Docket: 2015-995(GST)I

BETWEEN:

MONIKA GILL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 17, 2015, at Montréal, Quebec

Before: The Honourable Justice Guy R. Smith

Appearances:

For the appellant:	The appellant herself
Counsel for the respondent:	Olivier Vinet-Gasse

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* in relation to the goods and services tax, the notice of which is dated March 18, 2013, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 15th day of January 2016.

"Guy R. Smith"

Smith J.

Translation certified true
on this 4th day of March 2016
Francie Gow, BCL, LLB

Citation: 2016 TCC 13
Date: 20160115
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REASONS FOR JUDGMENT

Smith J.

[1] The appellant has appealed a notice of assessment from the respondent, through the Minister of Revenue of Quebec (the **Minister**), dated March 18, 2013, denying her application for a GST/QST rebate following the purchase of a new condominium (the **complex**), on which the appellant had paid the GST/QST in accordance with the *Excise Tax Act* (the **ETA**).

Summary

[2] Subsection 254(2) of the ETA provides that the purchaser of a new residential property may apply for a partial rebate of the GST paid on the purchase price if he or she satisfies the conditions set out in paragraphs 254(2)(a) to (g). In this case, the Minister denied the rebate primarily on the grounds that the appellant had not acquired the complex for use as her primary residence and that neither she nor any of her relations had ever occupied it. The appellant, on the other hand, claims that she had the requisite intention at the time the builder accepted her promise to purchase and that she occupied the complex for approximately five months while waiting for the transfer of title, but that she had decided to rent out the complex to third parties after reconciling with her husband.

Issues

[3] There are three issues to decide in connection with this dispute:

1. The first issue involves the expression "*aux termes du contrat de vente*" in the French version of paragraph 254(2)(b) of the ETA. The Minister submits that the "*contrat de vente*" was signed at the time of closing, and that given the wording of the provision, it is from that moment that the Court must consider the issue of intention. This is above all a question of statutory interpretation.

2. The second issue is whether the appellant had the requisite intention under paragraph 254(2)(b) of the ETA. This involves a review of all the evidence to determine whether, at the time she undertook to purchase the complex, the appellant intended to acquire it for use as her primary residence. The Minister assumed that she did not have the requisite intention.

3. The third issue is closely related to the second, namely, whether the appellant in fact occupied the complex within the meaning of paragraph 254(2)(g). The appellant submits that she took possession of the complex once the work had been substantially completed. The Minister, on the other hand, assumed that the appellant had never occupied the complex.

[4] Issues 2 and 3 above are questions of fact, and it is understood that the appellant must convince this Court of the contrary on a balance of probabilities.

Facts

[5] The appellant is a resident of the city of Laval, Quebec. She submits that she was in the process of separating from her spouse and that she had purchased the complex at issue in the Laurentians for the purpose of moving there with her three children and escaping her family environment. She intended to remain there permanently. According to her testimony, she signed a promise to purchase with the builder on or about March 13, 2011, moved in following the completion of the work in June 2011 and lived there until December.

[6] Her spouse, who had declared bankruptcy in 2010 and was unemployed, found a new job in October 2011; the couple then reconciled, and she decided to return to live with him in the family home in Laval. The complex was rented out to third parties in December 2011.

[7] According to the appellant, even though she had returned to the family home, she decided to keep the complex because she was still considering the possibility of returning there. She then explained that her spouse was diagnosed with cancer in spring 2012, and she decided to remain in the family home permanently, which is not relevant to this dispute.

[8] The appellant indicated that she had no proof of a change of address because the property taxes, monthly fees and services (water and hydro) were at the builders' expense until the closing. She had not signed up for cable or a land line because she had a cell phone. Also, because she returned to the family home in Laval, that was the address that appeared on her income tax return. She filed documents that were not relevant to this dispute.

[9] Upon cross-examination, the appellant admitted that she had not moved all of her furniture and personal effects, that her three children had never lived in the complex and that they had not changed schools. She mainly lived there on weekends, generally by herself.

[10] The spouse's testimony did not add much evidence, although he did confirm, among other things, the financial and marital difficulties, the couple's reconciliation and the efforts to find tenants starting around mid-October 2011. I note, however, that he contradicted himself by stating that the search for tenants began in December.

[11] He also presented, as evidence of the appellant's intention to occupy the premises, a copy of an application for a certificate of authorization that he himself had filled out and filed with the Municipality of Sainte-Agathe on September 8, 2011, to allow the appellant, as owner, to provide accounting services from the complex. Given the change in circumstances, there was no follow-up on this application, and it was cancelled in December 2011. I find that this document has very little probative value.

[12] To complete this summary of the facts, I would add that the appellant acknowledged upon cross-examination that she owned another condominium located in Saint-Jean-sur-Richelieu and that this was also a rental property. Although she declared a loss in her 2011 income tax return of approximately $3,009, she did not seem to be well informed on this subject. Her spouse's testimony regarding the circumstances surrounding the acquisition of this property seemed both mysterious and suspicious, particularly given the family's financial

difficulties and his 2010 bankruptcy. In short, I draw from this a negative inference with respect to their credibility.

The "*contrat de vente*" – the applicable law

[13] As indicated above, subsection 254(2) of the ETA provides that the purchaser of a new residential property may apply for a partial rebate of the GST paid on the purchase price. Among the conditions for the rebate, paragraph 254(2)(b) sets out the following:

> (b) - At the time the particular individual becomes liable or assumes liability under an agreement of purchase and sale of the complex or unit entered into between the builder and the particular individual, the particular individual is acquiring the complex or unit for use as the primary residence of the particular individual or a relation of the particular individual.
>
> [My emphasis.]

> (b) - au moment où le particulier devient responsable ou assume une responsabilité aux termes du contrat de vente de l'immeuble ou du logement conclu entre le constructeur et le particulier, celui-ci acquiert l'immeuble ou le logement pour qu'il lui serve de lieu de résidence habituelle ou serve ainsi à son proche;
>
> (Mon soulignement.)

[14] The Minister submits that the Court must analyze the appellant's intention from the moment she acquired the title "*aux termes du contrat de vente*", i.e. at the time of closing. The Minister cites article 1708 of the *Civil Code of Québec* (the **CCQ**), which defines "sale" under the civil law:

> **1708**. Sale is a contract by which a person, the seller, transfers ownership of property to another person, the buyer, for a price in money which the latter obligates himself to pay.
>
> A dismemberment of the right of ownership, or any other right held by a person, may also be

> **1708.** La vente est le contrat par lequel une personne, le vendeur, transfère la propriété d'un bien à une autre personne, l'acheteur, moyennant un prix en argent que cette dernière s'oblige à payer.
>
> Le transfert peut aussi porter sur un démembrement du droit de propriété ou sur tout autre droit

transferred by sale.

1991, c. 64, a. 1708

dont on est titulaire.

1991, c. 64, a. 1708

[15] I must note from the outset that I am far from convinced by this interpretation, given the use of the expression “under an agreement of purchase and sale” in the English version of paragraph 254(2)(b), which instead suggests a promise to purchase undertaken before the purchaser acquires title in the property.

[16] I also note that paragraph 254(2)(f) of the ETA provides for the possibility of occupying the premises “after the construction or substantial renovation is substantially completed and before possession of the complex or unit is given to the particular individual under the agreement of purchase and sale”. The expression “under the agreement of purchase and sale” in that paragraph must logically refer to a document delivered after the completion of the work, i.e. at the time of closing of the transaction.

[17] As indicated above, the Minister cites article 1708 of the CCQ in support of his interpretation of the expression “*aux termes du contrat de vente*” and the moment at which the appellant’s intention must be analyzed. However, because this provision relates to the purchase of a new residential property, it is also important to consider article 1785 CCQ, which reads as follows:

1785. The sale of an existing or planned residential immovable by the builder or a developer to a natural person who acquires it to occupy it shall be preceded by a preliminary contract by which a person promises to buy the immovable, whether or not the sale includes the transfer to him of the seller's rights over the land.

[My emphasis.]

1785. Dès lors que la vente d'un immeuble à usage d'habitation, bâti ou à bâtir, est faite par le constructeur de l'immeuble ou par un promoteur à une personne physique qui l'acquiert pour l'occuper elle-même, elle doit, que cette vente comporte ou non le transfert à l'acquéreur des droits du vendeur sur le sol, être précédée d'un contrat préliminaire par lequel une personne promet d'acheter l'immeuble.

(Mon emphase.)

[18] To meet the requirements of this provision, there must be a "preliminary contract" by which the purchaser promises to buy the residential immovable in a transaction that must ultimately conclude with a notarized deed of sale.

[19] The Minister brought to my attention the decision in *Virani v. The Queen*, 2010 TCC 113, but I do not believe that it supports her position on this point. That decision also involved a condominium in British Columbia that was still under construction. The appellant signed a promise to purchase in November 2002 but did not acquire title in the property until February 2005. The Minister submitted that the promise to purchase was a "pre-construction agreement" and not an "agreement of purchase and sale" and that the relevant date for determining intention was the closing date in 2005. Justice Campbell disagreed with this interpretation, stating the following at paragraph 12:

> 12. The wording in this provision is crystal clear. It specifically refers in both paragraph 254(2)(b) and in clause 254(2)(g)(i)(B) to "an agreement of purchase and sale". Liability explicitly attaches to the particular individual who executes an agreement of purchase and sale. There is no ambiguity here and I am simply rejecting Respondent counsel's submissions that liability arises for the Appellant when he took legal title and assumed responsibility for the mortgage payments in February 2005. That reasoning completely ignores the wording of subsection 254(2).
>
> [My emphasis.]

[20] It is important to note that in the original English decision, Justice Campbell uses the term "agreement of purchase and sale", which was translated as "*contrat de vente*" in the French version. Justice Campbell went on to state at para. 14:

> 14. Respondent counsel argued that the Appellant assumed no liability until February 2005 because in November 2002 he did not have legal title. She characterized the November 2002 document as a pre-construction agreement. That may be exactly what it is but, nonetheless, the contract was clearly an agreement of purchase and sale as referenced and contemplated in this provision. In fact, Exhibit A-3 titles it "contract of purchase and sale". This document solidly committed the Appellant to, and made him liable for, the purchase of the Seymour Street property. The deposits totalled over $31,000.00. Therefore, I believe that the intention of the Appellant to acquire and occupy the Seymour

Street unit as his primary residence must be determined in November 2002 when he executed the agreement of purchase and sale and not in February 2005 when the actual transfer of legal title and possession occurred.

[My emphasis.]

[21] The Minister also brought to my attention the decision in *Wong v. The Queen*, 2013 TCC 23, originally written in English. At paragraph 5 of the French translation, Justice Paris wrote the following:

> [5] Dans le cas présent, il n'est pas contesté que le contrat de vente pour l'achat de la propriété a été conclu par M. et Mme Wong le 9 décembre 2009, date précédant la construction de l'immeuble où se trouve la propriété. Par conséquent, c'est l'intention qu'ils avaient à ce moment-là au sujet de l'utilisation qu'ils feraient de la propriété qui est déterminante.

[My emphasis.]

[22] I therefore find that the expression "*aux termes du contrat de vente*" in the French version of paragraph 254(2)(b) of the ETA must be broadly interpreted to include a promise to purchase or, to use the words of article 1785 CCQ, "a preliminary contract by which a person promises to buy the immovable". This interpretation gives a common meaning to both versions of the provision. In light of this finding, it is evident that the evidence must be analyzed from the time the promise to purchase was signed.

[23] Before turning to the second issue, I would add that the Minister himself filed in evidence a document entitled [TRANSLATION] "conditional pre-occupancy agreement" signed by the appellant on September 1, 2011, in which it is indicated that [TRANSLATION] "all of the clauses of the preliminary agreement and pre-contract, without restriction, take precedence over this conditional pre-occupancy agreement". I am of the view that this document clearly and unambiguously establishes the existence of a preliminary agreement or a promise to purchase within the meaning of paragraph 254(2)(b) of the ETA.

Intention under paragraph 254(2)(b) of the ETA – the applicable law

[24] Regarding the issue of intention, I must determine whether, at the time she entered into the promise to purchase, the appellant intended to acquire the complex for use as a primary residence: *Mendes v. R.*, 2015 TCC 11. In that decision, Justice Woods found that the evidence was not sufficiently detailed to satisfy her that the appellant had indeed intended to use the property as a primary residence and that the evidence was not plausible.

[25] In *Kandiah v. The Queen*, 2014 TCC 276, Justice Miller states at paragraph 18 that the onus is on the appellant to satisfy the Court on a balance of probabilities. He cites the following passage from *Coburn Realty Ltd. v. Canada*, 2006 TCC 245, with respect to intention:

> [10] Statements by a taxpayer of his or her subjective purpose and intent are not necessarily and in every case the most reliable basis upon which such a question can be determined. The actual use is frequently the best evidence of the purpose of the acquisition. . . .
>
> [My emphasis.]

[26] In that decision, there was little evidence relating to the occupancy of the premises, and the property was listed for sale shortly after closing, which led Justice Miller to believe that this was probably the best indicator of the appellant's intention at the time he signed the promise to purchase. Furthermore, he wrote the following at paragraph 21:

> [21] Taking a few belongings (mattresses and towel for example), leaving behind virtually all of your other belongings and furnishings in the family home, does not constitute actual use of 50 Minerva Avenue as the primary place of residence for the family. At best, I would describe Mr. Kandiah's and his daughter's arrangement as camping, not residing – certainly not residing as a primary place of residence.
>
> [My emphasis.]

[27] Finally, in *Goulet v. The Queen*, 2010 TCC 95, the property had been purchased by the parents, and, according to the evidence filed, their son and daughter each lived there for a distinct four-month period. The Court held that the evidence as a whole did not indicate that there had been a genuine change of address and that the children's occupancy was temporary at best.

Occupancy of the premises – the applicable law

[28] For the third issue, paragraph 254(2)(g) of the ETA provides that the purchaser must be the "the first individual to occupy the complex . . . as a place of residence at any time after substantial completion of the construction or renovation".

[29] In my view, the considerations identified in *Kandiah* and *Goulet, supra,* also apply to the issue of occupancy of the premises after substantial completion of construction. It must be more than passing or sporadic. There must be an element of permanence that supports the intention to acquire the complex for use as a primary residence. Transitory occupancy cannot satisfy the requirement that the purchaser be "the first individual to occupy the complex" within the meaning of paragraph 254(2)(g) of the ETA.

Analysis and conclusion

[30] In light of my finding with respect to the first issue, the appellant must satisfy this Court on a balance of probabilities that she intended to acquire the complex as a primary residence for herself or a relation at the time she signed the promise to purchase in spring 2011 and, second, that she actually occupied the complex after substantial completion of the construction.

[31] I should state from the outset that I find the testimony of the appellant and her spouse far from persuasive, and I have serious doubts as to their credibility. Not only did the testimony contain inconsistencies, but the presentation of the evidence was simplistic. It appeared prefabricated and even deliberately gathered to meet the statutory requirements and support the application for a rebate under the ETA.

[32] First, there was no independent witness to corroborate the appellant's version of the facts. There was also a near-total absence of documentary evidence. While the appellant provided explanations for the lack of bills and lack of evidence of a change of address, this Court was not given the opportunity to review the application for credit from the bank, the promise to purchase or the documents exchanged after the completion of the construction. The sole document relevant to the transaction was presented by the Minister, and this was the [TRANSLATION] "conditional pre-occupancy agreement". This document contradicts the testimony of the appellant, who claimed that she had signed a promise to purchase on March 11, 2011, which was accepted by the builder on March 13, 2011, and that

she had moved in on June 30. The pre-occupancy agreement instead suggests a promise to purchase dated June 30, 2011. Moreover, because this agreement was signed on September 1, 2011, it seems evident that the appellant could not have moved into the complex before early September.

[33] The appellant indicated that she had not moved all of her furniture or personal effects into the complex and that she mainly went there on weekends, generally by herself. Her testimony was vague on this point and lacking in detail. I can only conclude that her occupancy was temporary and sporadic at best. There was certainly no element of permanence. Even if I were to accept that she moved in in early September, which does not seem very plausible, the couple reconciled in mid-October, and she and her spouse began seeking tenants at that time. Given the short duration and transitory nature of the occupancy, I cannot conclude that the appellant was the first individual to occupy the premises within the meaning of paragraph 254(2)(g).

[34] Finally, the complex was rented to third parties shortly after the transaction was closed, and, like Justice Paris in *Kandiah*, *supra*, I am of the view that the actual use of a property is the best evidence of the purpose of its acquisition.

[35] I have no choice but to dismiss the appeal.

Signed at Ottawa, Canada, this 15th day of January 2016.

"Guy R. Smith"

Smith J.

Translation certified true
on this 4th day of March 2016
Francie Gow, BCL, LLB

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COURT FILE NO.:	2015-995(GST)I
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PLACE OF HEARING:	Montréal, Quebec
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APPEARANCES:

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Counsel for the respondent:	Olivier Vinet-Gasse

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