Docket: 2017-457(GST)I

BETWEEN:

DMITRI KNIAZEV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Dmitri Kniazev (2017-456(GST)I)
on May 30, 2018, at Toronto, Ontario.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Bobby B. Solhi
Counsel for the Respondent:	Angelica Buggie Peter Swanstrom

JUDGMENT

The appeal from the assessment dated January 15, 2016, made under the *Excise Tax Act* for the Goods and Services Tax/Harmonized Sales Tax ("GST/HST") New Housing Rebate is dismissed according to the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of March 2019.

"Guy R. Smith"

Smith J.

Docket: 2017-456(GST)I

BETWEEN:

DMITRI KNIAZEV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Dmitri Kniazev (2017-457(GST)I)
on May 30, 2018, at Toronto, Ontario.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Bobby B. Solhi
Counsel for the Respondent:	Angelica Buggie Peter Swanstrom

JUDGMENT

The appeal from the assessment dated January 22, 2016, made under the *Excise Tax Act* for the Goods and Services Tax/Harmonized Sales Tax ("GST/HST") New Housing Rebate is dismissed according to the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of March 2019.

"Guy R. Smith"

Smith J.

Citation: 2019 TCC 58
Date: 20190308

Dockets: 2017-457(GST)I
2016-456(GST)I

BETWEEN:

DMITRI KNIAZEV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Smith J.

I. Introduction

[1] Dmitri Kniazev appeals from an assessment made by the Minister of National Revenue (the "Minister") on January 15, 2016, denying the GST/HST New Housing Rebate application (the "New Housing Rebate") pursuant to Part IX of the *Excise Tax Act*, R.S.C 1985, c. E-15 (the "Act") in relation to the purchase of a property described as 266 Sloss Court, Newmarket, Ontario ("Sloss Court"). The Minister did so on the basis that the Appellant did not acquire the subject property with the intention of using it as a primary place of residence for himself or a qualifying relation and secondly that neither he nor a qualifying relation, were the first to occupy the premises.

[2] The Appellant also appeals from an assessment made by the Minister on January 22, 2016 again denying the New Housing Rebate with respect to a property described as 314-95 North Park Road, Thornhill, Ontario (the "Thornhill condo"). The Minister did so for the same reasons, namely that the Appellant did not have the requisite intention and that neither he nor a qualifying relation, were the first to occupy the premises as their primary place of residence. These appeals were heard together on common evidence.

[3] The New Housing Rebate provides for a rebate of excise tax otherwise calculated pursuant to subsection 165(2) of the Act on the purchase of a single unit residential complex, as defined. In Ontario, the rebate is capped at $24,000. It is payable pursuant subsection 256.21 and Regulations 41(1) and (2) but the conditions that must be satisfied are the same as those set out in subsection 254(2).

[4] For the purposes hereof, the only relevant provisions are paragraphs 254(2)(b) and (g). Paragraph 254(2)(b) refers to the purchaser's intention to acquire a residential property "for use as the primary place of residence of the particular individual or a relation of the particular individual". In this instance, there is no question that "particular individual" refers to the Appellant.

[5] For the purposes of that provision, the Court must look to the purchaser's intention "at the time" he or she "becomes liable or assumes liability under an agreement of purchase and sale" with the builder and must be satisfied that it was intended that the property would be acquired for use as a "primary place of residence". This issue was reviewed in some detail in the decision of *Gill v. The Queen*, 2016 TCC 13 ("*Gill*"). In that decision, I referred to the decision of *Kandiah v. The Queen*, 2014 TCC 276, where Justice C. Miller stated at paragraph 18 that the onus was on the appellant to satisfy the Court on a balance of probabilities that he had the requisite intention. He cited the following passage from *Coburn Realty Ltd. v. Canada*, 2006 TCC 245 ("*Coburn*"), 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. . .

[6] In *Coburn*, there was little evidence relating to the occupancy of the premises and the property was listed for sale shortly after closing, which led Justice C. Miller to conclude that this was probably the best indication of the appellant's intention at the time he signed the promise to purchase. He added that:

> [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 the property] 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.

[7] In the end, there are numerous decisions, each turning on their own facts, on the issue of a purchaser's intention to acquire a residence as a "primary place of residence" for the purposes of the rebate. What is required is a clear and settled intention to occupy the premises as a "primary place of residence", considered in the context of an individual's personal, family and work related circumstances. A tentative, fleeting or whimsical intention does not suffice.

[8] Parliament's use of the word "primary" also suggests that the purchaser must have a settled intention to centre or arrange his personal and family affairs around that property. The rebate is not intended for a secondary residence or "pied-à-terre". An individual can own multiple residences but would typically have only one "primary place of residence".

[9] The second relevant criteria is set out in paragraph 254(2)(g). It provides that the purchaser or qualifying relation must be the first to occupy the subject property. It is necessary to interpret this provision, and in particular the word "occupy", in the context of someone who presumptively intends to acquire a property as a "primary place of residence". As discussed in *Gill* (para. 29), there must be an element of permanence in the occupation of the premises. It must be more than sporadic, transitory or temporary. Acquiring title, taking possession of the keys and moving in a few items of furniture does not suffice.

II. The Appellant's evidence

[10] The Appellant testified on his own behalf. At all material times, he worked as a realtor with Homelife Victory Realty Inc. in Richmond Hill, Ontario and resided at 214 Savage Road in Newmarket, Ontario, a property he described as his "matrimonial home". His spouse had passed away sometime in 2010, though few details were provided. He had a daughter ("Nina") who studied at York University but who at the time of the hearing, was employed in northern Ontario and thus, according to the Appellant, unavailable to testify.

[11] The Appellant indicated that prior to the acquisition of the subject properties, he owned the so-called matrimonial home as well as an investment property located at 1070 Sheppard Avenue (the "Sheppard Avenue condo") acquired in 2010. The following chart provides a snapshot of the Appellant's activities during the relevant years:

Property	Agreement of Purchase and Sale	Closing / Possession	Sale / Disposition
214 Savage Road Newmarket, ON	No info.	No info.	Nov. 2012
266 Sloss Court Newmarket, ON	October 2011	Sept. 2014	March 2015
7 Wolford Crescent Keswick, ON	May 2012	Nov. 2012	No info.
703-1070 Sheppard Ave., Toronto, ON	2010	Nov. 2010	No info.
1314-95 North Park Rd.,Thornhill, ON	Jan. 2011	May 2014	Aug. 2014

[12] The basic thrust of the Appellant's testimony, is that he intended to dispose of the matrimonial home and move into a new residence but that he wanted to remain in the Newmarket area since it was more convenient for his work. He signed an Agreement of Purchase and Sale on October 19, 2011 to purchase Sloss Court intending to occupy it as his primary place of residence. He expected a closing within six months but soon realized that there would be substantial delays. As a result, he entered into another Agreement of Purchase and Sale on May 1, 2012 for 7 Wolford Crescent in Keswick, Ontario (the "Keswick property"). This was a luxury property located in a gated community on the shores of Lake Simcoe. His position is that he took possession of that property in November 2012 following the sale of his matrimonial home. It is not disputed that he claimed and received the New Housing Rebate with respect to that purchase.

[13] The Appellant indicated that the closing date of Sloss Court property eventually took place in September 2014. He moved into those premises and retained the Keswick property as a secondary home. Sloss Court was listed for sale in November 2014 and sold effective March 10, 2015. The Appellant then moved back to the Keswick Property.

[14] The Appellant indicates that prior to the actual sale of Sloss Court, he had attempted to sell the Keswick property. Maria Markman, a mortgage broker and acquaintance for 20 years, indicated to him that she would be prepared to buy the

property. An agreement was prepared and signed on October 1, 2015 and deposit cheques were delivered. The closing was to take place in January 2015. However, for personal reasons, she decided to cancel the transaction. The Appellant accepted the rescission and the deposit cheques were simply destroyed.

[15] As indicated above, the Appellant had purchased the Sheppard Avenue condo in November 2010 and it was immediately listed for sale. In the meantime, it was leased to tenants until March 2014. His daughter, who had been living with him at the Keswick property, then moved into the premises to be closer to York University.

[16] In January 2011, the Appellant entered into an Agreement of Purchase and Sale to acquire another condominium property located at 95 North Park Road (the "Thornhill condo"). He anticipated that it would be ready for occupation in three years and intended that his daughter would acquire title. The closing took place in May 2014 and she moved in, leaving the Sheppard Avenue condo vacant.

[17] The Appellant continued to list the Sheppard Avenue condo for sale. Since he was not having any success and preferred not to carry both properties, he listed the Thornhill condo for sale in August 2014. It sold within a week and his daughter moved back into the Sheppard Avenue condo.

[18] The Appellant maintained that the Thornhill condo was purchased for his daughter and that it was intended from the beginning that she would acquire title and reside there. He attempted to have title registered in her name, but could not do so since, as a student, she did not qualify for the mortgage.

[19] In connection with the purchase of both subject properties, the Appellant produced documentation relating to his home insurance policies, utilities and phone and internet services. This included a series of invoices from a moving company.

[20] During cross-examinations, the Appellant acknowledged that he owned another residential property located on Lorraine Avenue in Richmond Hill. He also acknowledged that his daughter owned a condominium property that he had purchased for her using life insurance proceeds following the passing of his spouse. There was no mortgage on that property.

[21] The Appellant was challenged on the low consumption of hydro and water for the subject properties. He admitted that neither he nor his daughter had effected changes of address with CRA, OHIP or for their driver's licence.

III. Analysis

[22] As noted above, except for the brief testimony of Maria Markham, the Appellant was the only witness. His oral evidence is almost entirely uncorroborated by a disinterested third party. The over-riding issue for the Court is whether the narrative presented by the Appellant, viewed globally, was credible or whether there were apparent or inherent inconsistencies that cast doubt on his testimony. The Court finds that his testimony was not credible.

[23] With respect to the Sloss Court property, the Court has serious doubts that the Appellant ever intended to occupy this property as his primary place of residence. Given his experience as a real estate agent, he knew or must have known from the beginning that the construction would be delayed for a lengthy period of time. I note that he failed to produce schedules of the Agreement of Purchase and Sale that would likely have addressed the issue of the builder's right to extend the closing for an extended period of time. I find that this acquisition was likely planned from the beginning as a "long closing".

[24] Even if the Court accepts that the Appellant has the requisite intention – which it does not, it finds that his intention vas vitiated or frustrated by his own actions when he entered into the agreement to purchase the Keswick property. At best, I find that the Appellant had a "brief, and fleeting intent" (*Sivakumar v. R.*, 2013 TCC 325, para. 23) to occupy the Sloss Court property and that this falls short of the requirements of subsection 254(2)(b) of the Act.

[25] Although not before the Court in this appeal, but relevant to the issue of credibility, the Court also has serious doubts that the Appellant ever intended to occupy the Keswick property as his primary place of residence or that he in fact did so. He may have moved some furnishings, possibly to stage the property, but the water and hydro usage suggests that his occupation was at best sporadic, temporary and transitory. The Appellant had expressed a desire to find a residence in the Newmarket or Richmond Hill area close to his work but failed to provide an explanation to the Court as to how the purchase of this property located some distance from his place of work, made any logical or practical sense for him or his daughter who was attending York University in Toronto.

[26] The Appellant indicates that the Keswick property became a secondary residence once the Sloss Court property was completed in September 2014. Since the Court has already concluded that the Appellant did not have the requisite intent to occupy that property as his primary place of residence, it is not relevant that he may have moved some furnishings from the Keswick property. His occupation of Sloss Court was again at best transitory as it was listed for sale shortly after the date of possession and sold in March 2015.

[27] With respect to the Sheppard Avenue condo, the Court notes that it was listed for sale a short time after the date of acquisition. The Court finds that this is indicative of a pattern of buying residential properties and then re-selling them as quickly as possible. The Court finds that the Appellant had a similar intention with respect to the Thornhill Condo and that neither he nor his daughter ever intended to occupy it as a primary place of residence. The Appellant has suggested that his daughter moved into the Sheppard Avenue condo in March 2014 and then into the Thornhill condo in May 2014 before moving back to the Sheppard Avenue condo in August 2014. This is simply not credible and, without the testimony of the Appellant's daughter, remains entirely uncorroborated.

[28] During examinations in chief, the Appellant very briefly indicated that he had another property which he described as "an apartment" on Lorraine Avenue in Richmond Hill but few details were provided. Was it an investment property or a "pied-à-terre" used by him personally? The Court was not told. During cross-examinations, the Appellant acknowledged that he owned another property but again failed to provide details as to its use or any explanation as to why it had been excluded from his narrative. The Court finds that it was incumbent on him to provide an explanation and draws a negative inference from his failure to do so. Similarly, the Appellant admitted that his daughter owned a condominium property, free from any encumbrance, but failed to provide any details or explanation as to its use in the context of his narrative. The logical inference is that she actually resided in that property and thus that she never really occupied the Sheppard Avenue or Thornhill condos. In any event, the Appellant has not satisfied the Court on the balance of probabilities, that she occupied either of those properties, as required by subsection 254(2)(g).

[29] During cross-examinations, the Appellant acknowledged that he purchased the Sheppard Avenue condo in November 2010, the Thornhill condo in January 2011, the Sloss Court residence October 2011 and the Keswick property in May 2012. He admitted that "it was a hot time for buying" which is more indicative of an intention to acquire residential properties for resale or in the pursuit of profit,

also known as “flipping” (*Sivakumar v. R.*, 2013 TCC 325, para. 19). I find that this does not meet the requirement of subsection 254(2)(b) that the Appellant intended to acquire the properties “for use as his primary place of residence”.

[30] To conclude on the evidence, I find that the modifications made to the home insurance policies to designate one property as a primary or secondary home are inconclusive. I also attach very little weight to the various invoices submitted by the Appellant as they too were inconclusive. With respect to Maria Markham, I have doubts as to the probative value of her testimony with respect to an agreement that was rescinded within a few weeks with no legal consequences. Her testimony, if anything, simply supports the Court’s conclusion that the Appellant was involved in a commercial activity that involved the buying and selling of homes, also known as “flipping”.

[31] In the end, I find that the Appellant was first and foremost a real estate agent who bought and sold homes for his own account, without any intention of occupying them as his primary place of residence and more specifically, with respect to the subject properties, that neither he nor his daughter ever intended to occupy them as their primary place of residence.

[32] As a result, the appeals must be dismissed.

Signed at Ottawa, Canada, this 8th day of March 2019.

“Guy R. Smith”

Smith J.

CITATION:	2019 TCC 58
COURT FILE NO.:	2017-456(GST)I
STYLE OF CAUSE:	DMITRI KNIAZEV AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 30, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice Guy R. Smith
DATE OF JUDGMENT:	March 8, 2019

APPEARANCES:

Counsel for the Appellant:	Bobby B. Solhi
Counsel for the Respondent:	Angelica Buggie Peter Swanstrom

COUNSEL OF RECORD:

For the Appellant:

Name:	Bobby B. Solhi
Firm:	Tax Chambers LLP Toronto, Ontario

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada