Docket: 2021-2010(GST)I

BETWEEN:

NAVDEEP SINDHI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on May 31, 2023, at Hamilton, Ontario

Before: The Honourable Eugene P. Rossiter, Chief Justice

Appearances:

Counsel for the Appellant:	Craig Burley
Counsel for the Respondent:	Sam Perlmutter

JUDGMENT

The appeal with respect to an assessment made under Part IX of the *Excise Tax Act*, New Housing Rebate Application, Notice of Assessment dated September 10, 2019, is dismissed.

Signed at Ottawa, Canada, this 17th day of July 2023.

"E.P. Rossiter"

Rossiter C.J.

Citation: 2023 TCC 102
Date: 07172023
Docket: 2021-2010(GST)I

BETWEEN:

NAVDEEP SINDHI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Rossiter C.J.

I. BACKGROUND AND FACTS:

[1] This matter came before the Court by way of a Notice of Assessment dated September 10, 2019, issued to the Appellant by the Canada Revenue Agency ("CRA") wherein the Respondent denied the Appellant's application for a GST/HST New Housing Rebate. The Appellant filed a Notice of Objection on September 19, 2019 and ultimately a Notice of Appeal with the Tax Court of Canada on August 16, 2021. The Respondent filed a Reply on July 15, 2022, thereby enjoining the issues which are before the Court.

[2] The issue before the Court relates to the Appellant's residence at 108 Dunrobin Lane, Grimsby, Ontario. The Appellant asserts that he intended to reside in this residence. The Appellant signed an Agreement of Purchase and Sale for the residence on July 8, 2016 for $413,847.00. The Appellant had planned to marry and raise a family in what he described as a great family area, quiet with good space in and around the residence, which was to have three bedrooms.

[3] The Appellant had a partner for approximately 2.5 years, but they separated and went their own ways in January 2017.

[4] The Appellant had returned to Canada from Kentucky, United States where he worked as a general manager of gas stations (his father's business) for a period

of five years. The Appellant returned to Canada when his father's gas stations were sold, and lived with his parents upon returning to Canada.

[5] The Appellant planned to go into operating a trucking business which was to be owned and developed by his parents. Initially, it would involve one truck in which he was the driver and also general manager for the business, hauling freight in and about Ontario. In terms of background, he attended two years at York University in political science but did not complete his degree. He lived with his parents and worked in the business from the home of his parents.

[6] He had worked for a trucking company for about four months in 2015, at which time he obtained his trucking licence. This licence allowed him to drive trucking vehicles. As noted, in 2016 his parents were establishing their own trucking business.

[7] In 2016, the Appellant's income of $60,000.00 was entirely from his employment in the trucking business of his parents. In 2017, his income dropped to $38,000.00, again entirely from employment in the trucking business of his parents. In 2018, his income dropped to zero dollars although he continued to work in the trucking business of his parents.

[8] Initially in 2016, the Appellant used a mortgage broker to seek out financing for the purchase of the residence in question. He could afford a mortgage for about $420,000.00 at that time given the rates that he used in his calculations. He was advised by the broker that he was preapproved for financing in the area of $420,000.00 based upon his annual income in 2016 of $60,000.00.

[9] The Appellant closed the Agreement of Purchase and Sale in March 2018. By the closing date, the Appellant had several issues of concern:

a) The Appellant had broken up with his partner in January 2017. Therefore there was only a single income within which to finance the monthly mortgage payments which would become due upon the closure of the Agreement of Purchase and Sale in March 2018.

b) The trucking business of his parents (HS Steelers Transport) that was his employer was not doing well, and as a result, his income of $60,000.00 in 2016 was dropped by the company to $38,000.00 in 2017 and eventually to zero in 2018. He continued to drive a truck for the business in question and

was its general manager while operating the business out of his parents' house where he was living.

c) The Appellant could not obtain conventional mortgage financing due to his limited income when it came to close the residence transaction in question in March 2018.

d) The Appellant resorted to a private mortgage with high interest rates and administration fees. The financing on a private mortgage was extremely expensive and this was even after the Appellant's parents provided a mortgage on their own house, plus a mortgage on the residence in question. The Appellant describes this as "it is what it is".

e) The parents' trucking business eventually turned around but it was too late for the Appellant to obtain financing for the residence and during this period of time, the Appellant had to seek financing help from his parents.

[10] The Appellant's partner was never a party to the Agreement of Purchase and Sale for the property. There was no agreement with his partner to participate in the mortgage payments after the Agreement of Purchase and Sale was signed.

[11] In terms of occupancy of the residence in question post-property closing, the premises was heated by natural gas. The Appellant did not prepare or consume any meals in the residence, only staying at the residence for approximately two nights per week. The only furniture or housekeeping items he had on the premises was a mattress, sheets and pillows and a table. The Appellant had occupational home insurance for the residence, as well as internet and natural gas for the stove and for heat. He eventually sold the residence for $455,000.00.

II. **ISSUES:**

[12] There are three issues before the Court:

1) Whether the Appellant acquired the property with the intent to use it as a primary place of residence as per paragraph 254(2)(b) of the *Excise Tax Act*, R.S.C., 1985, c. E-15 ("ETA").

2) Whether the occupancy of the residence by the Appellant as required under paragraph 254(2)(g) of the ETA was such that he had to occupy the property as his primary place of residence or just occupy it as his place of residence.

3) Was the Appellant frustrated from carrying out his intention to occupy the premises as his place of residence and if so, did the frustration exist or even apply such as there was an exempt supply under subparagraph 254(2)(g)(ii)?

III. **THE LAW:**

[13] Section 254(2) of the ETA states as follows:

> **New housing rebate**
>
> **(2)** Where
>
> > **(a)** a builder of a single unit residential complex or a residential condominium unit makes a taxable supply by way of sale of the complex or unit to a particular individual,
> >
> > **(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 place of residence of the particular individual or a relation of the particular individual,
> >
> > **(c)** the total (in this subsection referred to as the "total consideration") of all amounts, each of which is the consideration payable for the supply to the particular individual of the complex or unit or for any other taxable supply to the particular individual of an interest in the complex or unit, is less than $450,000,
> >
> > **(d)** the particular individual has paid all of the tax under Division II payable in respect of the supply of the complex or unit and in respect of any other supply to the individual of an interest in the complex or unit (the total of which tax under subsection 165(1) is referred to in this subsection as the "total tax paid by the particular individual"),
> >
> > **(e)** ownership of the complex or unit is transferred to the particular individual after the construction or substantial renovation thereof is substantially completed,
> >
> > **(f)** 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 of the complex or unit
> >
> > > **(i)** in the case of a single unit residential complex, the complex was not occupied by any individual as a place of residence or lodging, and

> **(ii)** in the case of a residential condominium unit, the unit was not occupied by an individual as a place of residence or lodging unless, throughout the time the complex or unit was so occupied, it was occupied as a place of residence by an individual, or a relation of an individual, who was at the time of that occupancy a purchaser of the unit under an agreement of purchase and sale of the unit, and
>
> **(g)** either
>
> **(i)** the first individual to occupy the complex or unit as a place of residence at any time after substantial completion of the construction or renovation is
>
> **(A)** in the case of a single unit residential complex, the particular individual or a relation of the particular individual, and
>
> **(B)** in the case of a residential condominium unit, an individual, or a relation of an individual, who was at that time a purchaser of the unit under an agreement of purchase and sale of the unit, or
>
> **(ii)** the particular individual makes an exempt supply by way of sale of the complex or unit and ownership thereof is transferred to the recipient of the supply before the complex or unit is occupied by any individual as a place of residence or lodging,
>
> the Minister shall, subject to subsection (3), pay a rebate to the particular individual equal to
>
> **(h)** where the total consideration is not more than $350,000, an amount equal to the lesser of $6,300 and 36% of the total tax paid by the particular individual, and
>
> *(i)* where the total consideration is more than $350,000 but less than $450,000, the amount determined by the formula
>
> A × [($450,000 - B)/$100,000]
>
> where
>
> A is the lesser of $6,300 and 36% of the total tax paid by the particular individual, and
>
> B is the total consideration.

[14] There are a number of case authorities which were cited by either the Respondent or the Appellant during the course of closing arguments and those

authorities are: *Gagné v The Queen*, 2007 TCC 175, a decision of Justice Favreau; *Sozio v The Queen*, 2018 TCC 258, a decision of Justice Bocock; *Fard v The Queen*, 2022 TCC 42, a decision of Deputy Judge Masse; *Gill v The Queen*, 2016 TCC 13, a decision of Justice Smith; *Kniazev v The Queen*, 2019 TCC 58, a decision of Justice Smith; *Margolin v The Queen*, 2018 TCC 36, a decision of Deputy Judge Masse; *Virani v The Queen*, 2010 TCC 113, a decision of Justice Campbell; *Berkovich v The Queen*, 2014 TCC 268, a decision of Justice Lyons; *Sivakumar v The Queen*, a decision of Justice Campbell and *Kandiah v The Queen*, 2014 TCC 276, a decision of Justice C. Miller.

[15] There is a point that should be addressed and that is the question of occupation of the residence in question; there is a difference between paragraph 254(2)(b) and paragraph 254(2)(g). In paragraph 254(2)(b), the provision focuses on the intention of the Appellant for use "as the primary place of residence" of the particular individual. Paragraph 254(2)(g) makes no reference to the phrase "primary" but simply refers to occupying "as a place of residence". This can be a significant difference in sections in terms of application. Upon review, the authorities referred to and applying the Rules of Statutory Interpretation, I believe another interpretation must also be applied.

IV. **ANALYSIS:**

[16] I am satisfied with the evidence of the Appellant that the Appellant's intention at the time of the execution of the Agreement of Purchase and Sale to use the residence as his primary place of residence.

[17] Paragraph 254(2)(b) of the ETA provides that the particular individual whose is acquiring the unit in question must have the intention to acquire the residence for the use of primary place of residence. The intention is determined at the time the Appellant entered into the Agreement of Purchase and Sale, not at the time of occupancy (*Wong v The Queen*, 2013 TCC 23). A taxpayer's intention is a question of fact and when determining intention a judge must look to both the taxpayer's stated intention as well as the surrounding factual circumstances (*Kukreja v The Queen*, 2014 TCC 56). There are a variety of factors which go into whether or not the evidence supports the intention in question. In this particular case, the Appellant had no real experience in the real estate market[1]. The Appellant did not have to make any efforts[2] to sell a former property because he had no former property. The

[1] *Virani v The Queen*, 2010 TCC 113 at para 15; *Berkovich v The Queen*, 2014 TCC 268 at para 30.
[2] *Kandiah v The Queen*, 2014 TCC 276 at paras 24 and 28; *Berkovich v The Queen*, 2014 TCC 268 at para 31.

intention was that of the taxpayer alone; he would have been a single person although he had a brief discussion with his partner at the time about the purchase. That partner did not participate in, become liable under, or become a party to the Agreement of Purchase and Sale on the property in question. The taxpayer's income at the time of entering the Agreement of Purchase and Sale according to him was sufficient for him to meet the monthly obligations on the perspective mortgage in question.

[18] I found the Appellant to be forth-right and frank in his evidence. He was direct and did not avoid answering difficult questions. I think that he had some level of naivety with respect to his long-term prospects, but given that this is his first adventure into the real estate market, this is not surprising. I am satisfied that the Appellant had the intention at the time of the execution of the Agreement of Purchase and Sale to use the residence as his primary place of residence.

A. Did the Appellant Occupy the Property as a Place of Residence?

[19] As alluded to above, the residence test is different between paragraphs 254(2)(b) and (g); the former requires the property to be the taxpayer's "primary place of residence", whereas the latter only requires the property to be a "place of residence".

[20] The Respondent relies on *Gill v The Queen*, 2016 TCC 13 for the proposition that paragraph 254(2)(g) requires a taxpayer to occupy the property as their "primary" place of residence. In *Gill* at paragraph 29, Justice Smith wrote regarding paragraph 254(2)(g):

> 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.

[21] With respect I must disagree. In statutory interpretation, there is a presumption of consistent expression, one part of which states different words have different meanings. In *Jabel Image Concepts Inc v Canada*, [2000] GSTC 45, the Federal Court of Appeal wrote at paragraph 12:

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.

[22] In the case of paragraphs 254(2)(b) and (g), it must be presumed Parliament intentionally chose to make a distinction when it used the words "primary place of residence" in paragraph (b) and "place of residence" in paragraph (g). I must therefore reject the Respondent's argument that paragraph 254(2)(g) requires the Appellant to have occupied the property as his primary place of residence.

[23] Notwithstanding my above commentary, I do not find the Appellant to have occupied the property. As guidance, I find the comments of Justice Bocock in *Sozio v The Queen*, *supra*, at paragraph 15 thereof to be of particular relevance:

> [15] Each case is an exercise in analyzing the taxpayer's subjective intention using the unique facts of each appeal across a variety of indicia. The facts will provide direction and inform the application and weight to be given to the indicia. In short, is what a taxpayer says or intended supported across the waypoints of occupancy. Such indicia of occupancy as a primary residence are logical:
>
> a) demarcation of primary place of residence by change of address;
>
> b) the relocation of sufficient personal effects to the rebate property;
>
> c) if no occupancy of the residence, was there cogent evidence of frustration of occupancy;
>
> d) permanent occupant insurance versus seasonal or rental coverage;
>
> e) delivery of possession of previous primary residence to another;
>
> f) If dual occupancy continues, then the rebate property must be more frequently occupied, more convenient to third party locations such as work, more convenient amenities and more suitable to the needs of the taxpayer.

[24] It is my view that occupancy is something more than simply having a mattress with a set of sheets and pillowcases and a table on the premises. Although the Appellant did some measure of staying at the premises in question, two nights per week, this certainly could not classify one as occupying the premises. What he did was arrange for the heat to be turned on at the premises, but he had to have heat at the premises because of the weather conditions. He arranged for home insurance coverage, but this would be a requirement in order to obtain any financing whether it be a conventional or private lender. He arranged for internet, but then again if he is going to spend anytime at the premises he would need internet in this day and age. What he did not do speaks more with respect to whether or not there was an occupancy of the residence by the Appellant:

a) he did not prepare or make any meals at the premises in question;

b) he did not stay or occupy the premises for more than two nights per week;

c) he continued to live with his parents in their place of residence;

d) he did not change his address for mailing purposes;

e) he did not relocate sufficient personal effects to the property in question;

f) there was no evidence that it was more frequently occupied, in fact there was evidence to the contrary that it was less frequently occupied than his other residence that he was enjoying with his parents;

g) there was no evidence with respect to convenience to a third party location such as work or more convenient amenities more suitable to the needs of the taxpayer.

[25] There is no question in my mind that the Appellant had the intention to occupy the premises in question as his primary place of residence, but I do not believe that the evidence supports that he occupied the place of residence at a sufficient level to qualify for occupancy. Therefore, the Appellant does not satisfy the condition in paragraph 254(2)(g).

B. Was There a Frustrating Event?

[26] The Appellant contends he was frustrated from occupying the residence. The frustration, he argues, was his failure to obtain a conventional, long-term mortgage. To invoke frustration, the surrounding circumstances must make the frustrating event unforeseeable, beyond the buyer's control, and deny the buyer any alternative pathway to having the property be their primary residence (*Sozio*, *supra*, at para 29). If a frustrating event is found, the Appellant does not need to satisfy the occupancy requirement under subsection 254(2) (*Sozio*, *supra*, para 12).

[27] The lack of a traditional mortgage did not prevent the Appellant from satisfying the occupancy condition under paragraph 254(2)(g). The Appellant secured a private mortgage before closing on the residence, and that mortgage allowed the Appellant to occupy the residence for at least six months. I am not convinced that having a private mortgage for the first six months, rather than a traditional mortgage, in any way prevented the Appellant from occupying the

property. As a result, I cannot find the inability to secure a traditional mortgage to be a frustrating event.

V. **CONCLUSION**

[28] For all of the foregoing reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 17th day of July 2023.

"E.P. Rossiter"

Rossiter C.J.

CITATION:	2023 TCC 102
COURT FILE NO.:	2021-2010(GST)I
STYLE OF CAUSE:	NAVDEEP SINDHI AND HIS MAJESTY THE KING
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	May 31, 2023
REASONS FOR JUDGMENT BY:	The Honourable Eugene P. Rossiter, Chief Justice
DATE OF JUDGMENT:	July 17, 2023

APPEARANCES:

Counsel for the Appellant:	Craig Burley
Counsel for the Respondent:	Sam Perlmutter

COUNSEL OF RECORD:

For the Appellant:

Name:	Craig Burley
Firm:	

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada