

Docket: 2009-2830(GST)I

BETWEEN:

CATHERINE LAVIGNE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 15, 2011, at Sherbrooke, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Agent of the appellant: René Bellerose
Counsel for the respondent: Daniel Cantin

JUDGMENT

The appeal of the assessment under the *Excise Tax Act*, the notice for which is numbered 08232500612380003 is dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 25th day of August 2011.

"Réal Favreau"

Favreau J.

Translation certified true
On this 27th day of September 2011
Monica F. Chamberlain, Translator

Citation: 2011 TCC 402
Date: 20110825
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REASONS FOR JUDGMENT

Favreau J.

[1] The appellant applied for the transitional rebate of 1% of the goods and services tax (the GST) pursuant to subsection 256.74(5) of the *Excise Tax Act* (the ETA). In the assessment made following the application for the rebate, the Minister of National Revenue (the Minister) denied the rebate of \$823.35 requested by the appellant on the grounds that the appellant took possession of her condominium prior to January 1, 2008. The appellant is appealing from this assessment by the informal procedure.

[2] The transitional rebate of 1% resulted from reduction of the GST rate from 6% to 5% on January 10, 2008.

[3] Among the conditions to be met in order to be entitled to the rebate, subsection 256.74(5) of the ETA requires that the ownership and possession of a residential complex be transferred to the appellant after December 2007 under an agreement of purchase and sale signed after May 2, 2006, but on or before October 30, 2006. Paragraph 256.74(5)(a) reads as follows:

Transitional rebate –2008 rate reduction

(5) If a particular individual

(a) pursuant to an agreement of purchase and sale, evidenced in writing, entered into after May 2, 2006, but on or before October 30, 2007, is the recipient of a taxable supply by way of sale from another person of a residential complex in respect of which ownership and possession under the agreement are transferred to the particular individual on or after January 1, 2008,

...

the Minister shall, subject to subsection (7), pay a rebate to the particular individual equal to the amount determined by the formula...

[4] The conditions set out under paragraphs 256.74(5)(b) and (c) have been met. The only issue is the date on which the appellant took possession of her condominium.

[5] On September 25, 2007, the appellant signed a preliminary contract with 9071-1920 Québec Inc for the purchase of a condominium located at 4228 Pavillion Street in Sherbrooke. The occupation date set out in the contract was November 16, 2007. The GST calculated at the 6% rate was \$7,718.86. The price in the contract after taxes was \$140,000.

[6] On December 4, 2007, the appellant sold her residence located at 4455 Gatineau Street in Sherbrooke. Under the contract of sale, the purchaser became the owner of the immovable starting at the date of the contract of sale with immediate possession and occupation.

[7] Prior to the sale of the residence, in late November 2007, the appellant moved into the condominium. At this date, the unit was substantially completed and liveable. According to the evidence, the contractor kept a copy of the keys to the unit to enable him to complete the work.

[8] On March 18, 2008, the appellant signed a notarized contract of sale for the purchase of the condominium and the vendor credited the amount of the new housing credit to the appellant. Under this contract the appellant became the owner starting on the date of the contract with immediate possession and occupation.

[9] On May 15, 2008, the appellant filed a tax adjustment request regarding the residential complex and she claimed on this form that the date that the offer to purchase was signed was September 25, 2007, in other words, after May 2, 2006, but

on or before October 30, 2007, but that the date she took possession and the date ownership was transferred was on March 18, 2008, in other words, on or after January 1, 2008, which entitled her to a rebate of 1% of the GST paid.

[10] The appellant contends that, although she moved into the unit at the end of November 2007, she did so only as a tenant with permission of the contractor on the one condition that she pay for electricity. The appellant did not pay monthly fees until the date of the transfer of ownership title to the immovable. The appellant adduced a residential insurance policy, tenant subscriber as of November 30, 2007. This insurance policy was amended on March 18, 2008, to become a residential condominium unit owner policy.

[11] According to the evidence, the appellant paid for the condominium on March 18, 2008, at the notary's office, the same date when she also signed a hypothecary loan with the National Bank of Canada. For the period from the end of November 2007 and March 18, 2008, the appellant did not pay municipal taxes or school taxes for her condominium.

[12] The evidence also revealed that, starting at the beginning of December 2007, the appellant made a change of address with the Ministère du Revenu du Québec and the Société d'assurance automobile du Québec and she had the telephone installed and subscribed to Bell Express Vu service.

[13] At issue in this case is the interpretation by the parties of the term "possession" used in paragraph 256.74(5)(a) of the ETA. The appellant claimed that the term "possession" must be as defined in article 921 of the *Civil Code of Québec* (C.C.Q.).

Article 921. Possession is the exercise in fact, by a person himself or by another person having detention of the property, of a real right, with the intention of acting as the holder of that right.

The intention is presumed. Where it is lacking, there is merely detention.

According to the appellant, the concept of "possession" necessarily refers to the concept of possession under the notarized contract of March 18, 2008.

[14] According to counsel for the respondent, the concept of "possession" should instead be interpreted within the broad meaning of "detention" or "occupation".

[15] With respect to the definition of the term “possession”, author Pierre-Claude Lafond in *Précis de droit des biens*, 2nd edition, Montréal: Thémis, 2007, p. 201 stated the following:

[TRANSLATION]

Defined in this way, possession sometimes can be referred to as “legal possession” or “civil possession”. Thus, the terms “natural possession”, “permissive possession” and “detention” are juxtaposed. The use of the term “possession” should be restricted to situations involving “legal possession”, in other words, those that produce actual effects. In other situations, the term “detention” should be used exclusively.

The definition set out in article 921 of the C.C.Q. is the ordinary law definition. Specific statutes may explicitly or implicitly, attribute a different meaning to this term for specific purposes.

[16] According to the following statement by Professor and legal writer, Pierre-André Côté, from *The Interpretation of Legislation*, 3rd edition, Montréal: Thémis, 2000, p. 346:

. . . Because a word’s meaning is derived from its context, it is hazardous to shift from one law to another without making adjustments dictated by the new context.

[17] Since it is possible for two statutes from the same legal system to use the same term to describe two different situations, this is even more likely if the same term is used in a contract drafted by a notary in a civil law system whereas the ETA was originally drafted in English in a common law system.

[18] The ETA does not define the terms "possession" and "ownership". The concept of "possession" under civil law is irreconcilable with the meaning that Parliament wanted to confer on the term in ETA provisions regarding the transitional rebate, since possession is an attribute of ownership rights.

[19] Since Parliament does not speak in vain, a meaning must be given to the term “possession” for it to have any effect. When interpreting a legislative provision, the provision must be read as a whole keeping its purpose in mind. The current tax adjustment applies only to individuals who entered into an agreement of purchase and sale of a residential complex after May 2, 2006, but on or before October 30, 2007, in respect of which ownership and possession under the agreement are transferred on or after January 1, 2008, which is not the case here. In the specific

context of a transitional tax rebate, the term “possession” should be interpreted as meaning “occupation” or “detention”.

[20] Moreover, this interpretation complies with the interpretation made by this Court in *Don Wallace Reynolds and Paul Po Hui Pei v. The Queen*, 2009 TCC 470 (Paris J.) and *Morgan Eastman and Ann Cavrak v. The Queen*, 2009 TCC 482 (Woods J.) regarding the application of paragraph 256.3(1)(a) of the ETA, a transitional measure with wording similar to that of paragraph 256.74(5)(a), which was implemented when the GST was reduced from seven to six percent On July 1, 2006.

[21] For all of these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 25th day of August 2011.

"Réal Favreau"

Favreau J.

Translation certified true
On this 27th day of September 2011
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Counsel for the respondent: Daniel Cantin

COUNSEL OF RECORD:

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