Docket: 2012-2801(GST)G

BETWEEN:

703008 B.C. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 20 and 21, 2014, at Kelowna, British Columbia
and written submissions filed on January 13, 2015.

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant:	Kenneth Hauser
Counsel for the Respondent:	Victor Caux
	Devi Ramachandran

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessment made under the *Excise Tax Act* for certain reporting periods of the Appellant ending between September 1, 2008 and August 31, 2009, the notice of confirmation of which is dated March 29, 2012, is dismissed, with costs.

Signed at Antigonish, Nova Scotia, this 20th day of August 2015.

"S. D'Arcy"

D'Arcy J.

Citation: 2015 TCC 208
Date: 20150820
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703008 B.C. LTD.,

Appellant,

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Respondent.

REASONS FOR JUDGMENT

D'Arcy J.

[1] The issue before the Court is whether, during certain GST reporting periods ending between September 1, 2008 and August 31, 2009 (the "Assessed Periods"), the Appellant, for the purposes of Part IX of the *Excise Tax Act* (the "*GST Act*" or the "Act"), supplied certain condominium units by way of sale or by way of lease.

[2] I heard from the following witnesses: Ms. Diane Bold, who during the relevant period was a mortgage specialist with the Royal Bank; Mr. Robert Hager, who during the relevant period was the president of a sales and marketing company called Tactx Project Sales and Marketing ("Tactx"); and Mr. Brian Kevin Bird, the president of the Appellant.

[3] I found all three witnesses to be credible.

Summary of Facts

[4] Unless otherwise noted, the following facts are taken from the Partial Agreed Statement of Facts (PASF) attached as Appendix A to these Reasons for Judgment.

[5] The Appellant is a real estate development company based in Kelowna, British Columbia. One of its projects was a condominium development in Kelowna

known as Terravita. The project as planned by the Appellant was to consist of four private gated condominium buildings.

[6] Between September 2007 and August 30, 2009, the Appellant constructed three of the four Terravita condominium buildings. The first condominium unit was available for occupancy around July 2008.[1]

[7] It appears that the Appellant began to market the Terravita project in March of 2007. It retained Tactx to market and sell the condominium units in the Terravita project (the "Terravita Condo Unit(s)").[2]

[8] Mr. Bird testified that the Appellant wanted to sell the Terravita Condo Units as quickly as possible in order to pay down the $33 million loan the Royal Bank had provided to finance the construction of the project. In order to accomplish this goal in a very competitive real estate market, it implemented a financing program referred to as the Terra-Living Financing Program (the "Financing Program"). Mr. Bird described the Financing Program as an interest-only financing plan, nominally on $100,000.[3]

[9] The witnesses described the program using the example of a Terravita Condo Unit with a $400,000 fair market value, where the Appellant's customer wished to use the Financing Program for $100,000 of the $400,000 fair market value.[4] In such a situation, the program worked as follows:

- The Appellant and its customer entered into an offer to lease agreement (the "Offer to Lease").

- The Offer to Lease provided for the following:

    - An offer to lease the Terravita condo unit for a 99-year term.

    - A monthly lease payment ($333.33 in the example) for the first three years of the lease. This amount was calculated as the interest

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1 Exhibit R-2, pages 35-36.
2 Exhibit A-1; Transcript, Testimony of Mr. Hauser, pages 37-39.
3 Transcript, Testimony of Mr. Bird, pages 115-120 and 135-138.
4 Transcript, Testimony of Ms. Bold, pages 16-17 and 21-22.

payable on a specific amount ($100,000 in the example) financed at 4% (the "Monthly Lease Payment").[5]

- A prepaid lease payment ($300,000 in the example), paid on the closing of the transaction (the "Closing Date"), equal to the difference between the fair market value of the condominium ($400,000 in the example) and the amount used to calculate the Monthly Lease Payment ($100,000 in the example) (the "Prepaid Lease Payment").

- An option for the Appellant's customer to purchase the condominium (the "Purchase Option") for an amount which was set at three hundred times the Monthly Lease Payment (the $100,000 used to calculate the Monthly Lease Payment).

[10] Before taking possession of a Terravita condo unit, the Appellant's customer signed a lease, which is referred to as the "Express Charge Terms Form of Lease" (the "Condo Lease").[6]

[11] The Royal Bank and the Valley First Credit Union provided financing to customers in respect of the Prepaid Lease Payments.[7] Ms. Bold described it as financing involving a lease component. Mr. Bird agreed that the customers granted the Royal Bank a mortgage of lease.[8]

[12] Ms. Bold and Mr. Bird, using the example referred to above, described the financial benefits of the Financing Program. Ms. Bold noted that the Appellant's customer's monthly cash outflow was reduced since he/she only paid interest on the $100,000 used to calculate the Monthly Lease Payment.

[13] She explained that the Financing Program also reduced the amount of the down payment required by the Royal Bank. If the customer simply purchased a Terravita Condo Unit for $400,000, then the Royal Bank could provide 80% financing on the $400,000, resulting in an $80,000 down payment. However, under the Financing Program the Royal Bank could finance up to 95% of a $300,000

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5 The Monthly Lease Payment was set for a three-year term then increased by a formula set out in the Agreement every three years for the duration of the ninety-nine year term.

6 PASF, pages 2-3; Exhibit 8 to Exhibit A-9.

7 Transcript, Testimony of Mr. Bird, pages 205-206.

8 Transcript, Testimony of Ms. Bold, pages 26-27; Testimony of Mr. Bird, pages 204-205.

Prepaid Lease Payment if the customer intended to live in the condominium, resulting in a down payment of $15,000. If the customer intended to rent the condominium to a third party, then the Royal Bank could finance up to 80% of a $300,000 Prepaid Lease Payment, resulting in a down payment of $60,000.[9]

[14] Mr. Bird testified that, in the Appellant's eyes, the Financing Program lowered the purchase price by $100,000. He testified that the $100,000 represented the Appellant's profit on the sale of a condominium. The Appellant was content, in the short term, to receive the 4% interest on the $100,000. The management of the Appellant believed (on the basis of their experience in the local real estate market) that, when the customer sold his/her leasehold interest in the condominium to a third party, he/she would exercise the Purchase Option and the Appellant would receive the $100,000.[10]

[15] It is clear from the Appellant's financial statements that the Financing Program was a financial success for the Appellant in 2008 and 2009, two very difficult years in the real estate market because of the financial crisis.[11]

[16] The Appellant initially supplied all strata lots in Terravita by way of the Offer to Lease. However, between 2007 and 2009 the fair market value of the Terravita Condo Units fell by anywhere from $80,000 to $120,000. This resulted in the Financing Program generating negative cash flows for the Appellant. As a result, the Appellant started to sell a number of the Terravita Condo Units to customers using written offers to purchase pursuant to which the customer agreed to purchase the condominium on the closing date of the sale (the "Agreement of Purchase and Sale").[12]

[17] During the Assessed Periods, the Appellant supplied seventy-six of the Terravita Condo Units as follows:

- For 18 of the condominiums, the recipient of the supply signed the Offer to Lease but exercised the Purchase Option prior to the closing date.

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9 Transcript, Testimony of Ms. Bold, pages 21-23.

10 Transcript, Testimony of Mr. Bird, page 137.

11 Exhibits A-15, A-16; Transcript, Testimony of Mr. Bird, pages 177-179.

12 Transcript, Testimony of Mr. Bird, pages 175, 216-217; Exhibit 10 to Exhibit A-9.

- For 44 of the condominiums, the recipient of the supply signed an Offer to Lease, did not exercise the Purchase Option and signed the Condo Lease (the "44 Terravita Condo Units")

- For 14 of the condominiums, the recipient purchased the unit pursuant to the Agreement of Purchase and Sale. In these cases the recipient did not enter into an Offer to Lease.[13]

[18] During the Assessed Periods, the Appellant collected and remitted GST on the full purchase price in respect of the supplies to the 18 recipients who exercised the Purchase Option prior to the closing date and to the 14 recipients who purchased their units pursuant to the Agreement of Purchase and Sale. The Minister accepted the Appellant's treatment of these sales.

[19] The Appellant did the following in respect of the supplies of the 44 Terravita Condo Units:

- Signed a Certificate of GST stating that the supply was a sale subject to GST.

- Collected from the recipients, and remitted, GST on the Prepaid Lease Payment ($300,000 in the example).

- Self-assessed and remitted GST on the amount on which the Monthly Lease Payment was calculated ($100,000 in the example).

- When calculating its net tax claimed a credit of $36,189.02 in respect of the subsection 254(2) new housing rebates that certain recipients of the supplies had assigned to the Appellant.[14]

- Did not collect GST on the Monthly Lease Payments.[15]

[20] The Minister assessed the Appellant additional net tax for the Assessed Period consisting of GST of $599,605.34 deemed to be collectable on a deemed

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13 PASF, pages 2-3.
14 PASF, page 4.
15 Transcript, Testimony of Mr. Bird, page 197.

self-supply of the 44 Terravita Condo Units,[16] assessed GST collected but not reported of $11,499.95, and disallowed the credits of $36,189.02 claimed in respect of the subsection 254(2) new housing rebate.

[21] The Appellant accepts that it is liable for the $11,499.95 of GST collected but not reported, but does not agree with the other adjustments. It is the Appellant's position that the supply of the 44 Terravita Condo Units pursuant to the Offer to Lease and the Condo Lease was not subject to the so-called self-supply rules because the Appellant supplied these units by way of "sale" and not by way of "lease, licence or similar arrangement".

The Law

[22] During the relevant periods, every recipient of a taxable supply that was made in British Columbia was required to pay GST equal to 5% of the value of the consideration for the supply.[17]

[23] There is no issue in this appeal with respect to the recipient of the supply, the place of the supply or the total amount paid by the recipient of the supply.

[24] The issue is whether the Appellant supplied the 44 Terravita Condo Units to its customers by way of sale or by way of lease.

[25] The *GST Act* contains detailed rules with respect to the taxation of supplies of real property. As with most property, the Act taxes sales and leases of real property in very different ways. This is particularly true when the supply in question is a supply of a residential property such as a residential condominium.

[26] Pursuant to the definitions in subsection 123(1), each Terravita Condo Unit is a residential condominium unit, a residential unit and a residential complex for the purposes of the *GST Act*.

Taxation of Sales and Leases of New Residential Condominium Units

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16 The amount assessed was equal to the GST payable on the fair market value of the 44 Terravita Condo Units minus the amount the Appellant self-assessed in respect of the Monthly Lease Payments; Transcript, page 230.

17 Section 165.

[27] The sale of a new residential condominium unit constitutes a taxable supply. Generally speaking, the sale of a used residential condominium unit constitutes an exempt supply and is not subject to GST.[18] While the seller of a used residential condominium unit is not required to collect GST on the sale, the seller is not entitled to claim input tax credits for any tax paid on the acquisition of the unit.

[28] Leases of both new and used residential condominium units constitute non-taxable exempt supplies provided the lease is for at least one month and the condominium unit is being leased for the purpose of its occupancy as a place of residence or lodging by an individual.[19] In such a situation, the lessor of the residential condominium unit is not entitled to claim input tax credits for any GST paid on the acquisition of the condominium unit or with respect to expenses incurred in respect of the leasing of the condominium unit.

[29] A lease of a new or used residential condominium unit constitutes a taxable supply if the unit is supplied for a period of less than 30 days, such as in the case of a daily or weekly supply of a condominium unit at a resort.

Timing Rules

[30] The *GST Act* contains specific rules relating to when a GST/HST registrant must collect and remit amounts in respect of the GST. A registrant remits its *net tax* for each of its GST reporting periods. Generally speaking the *net tax* of a registrant for a GST reporting period is equal to all the GST/HST that was actually collected by the registrant during the GST reporting period, plus all GST/HST that became collectable during the period, minus all input tax credits claimed in the GST/HST tax return for the reporting period.[20]

[31] GST becomes collectable by a registrant at the time it becomes payable by the recipient of the supply.[21] Sections 168 and 152 of the *GST Act* contain a number of timing rules that determine when the GST becomes payable by the recipient of the supply.

[32] Subsection 168(5) contains the timing rules for real property. This provision provides that, in most instances, the GST in respect of a taxable supply of real

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18 See Sections 2, 3 and 4 of Part I of Schedule V to the *GST Act*.

19 Section 6 of Part I of Schedule V to the *GST Act*.

20 Section 225.

21 This is a result of the operation of subsection 221(1).

property by way of sale is payable on the earlier of the day ownership of the property is transferred to the recipient and the day possession is transferred under the agreement for the supply.

[33] However, subsection 168(5) contains a special rule applicable to the taxable supply by way of sale of a residential condominium unit. This rule applies when the supplier transfers possession of the condominium unit to the recipient of the supply before the condominium complex in which the unit is situated is registered as a condominium: in other words, in a situation where the supplier provides the recipient with possession of the condominium but cannot transfer ownership, since the supplier can only transfer ownership once the condominium complex is registered as a condominium under the applicable provincial law.

[34] In such a situation the GST is deemed to be payable on the earlier of the day ownership is transferred and sixty days after the condominium is registered.

[35] If a residential condominium unit is supplied by way of sale, and possession is not transferred until after the condominium is registered, the general rule applies; the GST is payable by the recipient and collectable by the supplier on the earlier of the day ownership of the residential condominium unit is transferred to the recipient and the day possession is transferred under the agreement for the supply.

[36] If a residential condominium unit is supplied by way of taxable rental or lease (e.g., for a period of less than one month), then, generally speaking, the GST is payable on the day the recipient of the supply is required to make the rental or lease payment.[22]

Self-Supply Rules

[37] Section 191 contains rules that are referred to as the self-supply rules.

[38] As discussed previously, leases of both new and used residential condominium units for a period in excess of one month constitute non-taxable exempt supplies. Subsection 191(1) contains rules that attempt to ensure that a builder of a single unit residential rental property pays the same amount of non-refundable tax as a person who purchases a new single unit residential rental property from a third party.

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[22] Subsection 152(2), assuming that the residential condominium unit is supplied under an agreement in writing.

[39] One situation in which the rules in subsection 191(1) apply is where a builder of a residential condominium unit gives possession or use of the unit 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.

[40] In such a situation, the subsection deems the builder to have made and received a taxable supply by way of sale of the residential condominium unit. The builder is also deemed to have paid as a recipient under the Act and to have collected as a supplier under the Act tax in respect of the deemed supply calculated on the fair market value of the residential condominium unit.

[41] The effect of the rule is that the builder of the residential condominium unit is required to remit tax on the fair market value of the unit.

[42] Similarly to the timing rules in subsection 168(5), subsection 191(1) recognizes the situation in which the possession or use of a residential condominium unit is given under a lease to an individual who has entered into an agreement of purchase and sale to purchase the residential condominium unit once the condominium is registered. In such a situation, the self-supply rules do not apply.[23]

The Appellant's Arguments

[43] The Appellant's main argument is that, for the following reasons, the Appellant supplied the 44 Terravita Condo Units by way of "sale" and not by way of "lease, licence or similar arrangement", as those terms are used in the *GST Act*:

1. The *GST Act* distinguishes between a supply by way of "lease, licence or similar arrangement" and a supply by way of "sale".

2. "Sale" includes a transfer of possession of property under an agreement to transfer ownership of the property.

3. A "sale" can occur where there is possession before ownership.

4. The Appellant's supply of each of the 44 Terravita Condo Units in question involved a transfer of possession of each of the condominium units under an agreement to transfer ownership of the condominium units.

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[23] Subparagraph 191(1)(*b*)(i).

5. To treat the supply of the 44 Terravita Condo Units otherwise than as a "sale" for the purposes of the Act would give rise to absurd results.

[44] The Appellant also argued that, if the supply of the 44 Terravita Condo Units constituted a supply by way of "lease, licence or similar arrangement", the subsection 191(1) self-supply rules did not apply since the supply fell within the exclusion in subparagraph 191(1)(*b*)(i).

Taxation of a Sale vs. a Lease of the 44 Terravita Condo Units

[45] The GST is a transaction tax levied on a specific supply according to the nature of the supply at the time the supply is deemed to be made under the *GST Act*.

[46] If the supply of each of the 44 Terravita Condo Units constituted a sale under the *GST Act*, the supply constituted a taxable supply of real property.[24] The supply would be deemed to have been made at the time the parties entered into the Offer to Lease,[25] with the Appellant being liable to collect from the recipient GST on the value of the consideration for the supply.[26] Assuming the relevant Terravita condominium building was registered as a condominium prior to the Closing Date for each of the 44 Terravita Condo Units at issue, GST on the full value of the consideration for each of the 44 Terravita Condo Units was collectable by the Appellant and payable by the recipient on the Closing Date.[27]

[47] In such a situation, the subsection 191(1) self-supply rules would not apply to the Appellant, since it did not supply the property by way of lease, licence or similar arrangement.

[48] If the supply of each of the 44 Terravita Condo Units constituted a supply by way of lease, licence or similar arrangement, then such supply will constitute a non-taxable exempt supply under section 6 of Part I of Schedule V to the *GST Act*. This will be the result since the Condo Lease provides for a lease of at least one

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24 Generally speaking, the supply would not constitute an exempt supply since the supply was made by the Appellant, who is considered the builder of the condominium units for the purposes of the *GST Act*.

25 Section 133.

26 Subsections 165(1) and 221(1).

27 Subject to the rules in subsection 168(6) for non-ascertained consideration and assuming that possession of the unit is not given to the recipient prior to the closing date.

month for the purpose of its occupancy as a place of residence or lodging by an individual.

[49] If the Appellant supplied each of the 44 Terravita Condo Units by way of lease, licence or similar arrangement, it was required to self-assess GST under subsection 191(1), unless the exclusion in paragraph 191(1)(*b*)(i) applied to the transaction. If one assumes that the exclusion did not apply, the Appellant would be required to self-assess tax on the fair market value of the units.

Appellant's treatment of the GST

[50] In respect of the supply of the 44 Terravita Condo Units, the Appellant collected from the recipients and remitted GST on the Prepaid Lease Payment. The Appellant also self-assessed and remitted GST on the amount on which the Monthly Lease Payment was calculated.

[51] In effect, the Appellant used what I will call a hybrid method when accounting for the GST. It treated the portion of the supply that related to the Prepaid Lease Payment as a supply of a Terravita condo unit by way of sale and the remainder of the supply as a lease of a Terravita condo unit. This is the result since the Appellant would only have to self-assess GST under the self-supply rules if it made a supply by way of lease.[28]

[52] There are no provisions in the *GST Act* that allow a portion of a single supply of a residential condominium unit to be taxed as a sale and another portion of the same supply to be taxed as a lease.[29]

[53] Therefore, even if I find that the Appellant supplied the 44 Terravita Condo Units by way of sale, the Appellant still has not properly accounted for the GST. If it were a sale, then, as just discussed, the Appellant should have collected GST from the recipients in respect of the full purchase price for the 44 Terravita Condo Units. Technically, if a sale did occur, the recipients of the supplies of the 44 Terravita Condo Units are still liable for GST on the portion of the purchase price that is in excess of the Prepaid Lease Payment. This liability is not extinguished

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28 See section 191.

29 Subsection 136(2) allows for the splitting of a single supply of real property comprising both a residential complex and real property that is not a residential complex. It does not apply to the situation before me, since the only property being supplied here is a residential complex.

until the recipient either pays the tax to the supplier or remits the tax directly to the CRA.

Application of the Law to the Facts Before the Court

[54] The definition of sale in subsection 123(1) of the *GST Act* states the following: "in respect of property, includes any transfer of the ownership of the property and a transfer of the possession of the property under an agreement to transfer ownership of the property". Because the definition uses the word "includes", a sale according to the common law meaning of the word is also a sale for GST purposes.[30]

[55] The inclusion in the definition of sale of any transfer of ownership of property ensures that any agreement providing for the transfer of the beneficial ownership of a property will constitute a sale.[31]

[56] The *GST Act* contemplates situations where a single supply may result in the transfer of possession prior to the transfer of ownership pursuant to the same supply.[32] The inclusion in the definition of sale of a transfer of possession under an agreement to transfer ownership ensures that, if at the time the supply is deemed to be made under the *GST Act* only possession is given to the recipient, the supply will still constitute a sale if the agreement for the specific supply provides for the subsequent transfer of ownership of the property.

[57] In my view, regardless of when a supplier provides possession to the recipient, the supply will only constitute a sale under the *GST Act* if it is made under an agreement that, at the time the supply is made, binds the supplier to transfer ownership of the property and binds the recipient to acquire such ownership. If the supplier provides the recipient with possession and, at the time the supply is made, there is no agreement binding on both parties to transfer ownership, then, in most instances, the supply will be by way of lease, licence or similar arrangement.

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30 See *Storrow v. R.*, [1978] CTC 792 at 794.

31 This ensures that a gift of property and a transfer of ownership under a barter transaction constitute sales under the *GST Act*, see Department of Finance Technical Notes, May 1990, subsection 123(1) "sale", reproduced in Canada GST Service, Binder C2 (Toronto: Carswell, 2013) at 123-905.

32 See for example, subsections 168(5), 191(1) and 191(2).

[58] The Offer to Lease[33] and the Condo Lease[34] refer to the situation where the Appellant provides possession of the condominium units to the recipient under a lease for a 99-year term with the option to purchase the unit at a future date.

[59] Sections 1, 2 and 3 respectively of the Offer to Lease state:

- The offer is to lease those lands designated . . .
- The offer is to lease the Premises upon the terms and conditions set forth in the Lease . . .
- The Lease will be for a term of Ninety-nine (99) years and shall commence on . . .[35]

[60] The Condo Lease clearly states that the transaction is a lease of a condominium unit. The Recitals and Articles 1.01 and 13.05 of the Condo Lease state the following:

EXPRESS CHARGE TERMS
FORM OF LEASE

THIS LEASE dated the ____ day of _____, 2007.

WHEREAS the Transferor (in these Express Charge Terms referred to as the "Landlord") is the registered owner of those lands described in . . .

AND WHEREAS the Transferee (in these Express Charge Terms referred to as the "Tenant") wishes to lease the Lands from the Landlord.

. . .

1.01 WITNESS that in consideration of the rents reserved and the covenants and provisos herein contained on the part of the Tenant, the Landlord hereby leases to the Tenant the Leased Premises to hold for and during the term of ninety-nine (99) years . . .

. . .

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33 Example provided in Exhibit A-5.

34 Exhibit 8 of Exhibit A-9, Testimony of Mr. Bird, pages 134-135. Mr. Bird testified that this form of lease was used for all of the 44 Terravita Condo Units.

35 Exhibit A-5.

> 13.05 The sole relationship between the parties hereto is that of Landlord and Tenant and nothing contained herein nor any acts of the parties hereto will be deemed to create any other relationship.[36]

[61] Further, the documents contain most of the terms one would expect to find in a lease of a residential unit such as a residential condominium.

[62] Article 2.01 of the Condo Lease sets out the rent for the term of the lease; Article 2.04 deals with operating costs and states that the lease shall be a completely carefree net lease; Article 4 addresses insurance; Article 5 addresses the tenant's use of the premises; Article 6.01 addresses the maintenance and repair of the units during the term of the lease; Article 8 addresses assignments of the lease and subleasing; and Article 10 deals with defaults by the tenant, including the failure to pay the rent when it is due.

[63] The agreement when read as a whole clearly evidences a lease, not a sale, of each of the 44 Terravita Condo Units. The following facts from the PASF support my conclusion:

- "The Appellant held title to the condos."
- "The Appellant registered the Agreement [the Condo Lease] at the Land Titles Office as leases on the Appellant's titles."
- "The Recipients had no right to a return of any of the Prepaid Rent or Monthly Rent."
- "Payment of the rent did not automatically entitle or transfer ownership of the Condos to the Recipients."[37]

[64] The Condo Lease provides the transferee with the use of the property during the term of the lease, with the Appellant retaining ownership of the condominium during the term of the lease.

[65] The Condo Lease does grant the recipient the option to acquire ownership of the condominium. Article 16.01 of the Condo Lease states the following:

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[36] Exhibit 8 to Exhibit A-9.

[37] Partial Agreed Statement of Facts, paragraphs 14, 15, 24, and 26.

> In consideration of the premises and the covenants entered into by the Tenant, the Landlord hereby grants to the Tenant or the Tenant's Mortgagee or assigns the option, during the term of the Lease or any renewal thereof to purchase the Lands for the sum of [*sic*] equal to the product of the current monthly rent payment as provided in Section 2.01 multiplied by the number 300.[38]

[66] In my view, an option that grants a lessee the ability to obtain ownership of the leased asset upon the lessee's election to exercise the option does not convert a lease into a sale for the purposes of the *GST Act*. The option is not, at the time the supply is made, a binding agreement by the supplier to transfer, and by the recipient to acquire, beneficial ownership of the property. Rather, it is a clause in the lease that provides the recipient with the option of acquiring ownership of the property in the future. Further, the provision of the property by way of lease and the subsequent transfer of ownership of the property upon the exercise of the option granted under the lease are separate supplies.

[67] The Appellant agrees that the option granted in the Condo Lease is not, at the time the supply is made, a binding agreement to transfer ownership of the condominium that is subject to the Condo Lease. The PASF states that the recipients of the supply of the 44 Terravita Condo Units were not obligated to purchase the condominiums, and the Appellant retained title to the condos unless the recipients exercised the option to purchase.

[68] Counsel for the Appellant argued that the Condo Lease was part of a financing mechanism to facilitate sales of the condominiums. He focused on the fact that the plan reduced the recipient's payments to be made at the time of the supply. He argued that it facilitated sales of the condominiums by, in his words, "giving the prospective owner the ability to get ownership of their condo unit at any time without penalty, and with the minimal amount of hoops to jump through".

[69] I do not agree with this argument. Suppliers in many instances use leases as a financing method to facilitate the supply of property. However, they are still leases. The fact that a lessee has the option to elect to purchase the leased property on some future date does not convert the lease into a sale. In my view, it is only when property is supplied pursuant to an agreement that is referred to as a lease, but which requires the recipient, at the time the supply is made, to purchase the property, that the so-called lease may be considered a sale for the purposes of the *GST Act*.

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[38] Exhibit 8 to Exhibit A-9.

[70] Counsel for the Appellant also argued that it is not in every situation that an option results in a sale. However, he argued, such is the result in the fact situation before the Court, primarily because all of the recipients intend to exercise the option to purchase prior to the expiry of the 99-year term. For the reasons just stated, I do not accept his argument.

[71] In addition, as this Court has noted on numerous occasions, the form of the transaction matters. In *Friedberg v. Minister of National Revenue* (1991), 135 N.R. 61, the Federal Court of Appeal stated at paragraph 4:

> In tax law, form matters. A mere subjective intention, here as elsewhere in the tax field, is not by itself sufficient to alter the characterization of a transaction for tax purposes. If a taxpayer arranges his affairs in certain formal ways, enormous tax advantages can be obtained, even though the main reason for these arrangements may be to save tax (see *Irving Oil Ltd. v. Minister of National Revenue* (1991), 126 N.R. 47; 91 D.T.C. 5106, per Mahoney, J.A.). If a taxpayer fails to take the correct formal steps, however, tax may have to be paid. If this were not so, Revenue Canada and the courts would be engaged in endless exercises to determine the true intentions behind certain transactions. Taxpayers and the Crown would seek to restructure dealings after the fact so as to take advantage of the tax law or to make taxpayers pay tax that they might otherwise not have to pay. While evidence of intention may be used by the courts on occasion to clarify dealings, it is rarely determinative. In sum, evidence of subjective intention cannot be used to "correct" documents which clearly point in a particular direction.

[72] If I were to find that the recipient's intention determined the taxation of the supply, then the supplier, the Canada Revenue Agency and the Court would be engaged in endless exercises to determine such intention. This would place a particularly harsh burden on the supplier.

[73] While the *GST Act* imposes the tax on the recipient, it requires the supplier to collect GST as an agent for the Crown and then remit such tax. If the recipient does not pay the proper amount of tax, then normally it is the supplier, not the recipient, who is assessed. As a result, the supplier must have some degree of certainty with respect to the application of the *GST Act* to a specific supply. For example, a supplier of a residential condominium unit must know, at the time the supply is made, whether he/she/it is required to collect GST on the full consideration for the property, to self-assess GST on the fair market value of the property, or to collect tax on monthly lease payments.

[74] A supplier could not make such a determination with any degree of certainty if it was based on a subjective factor such as whether or not a recipient intended to exercise an option to purchase.

[75] In addition, the evidence before me is that, for commercial law purposes, the Appellant treated the Condo Lease as a legal lease of the individual condominium units. This can be seen from the Appellant's treatment of a default by one of its customers under the Condo Lease. The particular customer had received financing from the Royal Bank, presumably to fund a portion of the Prepaid Lease Payment. The Royal Bank then placed a mortgage of lease on the condominium.

[76] At some point in time, the customer became bankrupt and stopped making the Monthly Lease Payments, which constituted a default under the Condo Lease.[39] The Appellant's solicitor then sent a letter to the Royal Bank demanding that they either exercise the option contained in the Condo Lease or remove their mortgage of lease. The letter stated the following:

> Please be advised that we are solicitors for 0703008 B.C. Ltd. which is the owner (the "Landowner") of land legally described as PID 027-794-466 (Strata Lot 90, Plan KAS3485) in Kelowna, B.C. (the "Property"). The Tenants entered into a lease of the Property from the Landowner (the "Lease"). The Tenants granted RBC the Mortgage of Lease which RBC registered in the Kamloops Land Title Office under the number shown above.
>
> The Tenants have defaulted on the Lease by virtue of having made an assignment in bankruptcy and the Lease is now terminated. The Landowner is entitled to remove the Lease and the Mortgage of Lease from title to the Property immediately. The Landowner, however, wishes to provide RBC with a reasonable period of time within which to redeem the Property from the Landowner and thereby protect RBC's security.[40]

[77] Mr. Bird testified that the Royal Bank first paid the outstanding Monthly Lease Payments and then hired a realtor to find someone who was willing to exercise the option or assume the lease.[41]

[78] The Appellant's treatment of defaults is clear objective evidence that it viewed the Condo Lease as a lease of a condominium unit, not a sale.

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39 Transcript, Testimony of Mr. Bird, pages 212-213; Exhibit 8 to Exhibit A-9, Article 10.02.

40 Exhibit A-12.

41 Transcript, Testimony of Mr. Bird, pages 213-214.

[79] In summary, on the evidence before me I have concluded that the Appellant, when entering into the Offers to Lease and Condo Leases in respect of the 44 Terravita Condo Units, made supplies under the *GST Act* by way of lease, licence or similar arrangement.

[80] The Appellant also argued that, even if the supply was by way of lease, the subsection 191(1) self-supply rules did not apply to the supply as a result of the exclusion in subparagraph 191(1)(*b*)(i).

[81] That subparagraph provides that the self-supply rules will only apply if the builder of the complex (the Appellant) 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, "**other than** an arrangement, under or arising as a consequence of an agreement of purchase and sale of the complex, for the possession or occupancy of the complex until ownership of the complex is transferred to the purchaser under the agreement" (Emphasis added).

[82] The exclusion only applies if possession is given under or as a consequence of an agreement of purchase and sale and if the possession only lasts until ownership of the complex is transferred to the purchaser under the agreement of purchase and sale. Similarly to the timing rules in subsection 168(5), this provision recognizes the situation where the supplier provides the recipient with possession of the condominium but cannot transfer ownership until some future date when the condominium is registered under the applicable provincial law as a condominium. In effect, it ensures that the self-supply rules do not apply to a sale of a condominium.

[83] The exclusion does not apply to the supply by the Appellant of the 44 Terravita Condo Units. Possession of the individual units was not given to the Appellant's customers under or as a consequence of an agreement of purchase and sale. There was no agreement of purchase and sale. The only agreement relating to the Appellant's customers' possession of the condominium units was the Condo Lease, which was a lease not an agreement of purchase and sale.

[84] Counsel for the Appellant also argued that the Court's acceptance of the Respondent's position that the 44 Terravita Condo Units were supplied by way of lease would lead to the following consequences which he called absurd:

> (1) except for $6,000 the appellant will have previously remitted the full amount of GST on all of the 44 Terravita condo units in question;
>
> (2) the Minister will receive $593,605.34 again;
>
> (3) the Minister will recoup $36,189.02 of the assigned new housing rebate[s] that the appellant claimed as an input tax credit which were assigned by homeowners;
>
> (4) the Minister has reassessed the appellant such a . . . length after the supply of the 44 Terravita units in question took place, and undertook such minimal efforts to advise those unit owners of the tax paid in error rebate that only a quarter of the condo unit owners were paid tax-paid-in-error rebates totaling $142,669.18.
>
> . . .
>
> . . . The end result . . . is that the Minister is going to have a windfall of . . . $487,125.18 . . . .
>
> . . . That is the $593,605.34 for the reassessed amount, plus the 36,189 that it will recoup of the new housing rebates, less the $142,669.18 for the tax-paid-in error rebates. . . . [42]

[85] I do not accept that my finding that the Appellant supplied the 44 Terravita Condo Units by way of lease leads to an absurd result.

[86] The only GST payable under the *GST Act* on the supplies of the 44 Terravita Condo Units was payable by the Appellant under the subsection 191(1) self-supply rules. No GST was payable by the recipients of these supplies. The GST that the Appellant collected from the recipients on the Prepaid Lease Payments constitutes tax paid in error.

[87] A registrant is required to remit all amounts that become collectable under the *GST Act* and "all other amounts collected by the person . . . as or on account of tax . . .".[43] As a result, the Appellant was required to remit the tax it collected in error in respect of the Prepaid Lease Payment.

[88] The *GST Act* provides two mechanisms for refunding tax paid in error that a supplier has collected and remitted. The supplier may refund the tax itself, issue a

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[42] Transcript, appellant's argument, pages 271-273.

[43] Subsection 225(1).

credit note containing prescribed information and then claim a credit on its GST for the refunded tax paid in error.[44] Alternatively, the person who paid the tax in error may claim a rebate under section 261. Both mechanisms are subject to a two-year time limitation.

[89] There is no windfall to the Minister. All of the tax paid in error was refundable under the *GST Act* to the recipients. In fact, the Minister accepted all applications for rebates filed by the recipients for tax paid in error. Such rebates totalled $142,669.[45]

[90] Apparently the Appellant is arguing that the windfall arises because the CRA did not inform either the Appellant or the recipients in a timely manner of the fact that tax was paid in error and that the recipients had a right to recover the tax paid in error. However, the evidence before me is that the first supply of one of the 44 Terravita Condo Units was made on September 25, 2008.[46] The Appellant was reassessed on March 11, 2010, well within the two-year limitation period for the refunding of the tax paid in error by the Appellant or the claiming of a rebate by a recipient. It was clear from the reassessment that the Minister believed the recipients had paid tax in error.

[91] Further, if the Appellant was concerned about the recipients' not knowing of the rebate for tax paid in error, it could have itself, under section 232, refunded to the recipients the tax paid in error and then claimed a credit for the amount refunded.

[92] The second portion of the Appellant's argument with respect to absurdity relates to the fact that the Minister denied the credit the Appellant claimed for assigned new housing rebates.

[93] The Minister correctly denied the claim with respect to the subsection 254(2) new housing rebates since the Appellant did not supply the 44 Terravita Condo Units by way of sale. However, the Appellant was entitled to claim rebates for new residential rental property under section 256.2, provided it satisfied certain conditions contained in that section. In fact, the Appellant has applied for and been allowed new residential rental property rebates in respect of 38 of the 44 Terravita Condo Units.

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44 Section 232.

45 Exhibit A-19, pages 2 and 3.

46 Transcript, Testimony of Mr. Bird, pages 174-176.

[94] In summary, my finding that the Appellant supplied the 44 Terravita Condo Units by way of lease does not produce an absurd result. The proper person pays the tax levied under the *GST Act*, the proper rebate is claimable by the Appellant, and there is no windfall to the Minister.

[95] For the foregoing reasons, the appeal is dismissed with costs. The Minister's assessment reflects the correct amount of additional net tax remittable by the Appellant.

Signed at Antigonish, Nova Scotia, this 20th day of August 2015.

"S. D'Arcy"

D'Arcy J.

Appendix A

PARTIAL AGREED STATEMENT OF FACTS

The parties agree to and admit the following facts for the purpose of these appeals. The parties may adduce further evidence at trial that is relevant to the issues in these appeals, provided that the evidence is not contrary to this statement of facts.

Agreed Facts:

The Appellant

1. The Appellant is a real estate development company based in Kelowna, British Columbia.

2. The Appellant was incorporated in British Columbia on August 30, 2004.

3. The Appellant's place of business is 105B – 347 Leon Avenue, Kelowna, British Columbia.

Terravita

4. During the reporting periods from September 1, 2008 to August 31, 2009 (the "Period"), the Appellant owned land on Auburn Road in West Kelowna, British Columbia.

5. The Appellant planned to develop this land as four private gated condominium buildings.

6. The project was known as Terravita.

7. As proposed, Terravita consisted of 142 strata lots in four buildings located at 2780, 2770, 2760, and 2750 Auburn Road.

8. The Terravita project was subdivided into condominiums by way of a strata plan registered with the Osoyoos Division Yale Land District as Strata Plan KAS3485.

9. During the Period, the Appellant built three of the four Terravita buildings, those located at 2780, 2770, and 2760 Auburn Road.

Lease Agreements

10. The Appellant initially supplied all strata lots in Terravita by way of an Offer to Lease Agreement.

11. The three Terravita buildings were substantially complete when the Appellant signed the relevant lease agreement.

12. The Appellant supplied a total of seventy-six units in Terravita during the Period. Of the seventy-six units:

    (a) for fourteen of the units, the recipients ultimately signed an Offer to Purchase and Agreement of Purchase and Sale rather than an "Express Charge Form Terms of Lease" (the "Agreement"), and paid the full amount of the unit prior to closing;

    (b) for eighteen of the units, the recipients signed an Agreement but exercised a right to purchase the units prior to the closing date; and

    (c) for forty-four of the units, the recipients signed an Agreement for the units (the "Condos") and did not exercise a right to purchase the units prior to closing.

    The issues in this appeal relate solely to the forty-four Condos for which the recipients signed an Agreement and did not exercise a right to purchase the units prior to closing (the "Recipients").

13. The Agreement had a ninety-nine year term.

14. The Appellant held title to the Condos.

15. The Appellant registered the Agreement at the Land Titles Office as leases on the Appellant's titles.

16. The Agreement set a basic rent for the Condos, which consisted of two amounts: an amount referred to in the agreement as "Prepaid Rent", and an amount referred to in the agreement as "Monthly Rent".

17. The Monthly Rent was set for a three year term, then increased by a formula in the Agreement every three years for the duration of the ninety-nine year term.

18. For forty of the Recipients, the Monthly Rent was calculated as if $100,000 were financed at 4%.

    a. For four of the Recipients, the Monthly Rent was calculated as if $150,000, $130,000, $120,000, and $200,000, respectively, were financed at 4%.

    b. The Prepaid Rent amount consisted of the difference between the fair market value of the Condos and the amount upon which the monthly rent was calculated.

19. The Recipients had an option to purchase the Condos, which was set at three hundred times the monthly rent.

20. The option to purchase could be exercised without penalty on thirty days notice to the Appellant.

21. The Appellant retained title to the Condos unless the Recipients exercised the option to purchase.

22. The Recipients had no right to return of any of the Prepaid Rent or Monthly Rent.

23. The Recipients were not obligated to purchase the Condos.

24. Payment of the rent did not automatically entitle or transfer ownership of the Condos to the Recipients.

Goods and Services Tax ("GST") Treatment of the Condos

25. The Appellant signed a Certificate of GST when it supplied the Condos, stating that the supply was a sale subject to GST.

26. The Appellant collected and remitted GST from the Recipients on the Prepaid Rent amount.

27. For all but one of the Condos governed by an Agreement, the Appellant self-assessed itself, and remitted GST on the amount on which the Monthly Rent was calculated.

28. The Appellant claimed $36,189.02 of New Housing Rebates on behalf of eight of the Recipients to whom it credited, in total, that amount.

29. The Appellant claimed that $36,189.02 as input tax credits in calculating its net tax.

30. The Canada Revenue Agency audited the Appellant's income tax return for the taxation year ending October 31, 2009 and the Minister of National Revenue did not reassess the Appellant's computation of its income from the Terravita Project units.

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COURT FILE NO.:	2012-2801(GST)G
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