Docket: 2023-181(GST)I

BETWEEN:

12329905 CANADA LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on May 30, 2024, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant: Trevor Kezwer

Counsel for the Respondent: Lucy Yao

JUDGMENT

WHEREAS the Court has published its reasons for judgment in this appeal on this date;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The appeal of the assessment dated June 9, 2022 in respect of the Appellant's entitlement to a new residential rental property rebate under section 256.2 of the *Excise Tax Act* is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant acquired and leased a qualifying residential unit as defined in subsection 256.2(1) of the *Excise Tax Act*.

2. There shall be no costs.

Signed at Toronto, Ontario this 3rd day of September 2024.

"R.S. Bocock"

Bocock J.

Citation: 2024 TCC 115
Date: 20240903
Docket: 2023-181(GST)I

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REASONS FOR JUDGMENT

Bocock J.

I. Introduction, Facts and Issues

[1] This appeal concerns the Minister's disallowance of a new residential rental unit rebate of goods and services tax (the "GST Rental Rebate"). The unit is an urban condominium. Tenant #1 occupied the unit for less than 9 months; immediately thereafter Tenant #2 occupied it and remains there today.

The issues before the Court

[2] The critical issues before the Court surround:

i. interim occupancies of condominiums ("condos") in Ontario;

ii. the critical time concerning formation of the owner's intention concerning the length of the first tenancy; and;

iii. the wording of various definitions in the *Excise Tax Act* related to (i) and (ii) above.

[3] The facts concerning the tenancies, dates and ownership of the rental condo unit ("unit") and the GST Rental Rebate application are not in dispute. The parties and counsel, to their credit, concluded and handed up a partial agreed statement of

facts ("PASF"). The following is summary of those relevant facts extracted from the PASF and the testimony and additional documents offered by the condo owner's principal, Mr. Nuica.

Tenant #1

[4] The Appellant entered into an agreement of purchase and sale to acquire the unit in a downtown Toronto high-rise building on December 10, 2020. The larger condo complex still required finishing construction, was "undeclared" as a registered condominium and yet deemed "occupiable" on an interim basis pending final completion. The Appellant gained immediate interim occupancy under the *Condominium Act, 1998, S.O. 1998, c. 19* , beginning December 10, 2020. Since the Appellant had purchased the unit to rent, a written lease was entered into on December 30, 2020 with Tenant #1 for an expressed period of January 17 to July 31, 2021. The lease was thereafter extended on a month-to-month basis until September 30, 2021. In total Tenant #1 rented the unit for some 8 and one-half months.

Registered ownership and a second tenancy

[5] The condo corporation was declared and registered on September 23, 2021 within the meaning of the *Condominium Act*. However, and coincidentally, Tenant #1 moved out of the unit on September 30th. Without interruption, Tenant #2 leased and occupied the unit on October 1, 2021, and has been a tenant ever since. The Appellant continues to own, and as stated, lease the unit. The Appellant received registered title to the unit on October 21, 2021.

Background of Tenant #1 and initial factual conclusion of the Court

[6] The history of Tenant #1 is relevant in this appeal. She had lived in downtown Toronto for five years before occupying the unit on January 15, 2021; she was consistently employed by the same employer and was an emergency room nurse at a major hospital in the Toronto area. A reference letter from her employer was delivered to Mr. Nuica at the time of lease formation which confirmed these facts. Quite apart from anything else, the Court accepts that the principal of the Appellant, Mr. Nuica, held the reasonable expectation that Tenant #1 would rent the condo for greater than a one-year period because of this previous history, stable job and the attractive rent.

[7] Even though the Court makes this conclusion, the Respondent states that it is insufficient to qualify the unit for the GST rebate. To qualify, the Respondent states

that the condo unit must have been occupied by the first to occupy for "at least one year". And, if not, then at "the particular time" the owner must have held the reasonable expectation that the first to occupy would do so for one year or greater. The Respondent asserts the relevant "particular time" in this appeal is October 20, 2021. Since by that date Tenant #1 has surrendered the unit, the holding a such a reasonable expectation of a one-year tenancy by Tenant #1 on that date was a factual and legal impossibility.

II. **The Law**

[8] The relevant, excerpted and emphasized sections of the *Excise Tax Act* ("*ETA*") are, as follows:

> **qualifying residential unit** of a person, *at a particular time*, means
>
> a) a residential unit of which, *at or immediately before the particular time*, the person is the *owner*, [….] *or has possession as purchaser under an agreement of purchase and sale*, [….] where
>
> […]
>
> (iii) it is the case, *or can reasonably be expected by the person at the particular time to be the case*, that the first use of the unit is or will be
>
> (A) [….], or
>
> (B) as a place of residence of individuals, *each of whom is given continuous occupancy of the unit, under one or more leases, for a period, throughout which the unit is used as the primary place of residence of that individual, of at least one year or for a shorter period ending when*
>
> […]
>
> **first use:** in respect of a residential unit, means the first use of the unit after the construction or last substantial renovation of the unit or, in the case of a unit that is situated in a multiple unit residential complex, of the complex or addition to the complex in which the residential unit is situated is substantially completed. (première utilisation)
>
> [**…**]
>
> **(3)** If
>
> […]

> (b) *at a particular time, tax first becomes payable in respect of the purchase from the supplier or* tax in respect of the deemed purchase is deemed to have been paid by the person,
>
> (c) at a particular time, the complex or addition, as the case may be, is a qualifying residential unit of the person or includes one or more qualifying residential units of the person, and,
>
> The minister shall […] pay a rebate to the person equal to the total of all amounts each of which is [….] determined by the formula

III. **The Parties' Positions**

Respondent's position in detail

[9] The Respondent's position is that "the particular time" as provided in 256.2(1)(a)(iii) of the definition of "qualifying residential unit" only refers to the time that the tax under the *ETA* became payable in respect of the purchase of the condominium. Under the *Excise Tax Act*, the tax is payable on the closing date or the day on which ownership of the unit is legally transferred.

[10] In the current appeal, the Respondent submits that "the particular time" when first use of the unit is to be considered is the day on which ownership of the Property was transferred to the Appellant: October 20, 2021.

[11] The Respondent further reasons that the expectation of the Appellant on October 20, 2021, the date of title transfer, is the only time for consideration relevant in this appeal. As such, factually on October 20, 2021, Tenant #1 had already vacated the unit and therefore the Appellant could not have reasonably expected that Tenant #1 would continue to reside there for at least one year. On October 20, 2021, first use of the unit had ended and limited to an 8 and one-half month period, despite the immediate execution of a new lease with and immediate occupancy by Tenant #2. Accordingly, the Appellant could no longer reasonably hold the expectation on that date that Tenant #1 would occupy the premises for at least one year. The Respondent asserts such a logical impossibility nullifies the qualification for the GST Rental Rebate.

[12] Therefore, the Appellant's reasonable expectation when the lease was entered into with Tenant #1, or any other time, is irrelevant to the interpretation of "qualifying residential unit". The Appellant's expectation with respect to first use in

this appeal must be considered on the day on which tax became payable which is the "closing date" or the day on which legal title was transferred.

The Appellant's Position

[13] The Appellant's position is that it had a reasonable expectation that Tenant #1 would occupy the unit for at least one year and the "the particular time" when the Appellant's reasonable expectation should be considered is when it entered into the lease with Tenant #1: December 30, 2020.

[14] Based upon the Appellant's testimony and documentation, Tenant #1 was employed as a nurse in Toronto and expressed no intention to leave the city. It was only because of the ongoing, prolonged COVID-19 pandemic lock downs that Tenant #1 decided to pursue other opportunities outside of Toronto.

[15] The fact that the written lease with Tenant #1 was only for a period of six months is irrelevant to the Appellant's expectation that Tenant #1 would occupy the unit for at least one year. The *ETA* does not require that a lease of one year or more for entitlement to the rebate and embeds that very concept within it.

IV. **Analysis and Decision**

[16] The definition of "Qualifying residential unit" requires that it be the case, or can reasonably be expected by the person at the particular time to be the case, that the first use of the unit is or will be in accordance with 256.2(1)(a)(iii)(A) or (B). Presently, it is uncontested that clause (B) applies because such subclause, unlike (A) relates to non-owners or non-lessors (or the relatives of either). Subclause (B) requires:

> (a) the unit must be used as a place of residence of individuals;
>
> (b) each of whom is given continuous occupancy of the unit;
>
> (c) under one or more leases;
>
> (d) for a period;
>
> (e) throughout which the unit is used as the primary place of residence of that individual;
>
> (f) of at least one year (or the shorter period of time contemplated by the section).

[17] Consequently, the requirements of subparagraph (iii) of the definition of "qualifying residential unit" will be met if either the first actual use or the reasonable expectation of a first use are consistent with the requirements of clauses (A) or (B);

> Since the requirements of paragraph (iii) of the definition of "qualifying residential unit" will be satisfied by either the actual first use or the reasonably expected first use determined under clause (A) or (B), the first step will be to determine what actual first use will qualify. The reasonably expected first use would simply be a reasonable expectation that the use would satisfy the requirements for the actual first use.[1]

[18] Clause 256.2(1)(a)(iii) of the *ETA* provides that the taxpayer must have a reasonable expectation concerning the tenant occupying the residential unit for its first use "at a particular time". The Court is called upon to determine the point at which such a "particular time" occurred in order to assess the Appellant's requisite reasonable expectation of Tenant #1's lease.

[19] This Court in *Melinte v R*, held that the "particular time" referred to in the definition of "qualifying residential unit" is the time at which the tax under the *ETA* became payable in respect of the supply.[2] In *Melinte*, the lease was dated December 24, 2004, covered a rental period from January 28, 2005 to December 28, 2005 (11 months). The title transfer date was March 1, 2005 and the lease was not extended beyond the 11 month term. In that case, unlike this appeal, title transfer (the tax due date) occurred before first tenant termination and there was a brief period in the first 12 month period when the condo remained vacant between the first and second tenancy. Like this case, the Court found that the landlord had a reasonable anticipation that the tenant would occupy for greater than one year despite the shorter-term written lease.

[20] The period between actual possession date of a unit by its "owner", in this appeal December 30, 2020, and the date upon which actual title is transferred is legally called "interim occupancy" in Ontario under the *Condominium Act*. Interim occupancy can last for lengthy periods well in excess of the nine and one-half month period in this appeal.

[21] The rule in the *ETA* that applies to condos (paragraph 168(5)(a)) is different from other real property. Where actual possession of a condo unit is transferred before registration, GST liability is postponed until legal title is transferred which

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[1] *Melinte v R.*, 2008 TCC 185 at para 16.
[2] *Melinte v R*, 2008 TCC 185 at para 28.

cannot occur until the condo is "registered" within the meaning of the *Condominium Act*. However, once the condominium complex is registered, if 60 days pass without ownership being transferred, the GST liability arises at that point, in any event. The calculation of the date for payment of the tax should not be conflated with the commencement point for the assessment of reasonable expectation for length of tenancy where the result is non-sensical and not clear from the legislation.

Presumption against tautology and purpose of the legislation

[22] The Respondent's interpretation of "particular time" is based on Justice Webb's decision in *Melinte.* Applied to the facts of the current appeal, such application offends the presumption against tautology and uses precedent which is distinguishable on the facts. Those critical factual differences have been identified above.

[23] The anti-tautological presumption is a basic principle of statutory interpretation, described as follows:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. [Quebec (A.G.) v. Carrières Ste. Therese Ltee, 1985 CanLII 35 (SCC), [1985] S.C.J. No. 37, [1985] 1 S.C.R. 831, at 838 (S.C.C.)]. Every word in a statute is presumed to make sense and to have a specific roll to play in advancing the legislative purpose....[3]

[24] In *R v. Proulx*, Lamer C.J. wrote:

> It is a well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it as mere surplusage.[4]

[25] In the current appeal, the Respondent asserts measuring the Appellant's reasonable expectation of length of the first use of the unit after the first use of the unit has already concluded is impossible. And so it is. However, such an interpretation renders the legislatively expressed concept of reasonable expectation superfluous if the subject meant to be countenanced no longer subsists when it is to be assessed.

[26] To give effect to Parliament's words, "a particular time" (the very phrase used to define a qualifying residential unit), "at" which the Appellant's reasonable

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[3] Sullivan, R. on the Construction of Statutes (2014, 6th ed.) at pg. 211.
[4] *R v Proulx*, 2000 SCC 5 (CanLII), [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61, at para 28.

expectation of the first use of the unit is to be considered, is *before* Tenant #1 vacated the unit.

[27] This interpretation is supported by authorities cited in this appeal, in determining the Appellant's reasonable expectation, given the facts in this appeal which occurred before and during the actual occupancy of Tenant #1. It is the reasonable expectation of the actual tenancy and its formation to which Parliament directs the reader. This confirms that the Appellant's reasonable expectation as to first use can only be determined before and during the time the actual first occurs because it is only at that point that the owner has a right to occupy the unit through its first tenant under the concept of interim occupancy, and did so.

[28] The previous jurisprudence is not maligned by this analysis. In *Melinte*, Justice Webb, when determining the Appellant's reasonable expectation on the closing day of the purchase, considered discussions and events that occurred attributable to a period before and after the lease was entered into but before title transfer.[5] In the Court's mind, the time between the commencement of the lease and the closing day was only 3 months yet any evidence supporting the owner's reasonable expectation of first use came from discussions and circumstances arising at the signing of the lease and before title transfer. "At a particular time" reached back to the lease formation period and before the tax became payable.

[29] Such logic aligns with the object and purpose of the legislation. A taxpayer's reasonable expectation for leasing the first use of "qualifying residential units" for at least one-year is required by Parliament in order to incentivize the development of long-term rental housing in Canada. Taking the words of the clause together with the related provisions, clause 256.2(1)(a)(iii)(B) clearly suggests that the legislature was intending to incentivize individuals to create new or substantially renovated apartment units to be rented on a long-term basis. To wit, in the current appeal, the property has been continuously occupied by long-term tenants since its placement on the condo rental market almost four years ago.

Extrinsic evidence supports granting the appeal

[30] The two most useful extrinsic aids for interpreting clause 256.2(1)(a)(iii)(B) are the relevant Department of Finance Technical Notes and judicial interpretations

[5] *Melinte v R*, 2008 TCC 185 at paras 3-4 and 30-31.

of section 265.2. The Department of Finance Technical Notes from 2001 regarding section 265.2 states that:

> In order to target the rebate in respect of residential units to persons who provide long-term residential rental accommodation, there is also a condition that those persons must reasonably expect that the first use of the units will be as primary places of residence of individuals, which could include the landlord or a relation (within the meaning of subsection 256(1)) of the landlord. Further, the use as a primary place of residence by each such individual must be for a period of at least one year, though not necessarily under one lease (e.g., an individual could occupy a unit for one year under twelve consecutive monthly leases)[6] [emphasis added].

[31] The Technical Notes state that the occupancy of the tenant in the first use of the unit does not need be expressed in a one-year lease. This indicates that the written term of the lease is not a determinative factor in finding the landlord had a reasonable expectation.

[32] Further, in *Boissonneault Groupe Immobilier v HMQ*, 2012 TCC 362 this Court observed that section 256.2 was an obvious effort by Parliament to focus on rentals that required extended periods of occupancy by excluding the availability of the rebate to daily, weekly, and monthly rentals. [7]

[33] This conclusion is further supported by the exceptions to the one-year leasing clause which allows a unit to be defined as a 'qualified residential unit' despite the unit being sold to someone who will use it as their primary residence before the full year has lapsed.[8]

[34] In this appeal the application of the presumption against tautology prevents a contorted denial of the GST Rental Rebate, otherwise perfectly applicable to rental units like this one which Parliament wanted to encourage. In short, the narrow consideration of only the "actual first use after title transfer" renders the expressed concept of a taxpayer's reasonable expectation of first to occupy meaningless in the case where a tenancy, otherwise reasonably anticipated to last more than one year, is terminated before one year and immediately followed by an uninterrupted long-term tenancy. The broad context and purpose of the section permits a more expansive interpretation with these unique facts.

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[6] Department of Finance, Technical Notes, [Feb 2001], section 256.2.
[7] *Boissonneault Groupe Immobilier v HMQ*, 2012 TCC 362 at para 45.
[8] *ETA*, s 256.2(1)(a)(iii)(B)(I)–(II).

V. **Conclusion and Costs**

[35] For these reasons, the appeal is allowed.

[36] Consistent with the applicable informal rules of this Court governing GST appeals and the quantum in issue, there shall be no costs.

Signed at Toronto, Ontario this 3rd day of September 2024.

"R.S. Bocock"

Bocock J.

CITATION:	2024 TCC 115
COURT FILE NO.:	2023-181(GST)I
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