Docket: 2014-3307(GST)I

BETWEEN:

JEYAKODY PARTHIBAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 15, 2017, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Hillary Adams

JUDGMENT

For the attached reasons for judgment, the appeal from the assessment made under the *Excise Tax Act*, notice of which is dated June 19, 2013, is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to the new housing rebate.

Costs of $250 are payable by the Respondent to the Appellant.

Signed at Ottawa, Canada, this 2nd day of March 2017.

"Patrick Boyle"

Boyle J.

Citation: 2017 TCC 30
Date: 20170302
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BETWEEN:

JEYAKODY PARTHIBAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] This appeal under the Court's informal procedure is in respect of Mr. Parthiban's claim for a GST/HST new housing rebate for his new family home in Markham, Ontario.

Overview

[2] The hearing focused on two issues: (i) the new housing rebate requirement in paragraph 254(2)(*b*) of the *Excise Tax Act* that when the Appellant bought the home in December 2011 it was to use the home as his and his family's primary place of residence, and (ii) the related requirement in paragraph 254(2)(*g*) that the Appellant and his family were the first persons to occupy the home as a place of residence after closing the purchase in December 2012.

[3] The Respondent was satisfied at the hearing that all of the evidence was that the Appellant, his wife and their young children have occupied the home throughout, and that the only other person to occupy the home is the Appellant's wife's brother who has lived with, and as part of, the family throughout the relevant time.

[4] The Court was therefore left to resolve only the first issue, whether in December 2011 when he entered into the agreement of purchase and sale for the home, Mr. Parthiban intended to use it as his family's primary place of residence.

[5] Following the conclusion of the evidence, the Respondent rightly also agreed that all of the evidence indicated that he bought the home intending to use it as his family's only place of residence, and that it has been used as such ever since they bought it through to today. The home has never been offered for sale nor for rent, and has never been left vacant.

[6] The Appellant's new housing rebate application was turned down because, per the Canada Revenue Agency (the "CRA") letter turning down the rebate request, "for rebate purposes, your house in Canada can only be considered a secondary place of residence since your status while in Canada is a visitor".

[7] The CRA notice of confirmation disallowing the Appellant's objection similarly concludes that the Markham home is a secondary residence because the Appellant continues to reside in the United Kingdom.

[8] This is the position that was maintained at the hearing notwithstanding the evidence.

[9] The Respondent's position is wrong. The legislation is clear that the Appellant's right to the rebate turns on the characterization of the house as a place of residence, not his status as a resident or non-resident. This is also clear from the CRA's own publications on the new housing rebate, including the Technical Interpretation issued to the Appellant at the time he was buying the house. It appears that CRA employees at the review and objection stages sought to read the words to deny the Appellant's rebate because they believed he and his wife were not lawful immigrants or residents. This case was not helped by the fact that the Department of Justice assigned the Tax Court hearing to an immigration lawyer.

The Facts

[10] The Appellant, his wife and his brother-in-law each testified. Their testimony was consistent throughout.

[11] The Appellant and his wife are U.K. citizens and passport holders who moved to Canada in 2011. Their three children have been born since 2011 in Canada, the oldest being born in late 2011.

[12] Before moving to Canada, the Appellant and his wife sold their U.K. home and placed all of their personal possessions in storage. Their stored items were shipped to Canada after they arrived.

[13] Once they arrived in Canada, they bought a car and the Appellant obtained an Ontario driver's licence.

[14] The Appellant and his wife had owned and operated a convenience store business in leased premises in the U.K. Before moving to Canada, they arranged for a local manager of the store's day-to-day business. They have continued to own the business. This, combined with the Appellant's other sources of income from his internet- and Skype-based software engineering consulting self-employment activities, has provided enough income for the family while they are living in Canada these past six years.

[15] The Appellant occasionally travelled outside Canada for family visits and for holidays, at times with his wife or with his wife and their children. These ranged from a one-week holiday in Jamaica to a few weeks to a month primarily in the U.K. visiting family and in Sri Lanka to attend a sick parent. The evidence is that the longest absence from Canada was perhaps as long as a month-and-a-half altogether. I find that the Appellant and his family were in Canada, as a typical family would be, in their Markham home for between 10 and 10-and-a-half months each year since the December 2012 closing on their Markham home.

[16] When they would visit family in the U.K., they would normally, if not always, stay at a sibling's home or that of another member of their extended family. It is clear that there is not one scintilla of evidence or even a hint of a suggestion that the Appellant or his wife at any time owned, leased or otherwise had available to them another place of residence anywhere in the world.

The Law

[17] The statutory requirements for the new housing rebate to be occupied by the buyer as a residence for himself or their family are as follows under the *Excise Tax Act*:

254(2) Where	254(2) Le ministre verse un remboursement à un particulier dans le cas où, à la fois :
. . .	[…]

(*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,	*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;
. . . and	[…]
(*g*) either	*g*) selon le cas :
(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	(i) le premier particulier à occuper l'immeuble ou le logement à titre résidentiel, à un moment après que les travaux sont achevés en grande partie, est :
(A) in the case of a single unit residential complex, the particular individual or a relation of the particular individual, and	(A) dans le cas de l'immeuble, le particulier ou son proche,
. . .	[…]
the Minister shall . . . pay a rebate to the particular individual . . .	

[Emphasis added.]

[18] It is clear from the statutory language that the requirement to be satisfied for a new housing rebate is whether the housing unit was occupied as a place of residence. That is very distinct from either the buyer's residence status in Canada for income tax law purposes, which is a characterization of the person's status, or whether the buyer is lawfully present or resident in Canada for immigration law purposes, which addresses the status and rights of the person. The new housing rebate legislation requires me to characterize the home as a place of residence or not, not the person who owns the home. Clearly a person cannot be a "place of residence" or a "lieu de résidence".

[19] It should also be noted that in the French version the words for "primary place of residence" are "lieu de résidence habituelle". The use of the word "habituelle" in French imports no concept of ranking, ordination or numbering that might be associated with certain normal uses of the word "primary" in English. The French makes it even more clear and certain that the use of the word "primary" to qualify "place of residence" in English is not to suggest that the new housing rebate is only available to those who also have at least a second home also used as a place of residence.

[20] The requirement that the house be a primary place of residence is only in paragraph 254(2)(*b*) and not in (*g*). That is, it is only a requirement that, at the time of agreeing to buy it, the house was to be used as a primary place of residence. The words "primary" and "habituelle" do not appear in paragraph (*g*).

Analysis

[21] As noted above, the CRA letter denying the rebate application turns it down on the basis that the Appellant's house in Canada can only be considered as a secondary place of residence since his status while in Canada when he agreed to buy it and when he moved in was that of a visitor. The CRA letter continues immediately by referring as support for this to the discussion of "primary place of residence/lieu de résidence habituelle" in the CRA GST/HST New Housing Rebate Guide RC4028.[1]

[22] In the December 2012 closing, the Appellant requested a ruling on this issue from CRA's GST/HST Rulings Group in Ottawa. In January 2013, he received a Technical Interpretation in response. It reads:

> The "primary place of residence" of an individual is generally the residence that the individual inhabits on a permanent basis. Only one residence may be a

[1] I do not know for certain what Guide RC4028 said in 2013 when the letter was written, but in its current version it is clear that the discussion referred to does not at all support or suggest that it is not the house which must be able to be characterized as a place of residence meeting the requirements but that it is the immigration status or residence status for income tax law or immigration law purposes of the buyer/applicant for the rebate whose residence status must be determined and characterized. Specifically, the relevant paragraph says: "**Note** — If you buy or build a new house in Canada but your primary place of residence remains outside Canada, then your house in Canada would be a secondary place of residence and would not qualify for the new housing rebate." In French, this note reads: "**Remarque** — Si vous achetez ou construisez une habitation neuve au Canada, mais que votre lieu de résidence habituelle demeure à l'extérieur du Canada, votre habitation au Canada serait considérée comme un lieu de résidence secondaire et ne serait pas admissible au remboursement pour habitations neuves." These are the very terms used in the legislation and refer to the building, not a person. See *GST/HST New Housing Rebate*, Canada Revenue Agency, Guide RC4028(E) Rev. 10/16, page 7 (cra.gc.ca/gsthst), and *Remboursement de la TPS/TVH pour habitations neuves*, Canada Revenue Agency, Guide RC4028(F) Rév. 10/16, page 8, (arc.gc.ca/tpstvh).

> person's primary place of residence at any one time. If a person has more than one place of residence, the following are some of the factors that are taken into consideration when determining if the residence qualifies as the primary one . . . .[2]

This is entirely consistent with the legislation and does not confuse a building as a place of residence with the owner's country of residence.[3] The Technical Interpretation also correctly informs the Appellant that **"[w]hether or not the purchaser is a non-resident has no bearing on the eligibility of the new housing rebate or its assignment to the builder**".

[23] The Respondent confirmed in argument that on the evidence the Markham home was purchased with the sole intention of using it as the family's place of residence and that it has always only ever been used as that. However, the Respondent maintained its position that this house, which was their sole place of residence, could not be their primary place of residence for new housing rebate purposes if the Appellant and his wife did not have lawful residence status in Canada in December 2011 that would allow them to remain in Canada until they closed the purchase in December 2012. That their first son was a Canadian citizen born in October or November 2012 and moved into their new home with them in December 2012 unfortunately did not help because he had not yet been conceived in December 2011 when the agreement to purchase the home was entered into.

[24] In December 2011 the Appellant and his wife fully intended to have a family. They had tried without ultimate success for some time before their first son was born. The evidence is entirely clear that they were buying this home intending to use it as the sole place of residence for them and their children that they were intending, indeed trying hard, to have. Since their first child was a Canadian citizen who was native born in Canada and to which there were no immigration issues, I am not sure why there could remain a problem after December 2012.

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[2] Exhibit A-2.

[3] The Technical Interpretation continues (Exhibit A-2): "For further information on determining if a place of residence is a primary place of residence, please refer to GST/HST Policy Statement [P-228], *Primary Place of Residence*." This Policy Statement (issued March 30, 1999, last-updated May 16, 2000) is similarly consistent with the language of the legislation when it says: "A **primary place of residence** may be differentiated from a secondary place of residence since the terms primary and secondary are necessarily defined in relation to each other. . . . From this, it follows that where an individual has more than one place of residence . . . ." The Policy Statement continues: "The general guidelines as noted above and the specific criteria listed below are factors in determining whether a house constitutes a person's **primary place of residence**. . . . Where an individual . . . owns . . . more than one place of residence and continues to occupy both of them, the following factors may indicate which one is the **primary place of residence** . . . ."

[25] I frankly cannot see how a home in Markham that is occupied by a family as their only place of residence, without so much of a hint in the evidence of the possibility of another home being another place of residence, could be characterized as their secondary place of residence or as anything other than their primary place of residence. If I am the only person to own a house, I am its sole owner and I am not a co-owner. If a law turned on whether I was its primary owner, arguably that law could be interpreted by some as implicitly only applying in the case of co-ownerships in which there are at least two unequal co-owners. However, in the case of the new housing rebate I cannot conclude that the use of the word "primary place of residence" requires that an appellant have more than one home as a place of residence before he can be said to have a home that is a primary place of residence. If I am the only one who writes a test, even I fail, I know I will place first and, even if I ace it, I know I will place last, but I cannot, under any circumstances, place second or anywhere else. If I am the only one who runs a race, I will place first and be the winner even if I finish seconds before the maximum time allowed, and, even though I also placed last, I cannot place second.

[26] How can a family's only place of residence be its secondary place of residence? How can it be anything other than its primary place of residence? It is that family's sole place of residence 100% of the time. If it is not this family's primary place of residence for the reasons given by the CRA and the Department of Justice, very few Canadians will ever get the new housing rebate. Only those who have more than one home. Enough said.

[27] How does the CRA in Summerside and Scarborough read the CRA Policy Statement, Guide and Technical Interpretation written by CRA headquarters in Ottawa?

[28] The Respondent may have its doubts, suspicions and concerns, as may this Court, but this is a court of law and its legal decisions are based on evidence. Neither the law nor the evidence support the Respondent's position.

[29] The immigration status of the Appellant and his wife as non-citizens of Canada is simply not relevant for new housing rebate purposes. I acknowledge that with respect to the testimony of the Appellant there may be credibility and weight issues regarding testimony in which he speaks carefully about his immigration status. This is not surprising for someone in these circumstances. However, it is not relevant to the facts I need to determine nor the law I need to apply.

[30] The incontrovertible evidence is that the taxpayer and his wife arrived in Canada in 2011 and presented their U.K. passports which were stamped for admission and that they understood this allowed them to remain in Canada for six months. The Appellant and his wife believed that they could leave Canada for a period of time before the six-month period expired, and then return and present their U.K. passports, and again have them stamped and be allowed a further six-month stay. I do not know that their understanding is wrong as I was not presented with any law to the contrary. The Appellant had his wife's passport for the relevant time and his current passport presented to the Court and to the Respondent. According to the Appellant, they were never challenged or denied entry, nor the subject of any removal order or any other action. This worked for the Appellant and his wife. The evidence is that they were never asked upon re-entry when they last visited Canada. After several years, they both sought to regularize their immigration status in Canada with a view to becoming permanent residents and/or landed immigrants. The Appellant has a study visa application pending and has a valid visitor record issued by Citizenship and Immigration Canada allowing him to remain as a visitor until the end of this calendar year.[4] His wife has a work permit application pending and also has an appropriate visitor record allowing her to be in Canada, but not work in Canada. Their visitor records were put in evidence.

[31] Whether or not the Appellant and his wife were correct in their understanding that they were entitled to remain another six months as visitors in Canada after leaving Canada for a period of one week or more, the evidence is clear that in fact this worked for them. There is no evidence suggesting the contrary.[5] I do not know whether or not the Appellant's interpretation or understanding was correct as the Respondent has not referred me to any law in support of its explanation, but it was the Respondent's view that a U.K. passport holder was only entitled to remain in Canada no more than 182.5 days out of any 365-day period. Indeed the Respondent was not certain that that was a legal requirement and was not set out in a policy guide of Citizenship and Immigration Canada.

[32] My ability to characterize the house as having been intended to be used as their primary place of residence at the time they first agreed to buy it turns on whether the Appellant and his family intended to use that house as a place of residence. It does not turn on whether the Appellant or his family could have been

[4] The Appellant obtained this visitor record as the one until the end of 2016 expired.
[5] There is an unsourced reference in the notice of confirmation that their six-month visitor visa was denied on a few occasions.

the subject of a removal order, arrest, deportation, or even a rendering to a foreign facility. It turns on whether the family in fact intended to and did occupy the house as the family's place of residence. It is also not a requirement that the family's intention to use the house as their primary place of residence in December 2011 have been a smart, risk-free, sensible, plan for their family; it merely has to have been their intended use. It is not relevant to their new housing rebate entitlement that their plan to reside effectively year-round in Canada as visitors for a period of time which included the closing date on the house may have been risky given that they may not have been as successful as they might have expected in regularizing their personal immigration status if questioned or challenged. It does not matter that the risks associated with their understanding and plan were so great that the Respondent or individuals working for the Respondent might not be comfortable if it were them; it is not about them. It is this particular Appellant and his family whose intended use I am to assess and there is zero doubt that they intended to acquire their Markham home as their sole place of residence and that they have used it as that ever since they closed on it, notwithstanding that their immigration compliance may have been sketchy or that their immigration status may have made their intended use of the home a risky plan to be able to conclude smoothly. In fact, on the evidence they were able to conclude it. They closed on the house when it was built and moved in immediately.

Conclusion

[33] The Appellant's appeal is allowed as his purchase of the Markham home satisfies the requirements of the new housing rebate. The CRA will be ordered to reassess accordingly. I am awarding fixed total costs of $250 in favour of the successful Appellant in this informal appeal.

Signed at Ottawa, Canada, this 2nd day of March 2017.

"Patrick Boyle"

Boyle J.

CITATION:	2017 TCC 30
COURT FILE NO.:	2014-3307(GST)I
STYLE OF CAUSE:	JEYAKODY PARTHIBAN v. THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 15, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	March 2, 2017

APPEARANCES:

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Counsel for the Respondent:	Hillary Adams

COUNSEL OF RECORD:

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