Docket: 2007-2705(GST)I

BETWEEN:

JOHN MELINTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 7, 2008, at Toronto, Ontario.

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Laurent Bartleman

JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* and dated June 13, 2006 is allowed, with costs, 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 rebate under section 256.2 of the *Act* in relation to the purchase and the lease of the condominium acquired by the Appellant in 2005.

Signed at Toronto, Ontario, this 16th day of April 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC185
Date: 20080416
Docket: 2007-2705(GST)I

BETWEEN:

JOHN MELINTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this case is whether the Appellant is entitled to a rebate pursuant to section 256.2 of the *Excise Tax Act* ("*Act*") in relation to the acquisition and leasing of a condominium in Toronto.

[2] The Appellant entered into an agreement, dated February 9, 2002, to purchase a new condominium for a purchase price of $228,400. The unit was constructed and the Appellant had possession of the property in late December 2004. The closing for the purchase of the property was completed as of March 1, 2005.

[3] After the Appellant had signed the agreement to purchase the property in 2002 he met the person who since became his wife. They decided that they did not want to live in this condominium. As a result in November 2004, the Appellant advertised for a prospective tenant for the condominium. He stated, and I accept his testimony, that he only wanted a long-term tenant.

[4] The Appellant found an individual, Marie-Josee Turmel, who was the ideal tenant. She was employee of CIBC World Markets and had been relocated from

Montreal to Toronto. It was the Appellant's understanding that she would be in Toronto for at least a couple of years. The arrangement between the CIBC World Markets and Marie-Josee Turmel was that CIBC World Markets would pay the rent for her accommodation. Therefore, the Appellant entered into a lease with CIBC World Markets for the condominium unit. This lease is dated December 24, 2004 and was for the period from January 28, 2005 to December 28, 2005. It was the understanding of the Appellant that CIBC World Markets could not sign a lease for a longer period of time because of their budget restrictions. From the time when the lease was signed until sometime in December 2005, the Appellant had no reason to believe that the lease would not be renewed and that Marie-Josee Turmel would not continue to occupy the premises in 2006.

[5] However, in December 2005, the Appellant received notice that the lease would not be renewed. It is the Appellant's understanding that, because of cutbacks, CIBC World Markets would only pay for a smaller unit for Marie-Josee Turmel. The Appellant then entered into a property management agreement with Suite Toronto, Inc. pursuant to which Suite Toronto, Inc. agreed to act as the agent for the Appellant in leasing the unit. Suite Toronto, Inc. located a tenant who then occupied the premises from January 3, 2006 to June 24, 2007.

[6] The only dispute in this case is related to the interpretation of subparagraph (a)(iii) of the definition of "qualifying residential unit" in subsection 256.2(1) of the *Act* and whether the Appellant has satisfied the requirements of this paragraph. "Qualifying residential unit" is defined 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, a co-owner, a lessee or a sub-lessee or has possession as purchaser under an agreement of purchase and sale, or a residential unit that is situated in a residential complex of which the person is, at or immediately before the particular time, a lessee or a sub-lessee, where
> >
> > (i) at the particular time, the unit is a self-contained residence,
> >
> > (ii) the person holds the unit
> >
> > (A) for the purpose of making exempt supplies of the unit that are included in section 5.1, 6, 6.1 or 7 of Part I of Schedule V, or
> >
> > (B) if the complex in which the unit is situated includes one or more other

> residential units that would be qualifying residential units of the person without regard to this clause, for use as the primary place of residence of the person,
>
> (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) as the primary place of residence of the person or a relation of the person, or of a lessor of the complex or a relation of that lessor, for a period of at least one year or for a shorter period where the next use of the unit after that shorter period is as described in clause (B), 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
>
> (I) the unit is sold to a recipient who acquires the unit for use as the primary place of residence of the recipient or of a relation of the recipient, or
>
> (II) the unit is taken for use as the primary place of residence of the person or a relation of the person or of a lessor of the complex or a relation of that lessor, and
>
> (iv) except where subclause (iii)(B)(II) applies, if, at the particular time, the person intends that, after the unit is used as described in subparagraph (iii), the person will occupy it for the person's own use or the person will supply it by way of lease as a place of residence or lodging for an individual who is a relation, shareholder, member or partner of, or not dealing at arm's length with, the person, the person can reasonably expect that the unit will be the primary place of residence of the person or of that individual; or
>
> (b) a prescribed residential unit of the person.

[7] Subparagraph (iii) of the above definition requires that either it is the case or it can reasonably to be expected by the person (the Appellant) at the particular time to be the case, that the first use of the property will be as described in clause (A) or (B). The applicable clause in this case is clause (B). This requirement is that the first use of the unit will be:

> 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…

[8] The definition of "qualifying residential unit" applies to a single residential unit. It is not clear why clause (B) refers to “individuals” and therefore contemplates that the one residential unit would be used by more than one individual as his or her primary place of residence. The reference to the plural could mean either simultaneous occupancy by more than one individual or consecutive occupancy by different individuals.

[9] Counsel for the Respondent acknowledged that since subsection 33(2) of the *Interpretation Act* provides that words in the plural include the singular, a unit will qualify if it is used, as required, by only one person.

[10] The Supreme Court of Canada in *The Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54, 2005 DTC 5523 (Eng.), [2005] 5 C.T.C. 215, 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601, stated that:

> 10 It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see 65302 British Columbia Ltd. v. R., [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[11] It is therefore necessary to interpret this paragraph according to a textual, contextual and purposive analysis. It does not seem reasonable that Parliament would have intended that only units used simultaneously by more than one person would qualify and therefore there is no reason to not apply the *Interpretation Act* to include a single individual. Why would a unit that is used by only one individual as his or her primary place of residence not qualify because it is only occupied by one person? When the provision is interpreted to apply to one individual, it is difficult to determine a situation where the requirements would be satisfied by more than one individual simultaneously using the unit but not satisfied by one of the individuals using that unit and therefore it is difficult to determine why the provision was drafted with reference to the plural “individuals” if the reference to the plural of “individuals” was intended to apply to simultaneous occupancy by more than one individual.

[12] If a unit is simultaneously occupied by more than one individual, the provision suggests that each individual must occupy the unit for one year (or the shorter period of time contemplated by this clause). This would suggest that if two individuals occupy the unit – one for a year and the other for six months – that the unit will not qualify. However, on the basis that the plural includes the singular, the unit will qualify based on using the *Interpretation Act* and by applying the test to the one individual who does occupy the unit for the whole year. It does not seem reasonable that a unit that is used by two individuals – one for a year and the other for six months – would not qualify but a unit that is used by one individual for one year would qualify.

[13] In *Silicon Graphics Ltd. v. The Queen*, 2002 FCA 260, 2002 DTC 7112, [2002] 3 C.T.C. 527, the Federal Court of Appeal made the following comments on the use of Technical Notes:

> 50 Of course, Technical Notes are not binding on the courts, but they are entitled to consideration. See *Ast Estate v. R.*, [1997] F.C.J. No. 267 (Fed. C.A.), para. 27:
>
> > Administrative interpretations such as technical notes are not binding on the courts, but they are entitled to weight, and may constitute an important factor in the interpretation of statutes. Technical Notes are widely accepted by the courts as aids to statutory interpretation. The interpretive weight of technical notes is particularly great where, at the time an amendment was before it, the legislature was aware of a particular administrative interpretation of the amendment, and nonetheless enacted it.

[14] The Technical Notes related to this provision provide in part 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).

[15] The Technical Notes do not deal with the issue of whether the use of the plural "individuals" is meant to deal with simultaneous occupancy or consecutive occupancy nor do the Technical Notes deal with the fact that the definition also

contemplates actual usage and how actual usage will satisfy this definition since, as discussed below, the time to determine the status of the unit as a "qualifying residential unit" is when the tax is payable for the unit.

[16] 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.

[17] The requirements of clause (B) are:

(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 this clause).

[18] In applying this to one individual, since the provision refers to the "continuous occupancy", it is necessary to determine the required period of "continuous occupancy". The only period of time that is referred to is "at least one year" (or the shorter period of time contemplated by this clause) and therefore this must be the period of occupancy that will satisfy this requirement. As well, throughout this period of at least one year (or the shorter period of time contemplated by this clause), the unit must be used as the primary place of residence of the particular individual.

[19] As a result, in my opinion, the requirements of clause (B) will be satisfied if one individual throughout the period of one year (or the shorter period of time contemplated by this clause) uses the unit as his or her primary place of residence. The additional requirement of the use being "under one or more leases" will be

satisfied so long as the individual is using the unit under a lease regardless of whether that individual is a party to that lease. The requirement is simply that the use is under a lease not that the individual be a party to the lease. In the present case, the fact that the lease is with CIBC World Markets will not disqualify the use by Marie-Josee Turmel as she was using the unit under this lease even though she was not a party to it.

[20] Therefore if there is only one occupant of a unit, in order for the unit to qualify based on the actual use test, the unit will have to be occupied by the same individual for a full period of one year (or the shorter period of time contemplated by this clause).

[21] If the use of the plural “individuals” is interpreted to mean consecutive occupancies by one or more individuals, then this will result in an indeterminate period that would be required to determine if the unit is used as required and also produce anomalies. If the actual use requirement could not be satisfied until the unit is occupied by a second individual, then it could take years before this may occur. If the first occupant uses the unit for twenty years, the unit would not be used by a second individual for at least a year until twenty-one years after the unit is first occupied. This does not seem to me to be the intended result.

[22] As well since the definition refers to the “first use” this must mean that there could be a second or third use of the unit but only the first use is relevant. Therefore it is necessary to determine the period for this first use which would be some period that is less than the useful life of the unit. Since the only period referred to in the definition is one year, the period must be one year.

[23] Also, if one unit is occupied by the first tenant for five years and then by the second tenant, that unit, based on an interpretation of the use of the plural “individuals” that would require consecutive occupancies, would qualify after six years. If another unit was occupied by the first tenant for one year and then by the second tenant, that unit would qualify after two years. It does not seem reasonable that the two units should have different qualifying times.

[24] To add further confusion to the interpretation of this provision, subsection 256.2(3) of the *Act* provides that the relevant time for determining whether a unit is a qualifying residential unit is the particular time at which the tax is payable under the *Act*. How would anyone know, when the unit is acquired (and the tax is payable) how the unit will actually be used for the next year? At the particular time, no unit would actually be used by any individual as his or her

residence for a year as the particular time is when the unit is acquired and the tax is payable which is long before the expiration of the first year of occupancy. Therefore no unit will be able to satisfy the actual use test at the relevant time for the purposes of the rebate provided under subsection 256.2(3) of the *Act* unless the actual use is a very short period of time, which, in my opinion, is not the intended result. The only relevance of the actual use test then must be to determine the required time for the expected use test.

[25] It is interesting to note that the Canada Revenue Agency in RC4231 — GST/HST New Residential Rental Property Rebate state that:

> Qualifying residential unit — A qualifying residential unit of a person means:
>
> …
> • The first use of the unit will or can reasonably be expected to be:
>
> …
>
> • **the primary place of residence of an individual who will occupy the unit continuously for a period of at least one year** (or for a shorter period if the unit is sold to an individual who will occupy the unit as a primary place of residence or taken by the person or lessor, or a relation of the person or the lessor, for use as their primary place of residence).
>
> (emphasis added)

This summary by the Canada Revenue Agency only deals with the occupation by one individual not multiple individuals and simply refers to a one year period of occupancy in order for the unit to qualify.

[26] In my opinion, as noted above, the requirements of clause (B) will be satisfied if one individual throughout the period of one year (or the shorter period of time contemplated by this clause) uses the unit as his or her primary place of residence and, in my opinion, this interpretation is harmonious with the *Act* as a whole. To limit the qualifying period to one year is reasonable. If the qualifying period is not limited to one year of actual usage, what period of actual usage would be sufficient? There is no other period of time referred to in the definition and the one year period is also reflected in subsection 256.2(10) of the *Act*. As well, subsection 256.2(7) of the *Act* provides a person must apply for the rebate within two years from the end of the month in which the tax is payable by that person. This suggests that the rebate requirements were intended to be satisfied within two years of the date that the property is acquired.

[27] In this case the right of the Appellant to the rebate will be determined based on the expected use of the unit. The test is satisfied if it "can **reasonably be expected** by the person **at the particular time** to be the case" (emphasis added). Therefore the test will be satisfied if the Appellant reasonably expected **at the particular time** that the usage would be as contemplated by clause (B). For the purposes of the rebate, the particular time is the time as provided in subsection 256.2(3) of the *Act*. This subsection provides in part as follows:

> 256.2 (3) If
>
> (a) a particular person, other than a cooperative housing corporation,
>
> (i) is the recipient of a taxable supply by way of sale (in this subsection referred to as the "purchase from the supplier") from another person of a residential complex or of an interest in a residential complex and is not a builder of the complex, or
>
> ...
>
> (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 the 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, ...

[28] Therefore the particular time referred to in the definition of "qualifying residential unit" is the particular time that the tax under the *Act* became payable in respect of the purchase of the condominium. Subsection 168(5) of the *Act* provides that:

> (5) Notwithstanding subsections (1) and (2), tax under this Division in respect of a taxable supply of real property by way of sale is payable
>
> (a) in the case of a supply of a residential condominium unit where possession of the unit is transferred, after 1990 and before the condominium complex in which the unit is situated is registered as a condominium, to the recipient under the agreement for the supply, on the earlier of the day ownership of the unit is transferred to the recipient and the day that is sixty days after the day the condominium complex is registered as a condominium; and
>
> (b) in any other case, on the earlier of the day ownership of the property is

> transferred to the recipient and the day possession of the property is transferred to the recipient under the agreement for the supply.

[29] In this case the Appellant stated that the condominium complex was registered as a condominium on or about March 1, 2005 and since the closing date was March 1, 2005, I assume that title to the unit was transferred to the Appellant on that day. As a result, the GST would have been payable March 1, 2005 and this would be the particular day for the purposes of the definition of "qualifying residential unit". Therefore it is the expectation of the Appellant at March 1, 2005 that is relevant.

[30] Counsel for the Respondent argued that since the lease between the Appellant and CIBC World Markets included clauses that would penalize CIBC World Markets if the premises were not vacated on December 28, 2005, the Appellant could not have a reasonable expectation that Marie-Josee Turmel would still occupy the unit after that date. However, as acknowledged in the Technical Notes, it is not a requirement that the lease be for the full qualifying period as the example in the Technical Notes refers to a series of one month leases. It is the expectation of the Appellant with respect to whether the lease will be renewed that is relevant, not the expectation of whether the Appellant will be enforcing clauses that penalize a tenant who remains after the expiration of the term of the lease. It is not appropriate, in my opinion, to suggest that simply because the lease agreement includes clauses that would penalize CIBC World Markets if Marie-Josee Turmel should remain after the expiration of the term of the lease, would mean that the Appellant did not have a reasonable expectation that the lease would be renewed. If the lease is renewed or a new lease is signed with CIBC World Markets, the clauses in the existing lease that would have penalized CIBC World Markets if the premises were not vacated on December 28, 2005, would not have any affect.

[31] It was the Appellant's understanding that Marie-Josee Turmel was going to be in Toronto for at least a couple of years and it is difficult to accept that the Appellant could have known on March 1, 2005 that CIBC World Markets would be facing cutbacks in December 2005 and would not renew the lease. The Respondent did not dispute that Marie-Josee Turmel was using the unit as her primary place of residence. Since the Appellant, on March 1, 2005, reasonably expected that Marie-Josee Turmel would continue to reside in the unit for at least one year from that time, the requirements of subparagraph (a)(iii) of the definition of "qualifying residential unit" are satisfied in this case.

[32] As noted above, as of March 1, 2005 (which pursuant to subsection 256.2(3) of the *Act* is the particular time for determining whether the unit is a "qualifying

residential unit"), the unit could not satisfy any actual use test unless the actual use test only required a very short period of occupancy. This again highlights the interpretation problems of section 256.2 of the *Act* and in my opinion, confirms that the actual use test must be relevant for the purpose of determining the period of occupancy that will be relevant for the expected use test.

[33] The appeal is allowed, with costs, 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 rebate under section 256.2 of the *Act* in relation to the purchase and the lease of the condominium acquired by the Appellant in 2005.

Signed at Toronto, Ontario, this 16th day of April 2008.

"Wyman W. Webb"

Webb J.

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APPEARANCES:

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