

Citation: 2023 TCC 81
Date: June 2, 2023
Docket: 2019-1326(GST)I

BETWEEN:

JANIS ROBB,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on June 30, 2022, at Toronto, Ontario

Before: The Honourable Justice Susan Wong

Appearances:

Counsel for the Appellant: Charles Haworth
Thomas Ritthaler (summer student)

Counsel for the Respondent: Amin Nur
Sharon Lee

JUDGMENT

1. The appeal made under the *Excise Tax Act* for the notice of assessment dated July 20, 2018, with respect to the GST/HST New Housing Rebate is allowed without costs.

2. The matter is returned to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is entitled to the Ontario portion of the rebate with respect to the purchase of the property at 49 Dryden Way, Etobicoke, Ontario.

Signed at Ottawa, Canada, this 2nd day of June 2023.

“Susan Wong”

Wong J.

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REASONS FOR JUDGMENT

Wong J.

I. Introduction/Overview

[1] The appellant purchased a new townhouse at 49 Dryden Way in Etobicoke, Ontario, and applied for the Ontario portion of the GST/HST New Housing Rebate with respect to the property.

II. Legislative framework

[2] Subsection 254(2) of the *Excise Tax Act* provides for the partial rebate of the tax paid by an individual when buying a new home from a builder and sets out a list of prerequisite requirements. For the purposes of this appeal, I would paraphrase them as follows:

- a. the builder makes a taxable supply by selling a single unit residential complex or a residential condominium unit to the individual;
- b. at the time the parties enter into the purchase/sale agreement, the individual is acquiring the complex/unit for use as the primary residence of the individual or their relation;
- c. the total consideration is less than \$450,000;

- d. the individual has paid the GST/HST on the purchase;
- e. ownership of the complex/unit is transferred to the individual after construction is substantially completed;
- f. during the period between substantial completion of construction and possession under the purchase/sale agreement,
 - i. with respect to a single unit residential complex – no one occupied it; and
 - ii. with respect to a residential condominium unit – only a purchaser under the purchase/sale agreement occupied it;
- g. after substantial completion of construction, the first person to occupy the complex/unit is the individual or their relation.

[3] In Ontario, there is still a new housing rebate available where the total consideration exceeds \$450,000, due to the combined effect of subsection 256.21(1) of the Act and subsection 41(2) of the *New Harmonized Value-Added Tax System Regulations, No. 2*.¹ The rebate is limited to a maximum of \$24,000 and the individual must still meet the remaining prerequisites in subsection 254(2).²

[4] For the purposes of the rebate, a “relation” means an individual who is related to the particular individual, or the former spouse/common-law partner of the particular individual.³ Related persons by reason of subsections 251(2) to (6) of the *Income Tax Act* are also related for the purposes of the *Excise Tax Act*. The relevant portions of subsections 251(2) to (6) say that:

- a. related persons are individuals connected by blood relationship, marriage or common-law partnership or adoption;⁴ and
- b. persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other.⁵

III. **Issue**

[5] The question in this appeal is whether the appellant met the residence requirements under subsection 254(2), to qualify for the Ontario portion of the new housing rebate under subsection 41(2) of the Regulations.

[6] Specifically, the Minister of National Revenue denied the rebate on the basis that neither the appellant nor a qualified relation intended to or actually occupied the townhouse as a primary place of residence, pursuant to paragraph 254(2)(b).⁶

IV. **Factual background**

[7] The appellant purchased the three-bedroom townhouse at 49 Dryden Way in Etobicoke as a pre-build and signed the purchase/sale agreement on July 7, 2014.⁷ Before taxes, the purchase price was \$574,327.43 and she took possession on May 8, 2017.⁸

[8] The appellant is a yoga instructor and university-educated, with a Masters degree in Business. She testified that when she signed the purchase/sale agreement in 2014, she had just discovered that her husband was cheating on her. She stated that including about five attempts to reconcile over a five-year period, they were married for a total of 22 years and by the time of this hearing, they were close to finalizing their divorce.

[9] She testified that upon learning of her husband's infidelity, she moved into her parents' Caledon, Ontario home and thought about her next steps. She stated that at the time she purchased the townhouse, she did not own any other properties. The builder required an initial deposit of \$15,000 in July 2014, followed by three additional consecutive monthly \$15,000 deposits from August to September 2014.⁹ The appellant's parents paid the four deposits by initial cheque and three post-dated cheques.¹⁰

[10] The appellant stated that the mortgage loan for the townhouse was amortized over a 25- or 30-year period, resulting in monthly payments of about \$800. She was not working between 2014 and 2017, and used her bank account from her marriage to guarantee the loan. She explained that the bank account held funds which came from her then-husband during their marriage, but that the money was hers.

[11] The appellant testified that after taking possession of the townhouse, she lived there with her twin sister Jennifer. She stated that Jennifer was divorced and shared equal custody of her children, so Jennifer's children resided in the townhouse at times as well. The appellant explained that Jennifer lived there because she was renovating her own house and needed a place to stay during that period. The appellant acknowledged that her whole family works in the real estate field. She stated that her older sister works in real estate while Jennifer stages homes.

[12] She stated that she did her undergraduate studies in Ohio and that she has owned a house at 624 Athens in Cincinnati since 2008. She testified that she goes there often and that her telephone number has always been an Ohio number. Her then-husband worked for Procter & Gamble and his job required him to work outside of Canada, including Panama in 2017 and 2018. In cross-examination, she

acknowledged that she was in Panama often during 2017 and 2018 because they were undergoing marriage counselling and attempting to reconcile.

[13] In 2019, the appellant purchased a house in Etobicoke and the sale closed in June 2020. She stated that she rented out the 49 Dryden Way townhouse at that point because her plan/hope at the time was that she and her then-husband would live together in the Etobicoke house. She stated that when the global pandemic arose in 2020, he did not want to live in the recently purchased Etobicoke house because his job required him to work all over the world.

[14] She stated that the Etobicoke house was too large to live in alone and that after the pandemic subsided, her then-husband was relocated to the U.S. by Procter & Gamble. She testified that since they were attempting to reconcile at the time, she went to the Cincinnati house in order to be together. However, their reconciliation efforts were ultimately unsuccessful and their marriage ended. She testified that since their divorce, she has returned to live with her parents in Caledon and decide her next steps, while her ex-husband resides in the 624 Athens house in Cincinnati. She also stated that she recently rented out the Etobicoke house.

[15] The appellant tendered copies of receipts, invoices, and statements showing the following:

- a. purchase of a home alarm system in May 2017, billed to the appellant at 49 Dryden Way;¹¹
- b. purchase of dwelling insurance on May 5, 2017, for the period from May 8, 2017 to May 8, 2018, for 49 Dryden Way and showing the appellant as purchaser;¹²
- c. opening of an Enbridge account (for natural gas) on May 9, 2017, with no name or address on the excerpt provided;¹³
- d. first-time TV, internet, and home phone charges from Bell billed on June 26, 2017, to the appellant at 49 Dryden Way;¹⁴
- e. purchase of a queen size bed and a double bed from Structube on June 28, 2017, billed to the appellant at 48 Dryden Way. Based on the receipt, “bed” means bed frame and not the mattresses. The appellant also explained that the townhouse is on Lot 48;¹⁵
- f. exchange of the queen size bed from charcoal color to linen color on July 6, 2017, billed to the appellant at Lot 48 – 49 Dryden Way;¹⁶
- g. 2017 Toronto property taxes for 49 Dryden Way assessed to the appellant as owner on December 20, 2017;¹⁷

- h. two dining chairs sold to the appellant at 49 Dryden Way on January 12, 2018;¹⁸
- i. a 7-light brass ceiling light sold to the appellant at 49 Dryden Way on January 8, 2018, with an estimated ready date of March 31, 2018.¹⁹ The appellant stated that this light fixture was for the foyer;
- j. an 8-light brass chandelier sold on April 10, 2018 to “Designer Studio” at 49 Dryden Way.²⁰ The appellant stated that this light fixture was for the kitchen and recalled that she likely used her sister’s staging business in order to receive a designer discount. Although the appellant’s name does not appear on the invoice, I note that the purchaser’s contact number is a Cincinnati area code;
- k. a 13-piece knife block set and a pair of Waterford crystal glasses sold to the appellant at 49 Dryden Way on June 6, 2018;²¹
- l. utilities billed by Toronto to the appellant at 49 Dryden Way for water consumption and sewer services for the period from June 18 to October 15, 2018;²²
- m. Visa credit card purchases made from December 19 to 24, 2018, at various establishments near 49 Dryden Way, including Sherway Gardens shopping centre, Pet Valu, Metro grocery store, Richview animal hospital, and Shoppers Drug Mart, among others. The statement shows the appellant as account holder at 49 Dryden Way;²³
- n. installation of a central vacuum system billed to “Janis” at 49 Dryden Way on June 1, 2017.²⁴ The appellant testified that she has a Schnauzer breed of dog²⁵ and was accustomed to having central vacuum; and
- o. an Amazon order confirmation dated April 9, 2018 showing the purchase of resumé paper by the appellant and 49 Dryden Way as the delivery address.²⁶ The appellant testified that she purchased the paper because she was looking for a job at the time.

[16] The appellant tendered copies of smartphone photos showing various events that took place in the townhouse, including her niece’s birthday celebration (date-stamped November 2017),²⁷ a New Year’s eve gathering with her then-husband and in-laws (date-stamped December 31, 2017),²⁸ and a photo of her with her parents, sisters, and niece toasting the closing of her purchase of the townhouse.²⁹ She also tendered photos showing her dog at the living room window (date-stamped December 2017),³⁰ her nieces and nephew on the staircase, her garden that she planted in front of the townhouse;³¹ and herself doing yoga poses in the lower-level rec room of the townhouse.³² Some photos also showed in the background a large marble coffee table which the appellant said was purchased from Restoration Hardware and required four men to deliver.³³

[17] She also tendered photos of a drainage problem involving an external pipe (date-stamped December 2017),³⁴ an incorrectly installed closet door,³⁵ an improperly sanded/painted wall,³⁶ and a misaligned external door frame.³⁷ She testified that these photos were taken in 2017 for the purpose of communicating deficiencies to the builder.

V. Discussion and analysis

[18] The respondent says that in order to qualify for the rebate, subsection 254(2) requires that: (i) the particular individual intend to use the property as their (or their relation's) primary residence, and (ii) proof of this intention in turn requires that the particular individual (or their relation) occupy the property as their primary residence. With respect to the latter aspect regarding proof, the respondent relies on the proposition that a person's statement of their subjective purpose or intent is not necessarily or always the most reliable basis on which to resolve the question of intent and that actual use is often the best evidence.³⁸

[19] The wording of subsection 254(2) does not support the respondent's latter contention that proof of intent requires the appellant (or her relation) to actually occupy the townhouse as their primary residence. Paragraph 254(2)(b) says that at the time of purchase, the purchaser must have intended to use the property as either their (or their relation's) primary residence. Paragraph 254(2)(g) then provides that after substantial completion of construction of a residential condominium unit, the first person to occupy it must be the purchaser or their relation, i.e. there is no requirement that it be used as their primary place of residence.

[20] The proposition put forth in the case law says that a party's actions are often the best objective evidence of their stated subjective intent and I agree.

[21] The appellant's testimony and timeline of events have the messy authenticity of a marital breakdown in which the couple has been together for a significant period of time and has the means in terms of resources, time, motivation, and support to attempt reconciliation in multiple cities. She acknowledged that her family works in the real estate field which likely contributed to her comfort level with buying the townhouse followed by the Etobicoke house in relatively short order; the balance of the explanation is likely attributable to emotional choices.

[22] There was no evidence of a history of flipping properties or any profit-related motive on her part. On a balance, her actions were more consistent with an individual making personal choices rather than business decisions. For example, she had owned

a house in Cincinnati since 2008 and it appears that during her marriage, she spent time in both Canada and the U.S. although the proportions were unclear. On learning of her husband's infidelity, she returned to Ontario and purchased the townhouse with the financial help of her parents; the choice to live closer to one's family in these circumstances does not seem unusual.

[23] Reconciliation attempts are also not unusual during a marital breakdown. Given that her then-husband worked for a multi-national U.S. corporation, it is reasonable that the appellant lived in Panama with him for a period while still owning the townhouse and furnishing it to be her home. The subsequent purchase of the Etobicoke house appears to have been a hopeful and perhaps impulsive choice on her part but again, in the circumstances, it does not appear to be profit-motivated either.

[24] The appellant's various purchases and their sequencing after taking possession of the townhouse also suggest that she intended to live there as her primary residence. Some examples are as follows:

- a. she took possession of the townhouse on May 8, 2017, following which she had a home alarm system installed and set up the various utilities;
- b. she purchased a bed (i.e. a bed frame) in charcoal color and then took the trouble to exchange it for another color, while sleeping on a mattress on the floor in the meantime;
- c. she owns a dog and upon taking possession of the townhouse on May 8, 2017, she had a central vacuum system installed by June 1st.

[25] When the more essential aspects of home ownership were set up, she then took longer to do non-essential tasks, examples of which are as follows:

- a. the ceiling light for the foyer was purchased on January 8, 2018, with an estimated ready date of March 31, 2018, i.e. almost three months later;
- b. the ceiling light for the kitchen was then purchased on April 10, 2018, from a different store;
- c. she ordered resum  paper on April 9, 2018, to be delivered to the townhouse address;
- d. she purchased a solid marble coffee table; and
- e. she planted a garden.

[26] The fact that the appellant took smartphone photos of construction deficiencies for the builder is also reminiscent of the behavior of a purchaser who plans to live in the home in question. She habitually documented various events by

taking smartphone photos and the magnitude of the events ranged from small (e.g. her dog at the living room window) to significant (e.g. taking possession of the townhouse). In cross-examination, the respondent suggested that the photos could have been taken in locations other than at the townhouse. I do not believe that to be the case here.

[27] As a blood relative, the appellant's sister is a "relation" under the Act.³⁹ However, the evidence does not suggest that the appellant purchased the townhouse for her sister to use as a primary residence, nor that her sister was the first to occupy it after substantial completion of construction. Therefore, the fact that she may have resided in the townhouse is not relevant for the purposes of the rebate.

VI. Conclusion

[28] Based on the above findings, I am of the view that: (a) when the appellant purchased the townhouse, she intended to use it as her primary residence, and (b) after substantial completion of construction, she was the first person to occupy it. Therefore, she qualified for the Ontario portion of the new housing rebate with respect to her purchase of 49 Dryden Way.

[29] The appeal is allowed, without costs.

Signed at Ottawa, Canada, this 2nd day of June 2023.

"Susan Wong"

Wong J.

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Counsel for the Respondent: Amin Nur
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COUNSEL OF RECORD:

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¹ SOR/2010-151

² *New Harmonized Value-Added Tax System Regulations, No. 2*, SOR/2010-151, subsection 41(2)

³ Subsection 254(1), *Excise Tax Act*

⁴ Paragraph 251(2)(a), *Income Tax Act*

⁵ Paragraph 251(6)(a), *Income Tax Act*

⁶ Exhibit R-1, Tab 17

⁷ Exhibit A-1, Tab 2

⁸ Exhibit A-1, Tab 7

⁹ Exhibit A-1, Tab 2

¹⁰ Exhibit A-1, Tab 1

¹¹ Exhibit A-1, Tab 5

¹² Exhibit A-1, Tab 6

¹³ Exhibit A-1, Tab 8

¹⁴ Exhibit A-1, Tab 9

¹⁵ Exhibit A-1, Tab 10

¹⁶ Exhibit A-1, Tab 11

¹⁷ Exhibit A-1, Tab 12

¹⁸ Exhibit A-1, Tab 14

¹⁹ Exhibit A-1, Tab 13

²⁰ Exhibit A-2, Tab 28

²¹ Exhibit A-1, Tab 16

²² Exhibit A-1, Tab 21

²³ Exhibit A-1, Tab 24

²⁴ Exhibit A-1, Tab 3

²⁵ Exhibit A-2, Tab 27 (page 8)

²⁶ Exhibit A-1, Tab 28

²⁷ Exhibit A-2, Tab 27

²⁸ Exhibit A-2, Tab 27

²⁹ Exhibit A-2, Tab 29

³⁰ Exhibit A-2, Tab 27

³¹ Exhibit A-2, Tab 29

³² Exhibit A-2, Tab 29

³³ Exhibit A-2, Tab 27 (pages 7 and 11), Tab 29 (page 26)

³⁴ Exhibit A-2, Tab 27

³⁵ Exhibit A-2, Tab 29

³⁶ Exhibit A-2, Tab 29

³⁷ Exhibit A-2, Tab 29

³⁸ *Kandiah v. The Queen*, 2014 TCC 276 at paragraph 18; *Coburn Realty Ltd. v. The Queen*, 2006 TCC 245 at paragraph 10

³⁹ Subsection 254(1), *Excise Tax Act*; Paragraphs 251(2)(a) and (6)(a), *Income Tax Act*