942 for the

principle that it defies common sense that in order to evaluate his tax liability, a tax payer must first commence an action for disclosure of the technical data privy only to the municipality and then to retain engineers to interpret the data.

[21] The Complainant identified things that are assessable under the *Municipal Government Act*, RSA 2000, c M-26 (MGA) and s. 1 of the *Matters Relating to Assessment and Taxation Regulation*, Alta Reg 220/2004 (MRAT). These include property, improvement, structure and machinery and equipment. The Complainant concluded that under the legislation these definitions do not include GST; therefore, GST should not be included in the assessment.

[22] The Complainant stated that in the same jurisdiction, regulations governing all assessment schemes, including regulated property, ought to be similarly interpreted and applied for the sake of consistency and fairness. Reference was made to the Alberta Metal Buildings Cost Manual and the Alberta Construction Cost Reporting Guide (CCRG), used for regulated properties, which make a specific exclusion of the GST from the Project Costs (except Pre-construction and the Post-construction costs). Section 2.300.600 of the CCRG pertaining to GST states: "The GST paid on construction materials and services is excluded."

[23] The Interpretive Guide to the 2005 CCRG also specifically excludes GST: "The GST paid on construction materials and services is excluded. The GST paid by the owner is credited against tax collected by the owner from the sale of plant products and need not be recovered in the price of the product itself."

[24] The Complainant discussed a number of Board decisions and cases that, in its opinion, supported its argument that GST should be backed out of the cost of replacement.

[25] In *Winnipeg (City) Assessor v Manitoba Lotteries Corp.* (Order No. A-05-236) the Municipal Board of Manitoba noted that the Board did not include the GST:

> The Board notes that GST is included in Marshall and Swift estimates and that when the Board has used Marshall and Swift, GST has been assumed. Given the system of input tax credits, it is only the end user that is responsible for the GST. In this instance, the Board will not include GST (para 50).

[26] *Tolko Industries Ltd. v. Big Lakes (Municipal District),* 1998 ABQB 51 makes reference to a MGB decision which was upheld:

> ... whereas GST is a direct payment to the vendor of goods and services and the end user of these goods and services has an unconditional entitlement to the return of the GST. During the plant construction GST was paid, then refunded and therefore non-assessable (para 11).

[27] In *Executive Director of Assessment v. Food City,* 2005 NBCA 65 (*Food City*), the NBCA upheld the NBQB decision to exclude Harmonized Sales Tax (HST) from reconstruction cost calculations saying that:

> The principle of substitution is rooted in common sense: it "affirms that a prudent buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and

utility without undue delay" (see Real Estate Appraisal in Canada, at p. 14.2) (para 42).

The Court further held in *Food City* that in calculating the value including the HST:

> ...the assessment would be artificially inflated and lose any rational connection to "reality" and "truth". It would, as the Board noted, be an affront to common sense (para 45).

[28] In *Assessor of Area 8 v. Wedley* (2000), BCSC 1365 (*Wedley*), Justice Lowry states:

> The question was as the Board framed it: In estimating the value of the property for assessment purposes, is it proper appraisal practice to include an amount paid to the Federal Government for GST on the purchase of a newly constructed property? The Board determined that, on the evidence before it, the answer was No (para 26).

[29] In *Wedley*, the Complainant explained that the Court allowed the appeal because there is no value in the GST. No money is paid and no one received money. The person who has a liability is not out money because the debt is paid with GST that is collected. Therefore, it is unrealistic for a business to pay property taxes based on an assessment that includes GST as part of the value of the property.

[30] In *Memorial Gardens (Manitoba) Ltd. v. Manitoba (Municipal) Assessor* (2012) M.M.B.O No. 16 (*Memorial Gardens*), Acting Chair Walder states:

> .... the Owner's Agent, Mr. David Sanders, apparently accepts the PMA's estimated Replacement Cost New (RCN) of the structural improvements but does not agree that GST should be included in the RCN (para 9).
>
> The Board agrees with Mr. Sanders that it is now standard practice to deduct GST from the estimated costs when determining the RCN (para 10).

[31] The Complainant informed the Board that the requested assessment is within 5% of the assessment. It was acknowledged that where a requested reduction is less than 5%, the Board has discretion not to change the assessment even when the Complainant has shown the assessment to be inaccurate. Board decisions were presented to establish that there is no legislated restriction relative to the 5% guideline and that the Board can alter an assessment where there is an error in calculation or where there is compelling evidence. The Complainant submitted that the omission of an adjustment for GST in an assessment is not an assessor's opinion of value, but rather an error in the calculation of the replacement costs of the property; therefore, the Board is not bound by the 5% guideline and should reduce the assessment.

[32] On questioning by the Respondent, it was noted that the Complainant did not present any evidence that the owner of the subject was entitled to, applied for or received tax credits so it could not be determined if all the GST incurred in the cost of construction of the subject had, in fact, flowed through the owner. The Complainant stated that mass appraisal deals with what is "typical" so only the majority of owners have to be GST registrants and receive tax credits in order to be considered typical within mass appraisal.

[33] On further questioning by the Respondent, the Complainant agreed that GST registration applied to businesses owning improvements. The Complainant agreed that the Respondent's legislated duty was to assess the building, but not the business or commercial aspect of value. The Complainant agreed that filing to becoming a GST registrant is done on a business by business basis, not a property by property basis. The Complainant agreed that the Registrant owner is not claiming back anything specifically related to the property being assessed and that ITCs obtained anywhere in Canada could be applied to the owner's GST liability in relation to the subject improvement.

[34] The Respondent pointed out sections of the Tax Guide limiting time to pay the GST liability, limiting eligibility, and limiting the percentage of GST credits that can be claimed and asked the Complainant if an owner ever has to pay GST. The Complainant stated that the Deloitte memo says that a typical property owner is eligible for GST credits. The Respondent pointed out that Deloitte was not asked and so did not answer how the GST in the cost approach calculation affects market value. The Complainant stated that when a sale generates GST, the purchaser must pay it and the vendor is responsible for collecting it, but this is usually done on paper with no money changing hands. When purchasing a commercial property, GST is not a factor in the decision regarding price for either the buyer or the seller.

[35] The Board asked the Complainant to explain how the GST flow-through argument affects the market value of the property. The Complainant answered that the flow-through of GST affects market thinking. Market thinking is equated to market value which is determined by a market filled with prudent and competent buyers and vendors who are required by practicality or the law to be GST registrants. Sophisticated buyers and vendors would not pay for a property knowing that GST was part of the price. If the buyer and seller are GST registrants, then GST is not traded in the market place. Logic dictates that market thinking is that there is no GST in the trade value of properties. The Tax Guide allows the Registrant owner to deduct the GST by means of ITCs, so how can it form part of market value? The Complainant submitted that like the Court found in *Food City*, if GST is added in the assessment, it skews the assessment artificially 5% higher than market.

[36] The Board asked the Complainant what would happen to the commercial real estate market in Alberta if GST were to be removed from the assessments of commercial properties assessed on the cost approach. Prefaced by the disclaimer that the Complainant had not done a study on this issue, he thought the commercial real estate market would drop by 5%.

[37] The Board asked if ITCs ran with the property and the Complainant stated that ITCs ran with the GST registrant number. The ITCs collected in other cities or even other provinces could offset the GST liability incurred anywhere in Canada by the business holding the registrant number. The GST liability / ITCs are a liability or asset of the GST registrant, and not a liability or asset of the property. GST liability / GST credits are not purchased or sold with the property.

[38] The Board asked if the owner is liable to pay the remaining GST if the GST liability is not offset within the time allowed under the federal legislation. The Complainant stated that the Registrant owner would be liable to pay the GST incurred in the purchase of a property, although it was unlikely as buyers are sophisticated. The Board asked what happens if the federal GST scheme changes so that the GST liability cannot be offset, and the Complainant stated that changes in the GST tax scheme are made with sufficient notice to allow the market to adjust.

[39] The Board asked if GST is included in the sale price in the commercial market place. The Complainant stated that GST is in addition to the sale price, but is not actually paid. If one

party is not a GST registrant, the GST must be paid, but this is also unlikely, as all prudent and competent purchasers and sellers are GST registrants.

[40] The Board asked if the "true cost" as agreed by the parties in *Food City* was the same as "market value" in Alberta. The Complainant replied "true cost" is the consideration paid for the property under appeal.

[41] In closing, the Complainant stated that to include GST is neither fair nor equitable because if owners are GST registrants, then the GST would never be paid. If GST is included in the assessment, the assessment is artificially inflated over the market value.

[42] The Complainant argued that it had discharged its onus by providing convincing evidence that the assessment of the subject is too high by virtue of the GST being included in the assessment. Therefore, the burden of proof had shifted to the Respondent to prove that the assessment is correct.

[43] In conclusion, the Complainant requested the Board to exclude the GST from the assessed value of the improvements and to reduce the 2014 assessment of the improvements from $16,927,269 to $16,080,906. When added to the agreed upon revision of $11,493,494 for the land this would result in a revision of the assessment of the subject from $29,211,500 to $27,574,000.

Position of the Respondent

[44] Defending the 2014 assessment, the Respondent presented an Assessment Brief and a 'Legal Response to the Altus Argument Relating to the Use of GST in the Cost Approach', case law and board decisions, in support of its position.

[45] The Respondent cautioned the Board that the Complainant misstated the issue with its focus on the GST flow-through tax argument. Rather, the Board must decide if the final assessment correctly represents market value of the improvement, keeping in mind that the Respondent is mandated to determine an estimate of value. The Board was urged to focus on the subject's market value specifically for assessment purposes. The issue is not whether GST should be included in the assessment of properties calculated on the cost approach to value; rather, the issue is whether the final assessment represents market value.

[46] Section 467(3) of the MGA states that a Board must not alter an assessment which is fair and equitable having regard to the regulations and treatment of the valuation standards. Section 2 of MRAT states that the assessment must be an estimate of the value. The Respondent submitted that an assessment need only fall within an acceptable range under mass appraisal. Reference was made to *GSL Chevrolet Cadillac Ltd. v Calgary (City)*, 2013 ABQB 318, which states that MRAT grants the City some leeway in arriving at an assessment by providing for an "estimate" of the value of the fee simple estate to be made in coordination with the typical market conditions for similar properties and that an estimate of one factor does not destroy the reliability of a global assessment (at para 26).

[47] The Respondent is legislated to assess based on market value. Where market value cannot be determined due to lack of data or other circumstances, the assessment derived from the cost approach to value is accepted as market value. Replacement cost is defined in the International Association of Assessing Officer Property Appraisal and Assessment Administration (PAA) as "the cost, including material, labor, and overhead that would be

incurred in constructing an improvement having the same utility to its owner as the improvement in question, without necessarily reproducing exactly any particular characteristic of the property".

[48] The Respondent also quoted from *Appraisal of Real Estate* Second Edition as follows: "To develop cost estimates for the total building, appraisers must consider direct (hard) and indirect (soft) costs. Both types of costs are essential to a reliable cost estimate. Indirect costs include such costs as ad valorem taxes during construction." Ad valorem tax is defined in the PAA as a tax levied in proportion to the value of the thing(s) being taxed and in Wikipedia as a tax typically imposed at the time of transaction such as sales tax or value added tax. It was argued that GST is an ad valorem tax which is properly included in the calculation of replacement cost.

[49] The subject is assessed using the cost approach based on Marshall and Swift, which is a respected valuation manual that uses typical construction costs. The Respondent confirmed that Marshall and Swift defines replacement cost of a building as the total cost of construction required to replace the building and includes the cost of labor, materials, supervision, contractor's profit and overhead, architect's plans and specifications, sales taxes and insurance. As a sales tax, GST is considered to be a cost that is incurred to replace the improvement and therefore, is properly included in the cost calculation. The Respondent reminded the Board that the purpose of applying the cost approach is to determine the best estimate of the value of the improvement which is accepted as market value for the purpose of assessment.

[50] The Respondent asserted that it did not err in applying a BRM of 1.0 to the Marshall and Swift calculation, rather than a BRM of 0.9524, when assessing the subject and all other properties assessed on the cost approach in 2014. The action is consistent with the valuation process mandated by legislation. The vast majority of Alberta communities do not deduct GST when calculating assessments using Marshall and Swift.

[51] Prior to 2014, the City opted to exclude GST from cost based assessments, using an ad hoc BRM of 0.9524, because prior to the introduction of the Marshall and Swift, assessments of the cost based inventory were prepared using a variety of antiquated provincial cost manuals, most of which predated GST or did not contemplate the inclusion of GST. In order to ensure valuation consistency and equity among cost based properties, the GST included in Marshall and Swift calculations was backed out using a base rate multiplier of 0.9524. This practice was not endorsed by Marshall and Swift, but was implemented in response to Board decisions disallowing inequitable assessments arising when properties were assessed using different cost manuals. The BRM of 0.9524 was displayed under the heading "base rate multiplier" on the Marshall and swift Commercial Detail Report and is replaced in 2014 with a BRM of 1.0.

[52] Over time, the Respondent has converted the cost based inventory to Marshall and Swift. For the 2014 tax year, cost based properties similar to the subject were assessed using Marshall and Swift. As a result the Respondent is now in a position to include the GST equitably in its cost based assessments. Because GST is applied consistently, it results in a consistent equalized assessment. To back out the GST for the subject, would be inequitable and inconsistent for other properties similar to the subject.

[53] The Respondent argued that the market value of commercial properties contains a component of GST. The Respondent presented a list of 21 paired-sales of residential properties to demonstrate how the GST paid at the time of the first sale was not paid by subsequent home buyers. The Respondent suggested that the subsequent sales incorporated that GST in the selling

price and so the GST became part of market value. The Respondent stated that it is difficult to determine the percentage of GST within the market value of commercial properties. Market thinking would dictate that where a business owner cannot avoid full GST liability, the owner would pass the cost of GST to the purchaser on sale of the property. The Respondent pointed out that the Complainant did not present any evidence that GST does not form part of market value.

[54] The Respondent stated that if each and every time a building was built the GST was 100% refundable with tax credits, the Federal Government would have no reason to charge GST in the first place. The Federal Government does charge GST and in some cases the GST is refunded; however, it is never directly refunded and it is an offset of a future collection of GST. There is no guarantee that ITCs will pay the GST liability off completely under the ITC process. Further, the cost approach is often used when assessing the property of non-GST registrants or owners that are exempt or partially exempt from collecting GST, such as schools, hospitals, and churches. So long as GST is charged on construction of improvements, GST is a component of market value and it is a component of the Respondent's valuation standard.

[55] The Respondent cautioned the Board that the Complainant and the Respondent are not experts in the area of GST, and that the Complainant could be misinterpreting or misunderstanding how GST might affect market value. The Complainant's representations, in the absence of an expert, are not reliable. The Respondent pointed out a number of sections in the Tax Guide where ITCs were limited, such as for a small status supplier; operating expense situations; reduction of time limits for claiming tax credits; percentage entitlement to credits; and possible entitlement to credits for some or all of the "GST/HST embedded in the property".

[56] The Respondent asserted that a GST liability/ ITC scheme has no effect on the replacement cost of an improvement. Current federal legislation may allow certain tax payers to apply for GST tax credits, but this is unrelated to the market value of improvements. GST tax credits have time limits, exceptions, not everyone qualifies for credits, and not all credits are claimed. Therefore, the theory that GST always flows through to the end user, that the owner never pays GST, and that there is no GST in the market, is flawed. Even if it were so, the process of claiming credits is a business decision relating to a federal tax scheme that does not affect market value or an assessment.

[57] In response to a suggestion by the Complainant that GST does not add value and should not be included in the cost calculation, the Respondent stated that Marshall and Swift includes GST and other components not typically considered to add value, such as contractor's profit. The Respondent stated that the proper assessment question is not, "does an item add value to an improvement", but rather "what is the cost to replace an improvement?" In this case, to replace the improvement, GST is payable.

[58] The Respondent pointed out that the Complainant does not dispute the use of Marshall and Swift in determining replacement cost nor does it challenge the correctness of including GST in the Marshall and Swift calculation. Rather, the Complainant objects to the Respondent's change in the BRM and the Complainant did not present any evidence that the Respondent erred in doing so.

[59] The Respondent asserted that it is mandated to compare comparable properties, not to compare the tax positions of various owners. It does not have special rates for special owners. When assessing on the cost approach, the Respondent does not look at the owner's books, the state of the business or the owner's tax position.

[60] In answer to the Complainant's position that it is unacceptable to tax a tax, the Respondent submitted that the owner is taxed on an assessment, which is a best estimate of the replacement cost for an improvement. The cost approach yields a value that is accepted as market value for assessment purposes. The owner is not being taxed on a tax; the owner is being taxed on an estimate of market value for the purpose of assessment.

[61] The Respondent pointed out that the cost manuals referenced by the Complainant, such as the CCRG, are used to assess regulated properties which are treated very differently than unregulated properties. Regulated properties are defined clearly in section 1(n) of MRAT and they enjoy many adjustments, whereas, section 2 of MRAT sets out how market based property is assessed.

[62] The Respondent cautioned the Board that the Complainant misinterpreted Board decisions and case law presented and it took the Board through the same cases to distinguish them from the case at hand. The Respondent argued that some of the Complainant's cases did not actually consider GST as an issue. The Respondent also pointed out that several of the Complainant's cases were from outside of Alberta, where different legislation, assessment regulations and policies would have to be considered.

[63] The Respondent cited several Board decisions from Calgary and Edmonton where it was found that the Complainant did not prove that GST is not a component of market value and that the assessments were incorrect. In those cases, the Complainant failed to shift the onus and the assessments were confirmed.

[64] The Respondent critiqued the Board decisions that found that GST should be removed from the cost approach suggesting that those Boards made assumptions without proof that GST does not form part of market value. In addition, those Boards relied on *Food City* without analyzing the facts in that case. *Food City* was criticized because the Court of Appeal did not explain how GST liability/ ITC regime affected the market value of commercial property. *Food City* analyzed "real and true value" which may or may not be the same as market value. In that case, both parties agreed as to the "real and true value" of the property. The Respondent in this hearing submitted that since there was an agreement as to value in *Food City*, it was unclear if the GST was in addition to real and true value or part of real and true value. The Respondent also submitted that *Memorial Gardens* simply followed *Food City*, without providing reasons as to how GST affects market value.

[65] In summation, the Respondent cautioned the Board that the Complainant has the onus of proof to show that the assessment is incorrect. The Board was cautioned about the Complainant's use of terms such as "common sense", "logical conclusion" and "flow-through" which were not backed up by evidence. The Complainant admits that neither party is a GST expert, but the Complainant has the responsibility to bring expert evidence that GST does not form part of market value in order to prove that the assessment is incorrect. The Complainant did not raise any evidence to establish that changing the base modifier to 1.0 resulted in an incorrect assessment. The Complainant did not bring evidence in the form of an expert, studies, or other authority to show that GST does not form part of market value of the subject. Notwithstanding the Complainant's presentation, the GST liability/ ITC regime remains a mystery and the Board is being asked to accept a number of unproven assumptions.

[66] The Respondent submitted that the Complainant has asked the Board to make certain assumptions. Firstly, that the flow-through GST regime affects market value; secondly, that the majority of market users have a sophisticated understanding of the GST and are GST registrants;

thirdly, that all Registrant owners are eligible for 100% of ITCs; and fourthly, that market wide, all owners receive 100% ITCs.

[67] However, the Tax Guide indicates that not all owners are GST registrants; that owners may be entitled to a percentage; that owners might run out of time to collect ITCs; that credits might be used by the business elsewhere; and that there are other circumstances where GST liability remains. GST is incurred by the owner who may get a percentage of the GST back, but this does not mean that GST does not form part of market value. Further, the Complainant has not proven that GST does not form part of the market value in properties that are assessed on the income approach or the direct sales approach. The Complainant has not proven that it is incorrect to make GST a component of replacement cost when determining market value for the purpose of assessment.

[68] GST liability and ITCs are part of a corporate tax position on a corporate basis and do not affect market value. GST liability is not a liability of the property, but a liability of the owner. ITCs are not an asset of the property, but an asset of the GST Registrant.

[69] Even if the Board is convinced that GST does not form part of the market value, the Complainant did not prove that the assessment is incorrect. The Respondent asked the Board to confirm the assessment of the improvements at $16,927,269 which when added to the revised land assessment of $11,493,494 results in a total assessment of $28,420,500.

Decision

[70] The Board confirms the recommended 2014 assessment of $28,420,500 which includes the agreed upon land value of $11,493,494 and improvements value of $16,927,269.

Reasons for the Decision

[71] The overall task of the Board in this appeal is to determine whether the assessment of the subject property represents market value. Specifically, in this case, the issue is whether the GST should form part of the assessment of a property when that assessment is calculated pursuant to the cost approach to value.

[72] The Board is bound to follow the applicable legislation. According to s. 467(3) of the MGA:

> An assessment review board must not alter any assessment that is fair and equitable, taking into consideration (a) the valuation and other standards set out in the regulations and (b) the procedures set out in the regulations.

[73] According to s. 6(1) of MRAT:

> When an assessor is preparing an assessment for a parcel of land and the improvements to it, the valuation standard for the land and improvements is market value unless subsection (2) or (3) applies.

The Board notes that subsection (2) and (3) apply to parcels involved in farming operations which is not the case in this matter.

[74] "Market value" is defined in s.1(n) of the MGA:

"market value" means the amount that a property, as defined in section 284(l)(r) might be expected to realize if it is sold on the open market by a willing seller to a willing buyer.

[75] Section 284(l)(r) MGA states:

Property means (i) a parcel of land, (ii) an improvement or (iii) a parcel of land and the improvements to it.

[76] Therefore, the Board is satisfied that the subject property, which is a parcel of land with improvements, must be assessed using market value. The Board is bound by the definition of market value in the governing legislation.

[77] As stated above, the legislated definition of market value references a "willing buyer" and a "willing seller".

[78] During the merit hearing, the Board heard the Complainant state on many occasions that the market for the type of property under appeal involves buyers and purchasers who are GST registrants/prudent/informed/cognizant/competent/sophisticated and sufficiently versed in the intricacies of the GST legislation. These market participants are satisfied that, although there is a GST liability attached to the transfer of this type of property, the liability would be "washed out" or balanced by means of ITC credits. Effectively, the Complainant contended, GST is not paid and so does not form part of the transaction or the market value of commercial properties.

[79] The Board heard much explanation and argument from the Complainant describing GST as a "flow-through" system in which the end user pays, although the Complainant's remarks were prefaced by the disclaimer that he was not an expert in GST, and that very likely no one present at the hearing was an expert.

[80] The Board was left to decide whether the phrases "willing buyer" and "willing seller" embody the ordinary meaning of parties acting without duress in an open market transaction or whether those phrases imply a higher standard. The Board looked to see what evidence had been presented on this point.

[81] The Complainant urged the Board to conclude that in the context of the market of the subject property, parties would always be sophisticated and prudent enough to be GST registrants and only participate in a transaction if the interplay of GST liability and ITC credits meant that effectively no GST liability would arise. The Complainant did not provide any evidence to support this opinion other than the assertion that such a position would be logical and in line with common sense. To support his opinion, the Complainant referenced the interpretive Tax Guide produced by the Respondent, but the Tax Guide only provides the mechanics and technical workings of the GST/ITC regime. The Tax Guide is not evidence of how this regime actually works in the market nor how the regime affects the market place and market thinking. The Complainant also presented the Deloitte memorandum and the ASC email, which were in house documents offering general opinions and were not persuasive to the Board.

[82] The Complainant could not confirm to the Board that the subject's owner was, in fact, a GST registrant, other than his opinion that it would be illogical for the subject's owner not to be a GST registrant.

[83] The Board then heard evidence from the Respondent, who also referenced the Tax Guide, to illustrate that parties to a transaction are not always registrants, that there are limits to the ITCs

that can be claimed and that not all registrants are entitled to 100% of ITCs. The Respondent showed that there are instances in which GST does become payable on a transaction in this market. These facts are evident from a review of the Tax Guide, and do not require any speculation with respect to what may be considered common sense in the market for commercial properties.

[84] It is uncontradicted that the market transactions under consideration attract GST liability. The Respondent raised enough evidence to demonstrate that GST liability is not always "washed out" and that GST liability remains.

[85] The Board weighed the evidence from both parties on the question of the standard to be applied to the parties in the market. Beyond his stated opinion, the Board did not hear any evidence from the Complainant that the legislated standard of "willing buyer " and "willing seller" should be expanded to include the qualities of GST registrant/prudent/informed/ cognizant/competent and GST-sophisticated. The Complainant did not present Board decisions, case law or other authority to persuade the Board that the test of "willing buyer" and "willing seller" should be interpreted to include these elevated characteristics beyond the plain meaning of the words. Nor did the Complainant provide an expert to convince the Board that "willing buyer" and "willing seller" should be held to this higher or expanded standard.

[86] The Board was not persuaded that it should expand the legislated definition of "market value" as being between a "willing buyer" and "willing seller" and impose a higher standard. The Board is not swayed by the Complainant's assertions that common sense dictates that in this market place a buyer and seller necessarily possess a degree of sophistication that rises above mere willingness as it is understood in the context of the legislation. This Board bases its decisions on evidence and not opinion.

[87] The Complainant referred to the standard of mass appraisal in which he offered his opinion that the typical buyer in this market place would conduct himself so that GST is not payable in these sorts of transactions. However, the Board did not hear any market evidence from the Complainant that this was the case, beyond his stated option that it is just common sense.

[88] The Board heard other arguments from the Complainant as to why the GST should not form part of market value and thus not be factored into the assessments calculated according to the cost approach.

[89] The Complainant argued that two municipalities in Alberta do not include GST in assessments calculated according to the cost approach. Therefore, for the City of Edmonton to include GST is an affront to fairness. The Board does not accept the argument that for the sake of consistency and fairness, all jurisdictions ought to apply and interpret the assessment process in a similar manner. In addition, other municipalities in Alberta, but for two mentioned, do include GST in assessments calculated according to the cost approach.

[90] As well, the Board does not agree with the Complainant's argument that because GST is specifically excluded from some types of regulated properties, it should follow by analogy that the GST should be removed from unregulated properties. The legislation treats regulated and unregulated properties differently and the Board has no authority to manipulate what was intended by the legislators. Further, the Board notes that GST is not removed from all aspects of regulated property, just where specifically excluded. If the Complainant's argument is to be

accepted and consistency in all assessment regulations applied, then GST must be included in the assessment of unregulated property unless it is specifically excluded.

[91] With respect to the Complainant's argument that the MGA does not include GST in its definitions of improvements, property or equipment, it is the opinion of the Board that these definitions do not restrict valuation so as to exclude GST. The assessment is based on the valuation standard of market value within the requirements of s. 2 of MRAT. Like insurance, builder's mark up and architect fees, the Board finds that GST is a proper component of the valuation of an improvement.

[92] The Complainant also argued that GST does not add value to an improvement and therefore should not be included in market value. The Board notes that the Marshall and Swift manual (which, aside from its inclusion of GST is not being challenged) also includes supervision, contractor's profit, architect's plans and insurance in the calculation of replacement cost. These are all items which might not be thought to add value, but nevertheless factor into the calculation of replacement value. GST is in the same category.

[93] Although the Complainant argued that it was not required to provide the Board with an alternate calculation for assessment, the Board notes that the Complainant requested that the former base rate multiplier be reinstated or the assessment of the improvement be reduced by 5%. However, it is unclear if 4.86% (which the Respondent described as ad hoc) or 5% is the value of the GST included in the Marshall and Swift calculation and if the reduction should be applied before or after depreciation. The Complainant has failed to demonstrate the level to which GST would be recoverable by his hypothetical, sophisticated market participants.

[94] With respect to the Complainant's argument that to include GST would be imposing a tax on a tax, the Board notes that the Complainant did not present any evidence, legislation or policy prohibiting a tax on a tax, and that indeed the Respondent argued that GST is applied on many items with hidden taxes.

[95] The Board thoroughly reviewed the cases presented by both parties. In the opinion of the Board, many of the cases presented by the Complainant deal with assessment in other provinces and no evidence was presented to show that these provinces have similar assessment legislation, regulations and municipal policies to those that apply to the subject. The Board concluded that in several instances, the Complainant misinterpreted the cases or presented cases where GST was mentioned, but was not at issue.

[96] As well, the Board put little weight on some case law presented by the Respondent as those cases dealt with residential property or GST was not an issue.

[97] On balance, the Board placed most weight on decisions presented by the Respondent in which boards were charged with determining whether GST should be included in the calculation of the replacement cost of improvements. In those cases, the boards decided not to remove the GST from the assessments under appeal as the Complainant had not persuaded the boards that the assessment was incorrect.

[98] With respect to the issue of onus, the Board is not persuaded by the Complainant's argument that the treatment of GST within the market lies particularly within the knowledge of the Respondent, thereby shifting the onus to the Respondent to prove that GST does form part of market value. This contradicts the Complainant's main argument. The Complainant urges the Board to accept as a fact that the exclusion of GST in the market is self-evident and a matter of

common sense to all the sophisticated, willing buyers and sellers of commercial properties. The Board is of the opinion that the Complainant must establish a prima facie case that the assessment is incorrect, before the onus shifts to the Respondent to show that the assessment is correct.

[99] Since the Board is not reducing the assessment of the improvement, it is not necessary for the Board to address the Complainant's argument that assessments shown to be incorrect and that are within the 5% guideline, should nevertheless be revised.

[100] In conclusion, the Board is of the opinion that the Complainant's interpretation of market value requires an unwarranted and unsubstantiated expansion of the standard this Board must apply. The test requires consideration of how a "willing buyer" and "willing seller", as understood within the context of the MGA, will act. In the Board's view, willingness in this context means to act without duress. The Board was not provided with any evidence or authority to the contrary. There was no evidence, other than the Complainant's opinion, to suggest the market for commercial properties is necessarily comprised of participants with special knowledge or abilities, or that these market participants will always be GST registrants who are sufficiently sophisticated to always recoup the GST on a transaction.

[101] As well, the Board is satisfied that none of the other arguments presented by the Complainant are bolstered with enough evidence to show that the assessment is incorrect and that GST is not part of market value.

Dissenting Opinion

[102] There is no dissenting opinion.

Heard October 23, 2014.

Dated this 18 day of Nov, 2014, at the City of Edmonton, Alberta.

Shannon Boyer, Presiding Officer

Appearances:

Brett Flesher
for the Complainant

Cam Ashmore
Doug McClennan
for the Respondent

This decision may be appealed to the Court of Queen's Bench on a question of law or jurisdiction, pursuant to Section 470(1) of the Municipal Government Act, RSA 2000, c M-26.

Appendix

Legislation

The *Municipal Government Act*, RSA 2000, c M-26, reads:

> s 1(1)(n) "market value" means the amount that a property, as defined in section 284(1)(r), might be expected to realize if it is sold on the open market by a willing seller to a willing buyer;
>
> s 467(1) An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.
>
> s 467(3) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration
>
> (a) the valuation and other standards set out in the regulations,
>
> (b) the procedures set out in the regulations, and
>
> (c) the assessments of similar property or businesses in the same municipality.

Exhibits

C-1 – Complainant's Brief (310 pages)
C-2 – Rebuttal (193 pages)
C-3 – Cases (38 pages)
R-1 – Respondent's Brief (254 pages)
R-2 – City Legal Response Re: GST in Cost Approach (138 pages)
R-3 – Recent GST Cases (86 pages)
R-4 – Board Order, Strathcona County (13 pages)