Docket: 2012-2850(GST)I

BETWEEN:

SASHA TSENKOVA, SVETOZAR GARNENHOV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 20, 2013, at Calgary, Alberta

Before: The Honourable Justice G. A. Sheridan

Appearances:

Agent for the Appellant:	Sasha Tsenkova
Counsel for the Respondent:	Jeff Watson

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed on the basis that the Appellant has satisfied the requirements of section 256.2 of the *Excise Tax Act.*

Signed at Ottawa, Canada this 9th day of October 2013.

"G. A. Sheridan"

Sheridan J.

Citation: 2013 TCC 321
Date: 20131009
Docket: 2012-2850(GST)I

BETWEEN:

SASHA TSENKOVA, SVETOZAR GARNENHOV,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The issue in this appeal is whether the Minister of National Revenue was justified in denying the Appellant's application for a *GST/HST New Residential Rental Rebate Property Rebate* on the basis that the property in question was not a "qualifying residential unit" under subsection 256.2(1) of the *Excise Tax Act.*

[2] The relevant portions of the definition of "qualifying residential unit" are as follows:

> 256.2(1) "**qualifying residential unit**" of a person, at a particular time, means
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> *(a)* a residential unit of which, at… the particular time, the person is… a co-owner …, 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

…

> (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 a primary place of residence of that individual, of at least one year…

[3] On December 3, 2010, the Appellant became the co-owner, along with her spouse, of a new residential condominium unit ("Unit") and the GST was paid at that time. On December 30, 2010, the Appellant entered into an agreement with Premier Executive Suites[1] ("Premier Suites Agreement") to lease the Unit. In the preamble to the standard-form Premier Suites Agreement, the Appellant is identified as the "Landlord" and Premier Executive Suites as the "Tenant". In clause 2, the dates for the term of the Premier Suites Agreement have been written in the spaces provided: "Jan 15 2011" to "Jan 14 2012". Clause 2 further states that the "… Landlord agrees that the intention of the Tenant is to sub-let the premises to corporate executives for the purpose of providing temporary accommodation".

[4] It is this last clause that gives rise to the current dispute. The Minister denied the Appellant's claim for a rebate based on the assumption that the first use of the Unit was as "temporary accommodation"[2] to Premier Executive Suites' clients rather than as a "primary place of residence" occupied by a sub-lessee(s) throughout a period of at least one year as required by clause 256.2(1)(*a*)(iii)(B) of the *Excise Tax Act*.

[5] In *Melinte v. Her Majesty the Queen*[3], one of the few cases dealing with the interpretation of clause 256.2(1)(*a*)(iii)(B), Webb, J. (as he then was) noted that the term "at a particular time", as used in that provision, is defined under subsection 256(3) to mean when the unit is acquired and the GST is payable. But at that time, he queried, how "… would anyone know … how the unit will actually be used in the next year?"[4] In view of that impossibility, Webb, J. held that it is the *expectation* in respect of the first use of the unit at the time the GST is paid that is relevant[5] for determining whether the conditions of clause 256.2(1)(*a*)(iii)(B) have

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[1] Exhibit R-2.
[2] Subparagraphs 8(e) and (f) of the Reply to the Notice of Appeal.
[3] 2008 TCC 185, [2009] 1 C.T.C. 2046.
[4] *Ibid*, at paragraph 24.
[5] *Ibid*, at paragraph 29.

been met; namely, whether "… one individual throughout the period of one year … uses the unit as his or her primary place of residence…"[6].

[6] Applying these principles to the present matter, the Appellant could not have known what the "actual" first use of the Unit would be as of December 3, 2010 when she acquired the Unit and paid the GST; thus, it is her reasonable expectation as of that time that is key to her entitlement under clause 256.2(1)(iii)(B).

[7] The Appellant had the onus of satisfying the Court that the Unit was a "qualifying residential unit". She was the only witness to testify. Her evidence was well-organized, credible and remained unshaken on cross-examination.

[8] The Appellant purchased the Unit as an investment property. Because she lacked the experience and time to handle the rental of the Unit herself, she interviewed various property managers, ultimately deciding on Premier Executive Suites to take on the task. At no time between the purchase and lease of the Unit did the Appellant occupy or intend to occupy the Unit[7] nor was it ever intended that Premier Executive Suites would do so. Rather, it was always the Appellant's intention to find a long-term tenant for the Unit. Her reason for imposing this condition was to reduce the wear and tear on the Unit that would otherwise be likely to occur. This intention was communicated to Premier Executive Suites.

[9] Thus it was that, acting as the Appellant's agent, Premier Executive Suites secured a tenant who agreed to use the Unit continuously as his/her primary place of residence for at least one year. Further support for this is found in a letter from the representative of Premier Executive Suites[8] as well as in the documentation and timing of the transactions leading up to the first occupancy of the Unit: it was purchased on December 3, 2010; on December 30, 2010 the Premier Suites Agreement was executed leasing the Unit for a one-year period commencing January 15, 2011; on the same date, the subleasing tenant occupied the Unit. Two days later, on January 17, 2011, the Appellant signed the GST rebate application which was received by the Minister on January 28, 2011[9].

[10] In all the circumstances, notwithstanding the use of the term "temporary accommodation" in the standard-form Premier Suites Agreement, I am satisfied

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[6] *Ibid*, at paragraph 19.
[7] Subparagraph 8(b) of the Reply to the Notice of Appeal.
[8] Exhibit A-1.
[9] Exhibit R-1.

that at the time the GST was paid, it was the Appellant's reasonable expectation under the Premier Suites Agreement that an individual would use the Unit throughout a period of at least one year as his/her primary place of residence. Indeed, as of the hearing date, the original subleasing tenant continued to reside in the Unit under a series of renewals of the original sublease pursuant to the Premier Suites Agreement.

[11] The Appellant has met the requirements of section 256.2 *Excise Tax Act* and accordingly, the appeal is allowed.

Signed at Ottawa, Canada this 9th day of October 2013.

"G. A. Sheridan"

Sheridan J.

CITATION:	2013 TCC 321
COURT FILE NO.:	2012-2850(GST)I
STYLE OF CAUSE:	SASHA TSENKOVA, SVETOZAR GARNENHOV AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	September 20, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	October 9, 2013

APPEARANCES:

Agent for the Appellant:	Sasha Tsenkova
Counsel for the Respondent:	Gregory Perlinksi Jeff Watson

COUNSEL OF RECORD:

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